Collaboration Between Economic Operators in the Competition for Public Contracts

A Legal and Economic Analysis of Grey Zones between EU Public Procurement Law and EU Competition Law

Jacobsen Cesko, Kathrine Søs

COPENHAGEN BUSINESS SCHOOL
SOLBJERG PLADS 3
DK-2000 FREDERIKSBERG
DANMARK

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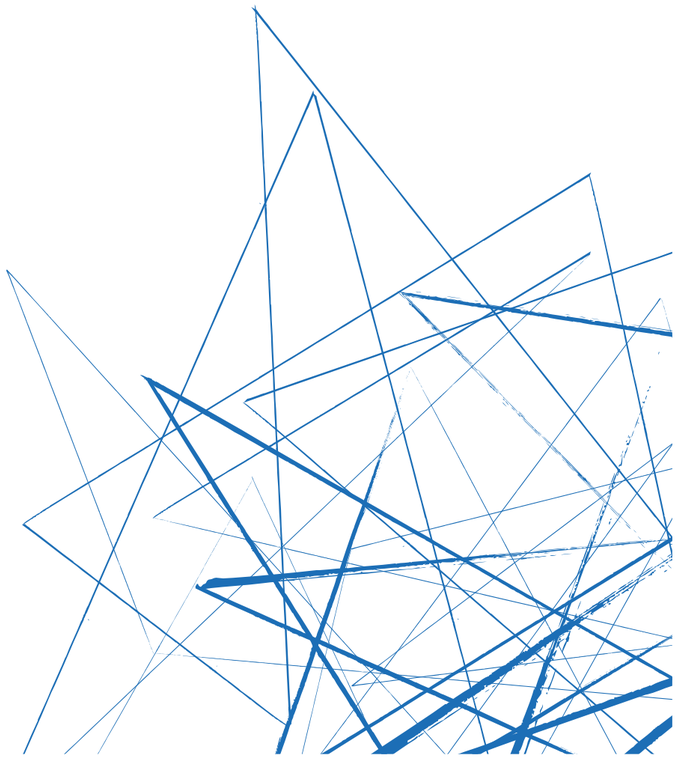

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PhD Series 27.2022

Kathrine Søs Jacobsen Cesko

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Kathrine Søs Jacobsen Cesko

Primary Supervisor: Professor Christina D. Tvarnø, CBS LAW

Secondary Supervisor: Associate Professor Pedro Telles, CBS LAW

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PREFACE

This PhD thesis has been written between January 2018 to May 2022 during my employment as PhD Fellow at Copenhagen Business School. It is partially funded by the Swedish Competition Authority and I would like to express my gratitude for their support. I would also like to acknowledge the important role played by my research stay at Monash University Faculty of Law in Melbourne, Victoria, Australia. My research stay at Monash University gave me the opportunity to benefit from the excellent research environment at the university.

This thesis would not have been written without the presence and encouragement of many people that I have been lucky to meet along the way. I would like to thank my supervisor, Professor Christina D. Tvarnø, for her support during the years that it took to complete this PhD thesis, not only in relation to the thesis but also in relation to everything else, reaching from career advice to everyday problems. I would also thank her for being a role model in many respects. Moreover, I would also like to thank my secondary supervisor, Associate Professor Pedro Telles for helping me through the last phase of writing. I have benefitted from your great knowledge and your keen eyes.

Furthermore, I would like to thank my colleagues at CBS Law, who has been very supportive. Additionally, I would like to thank Associate Professor Christian Bergqvist for our good competition law discussions and to give a special thanks to Thomas Zamiri Sørensen and Louise Charlotte Rasmussen for their impressive proofreading skills.

Finally, I would like to thank my family and friends, especially Selma for her unconditional love and for giving me a smile on my face every day. Last – but not a least – I thank my dear husband Almedin for everything, especially for bearing with my ups and downs until the PhD thesis was submitted. I thank you for all your love and support – for always being there for me.

This PhD thesis is dedicated to my parents who sadly passed away too soon and to my grandmother who has helped me through many difficult times.

Copenhagen, May 2022

Kathrine Søs Jacobsen Cesko

ABSTRACT

This PhD thesis investigates the interaction between the public procurement rules and the competition rules with a focus on the legal framework of collaboration between economic operators tendering in public procurement procedures. The purpose of the thesis is to clarify, analyze and discuss the current state of law on collaborations between economic operators competing for public contracts. Throughout the thesis, the focus will be on three different types of collaborations. First type being when an economic operator relies on the capacity of other economic operators in order to document whether they are capable of fulfilling the tendered contract. Secondly, the focus will be when economic operators form a bidding consortium for the purpose of tendering for and eventually fulfilling a public contract. Third and last focus will be on economic operators who use subcontractors to fulfil a public contract.

This PhD thesis seeks to answer the following questions (1) what effects can collaborations between economic operators in the competition for public contracts have on competition in the internal market; (2) when are collaborations between economic operator in the competition for public contracts considered legal under public procurement law but not under competition law; (3) how is it possible to reconcile a potential conflict between public procurement law and competition law.

The first two chapters contain the theoretical framework of the thesis. Chapter 1 provides the framework and an introduction to the thesis. Chapter 2 outlines the methodological approaches of the thesis, which contains an overview of the applied legal and economic methods and theories. The thesis applies the legal dogmatic method in order to clarify, analyze and discuss the current state of law on collaborations between economic operators competing for public contracts. Furthermore, it applies economic theories as a supplement to the legal analysis. Finally, theories on microeconomics and the industrial organization are applied, which belongs to neoclassical theory as well as auction theory and game theory.

Chapter 3 and Chapter 4 contain the foundations for the analyses in the thesis. Chapter 3 entails an analysis based on economic theory, in which it is examined what effects collaborations between economic operators in the competition for public contracts can have on competition in the internal market. The analysis will largely focus upon what competition is and how collaboration between

economic operators can affect competition when bidding on public contracts. It is found that there are differences in the view of competition and collaborations between economic operators tendering in public procurement procedure can both contribute to positive and negative effects on the competition. Chapter 4 analyses the objectives, means and scope of the public procurement rules and the competition rules. The understanding of the objectives is important for the interpretation of the rules, and the analysis of how to reconcile a potential conflict between the public procurement rules and the competition rules. It is found that the public procurement rules and the competition rules share the objective of promoting the internal market.

The legal framework for collaboration is covered in Chapter 5 and Chapter 6. Chapter 5 contains an analysis of the legal framework for the three collaboration types from a public procurement perspective. In addition, there is also a discussion of the collusion-related exclusion ground in Article 57(4)(d) of the Public Sector Directive. It is found that the general principle is that the contracting authority must respect the right of the economic operators to collaborate in order to submit a tender. Overall, the Public Sector Directive facilitates a flexible approach to collaboration between economic operators, yet there are limitations to the application of the three collaboration types. Moreover, a number of uncertainties are identified with regards to the framework set by the Public Procurement Directive when it comes to the application of the three types of collaboration. The chapter also discusses the assessment of the application of the collusion-related exclusion ground, where it is found that the contract authority has a wide margin of appreciation regarding whether or not to exclude a tenderer from the tender procedure. Although the collusion-related exclusion are worded differently from Article 101(1) TFEU, it is found, in connection with the interpretation and application of the collusion-related exclusion grounds, that it is reasonable to make the assessment in the light of the prohibition of anti-competitive agreements.

Finally, Chapter 7 and Chapter 8 provides an analysis of the identified grey zones between public procurement law and competition law, and followed by the conclusion of the thesis. Chapter 7 identifies and discusses whether there are situations with a discrepancy of legality between the three collaboration types under public procurement law and competition law. It can be deduced that there are several uncertainties when it comes to the collaborations that economic operators can enter into when tendering for public contracts. Consequently, in many situations it can be difficult to clarify whether the collaborations are in compliance with the public procurement rules and the competition rules as well as whether there is a conflict between the rules. For each type of collaboration, one situation is highlighted where it is uncertain how the collaboration should be assessed. It is argued

that the legal system of the EU needs to appear coherent in order to be regarded as a legal system, and coherence of EU law will therefore be seen as a premise of its legal system. Hence, there is a need for coherence between the EU rules on public procurement, which the thesis identifies a foundation. In addition, proposals are made regarding how to reconcile a potential conflict between public procurement law and competition law. Chapter 8 covers the results and final conclusions of the thesis.

The main finding of the thesis is that the current state of law on collaborations between economic operators competing for public contracts contains situations in which it is not clear whether a collaboration is legal or not. To ensure legal certainty, a more coherent and improved guidance on the legal framework is needed for collaboration between economic operators when tendering in public procurement procedures.

LIST OF ABBREVIATIONS

Abbreviation	Explanation
Bid Rigging Exclusion Notice	Notice on tools to fight collusion in public procurement and on guidance of how to apply the related exclusion ground, 2021/C 91/01
CJEU	Court of Justice of the European Union. The Court of Justice of the European Union includes the Court of Justice, the General Court and specialised courts
Commission	European Commission
De Minimis Notice	Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, 2014/C 291/01
GC	General Court
EC Treaty	Treaty establishing the European Community
Ed.	Edition
EFTA	European Economic Area
ECJ	Court of Justice
ESPD	European Single Procurement Document
EU	European Union
EU Courts	Includes the Court of Justice, the General Court and specialised courts
Horizontal Guidelines	Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01
Ibid	Ibidem (in the same book, chapter, page, etc.)
Joint bidding	The act of two or more economic operators submitting a single bid
Joint tendering	The act of two or more economic operators submitting a single bid
NUTS	Nomenclature of Territorial Units for Statistics
OJ or OJEU	Official Journal of the European Union

Para	Paragraph
Parliament	European Parliament
Public Procurement Directives	Includes the three applicable procurement directives: - Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC - 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 repealing Directive 2004/17/EC - Directive 2014/23/EU of The European Parliament and of The Council of 26 February 2014 on the award of concession contracts
Public Sector 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
SMEs	Small and medium-sized enterprises
TFEU	Treaty of the Functioning of the European Union
TEU	Treaty on European Union
Vertical Guidelines	Commission Notice, Guidelines on Vertical Restraint, SEC(2010) 414
Vol.	Volume
WTO	World Trade Organization
2004 Public Sector Directive	Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

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PART I

INTRODUCTION & METHODOLOGY

CHAPTER 1

Introduction and Framework

1. Introduction

The public procurement market constitutes a significant proportion of the economy in the European Union (henceforth EU). According to the European Commission (henceforth Commission), contracting authorities in the Member States annually spend around 14 per cent of their gross domestic product of the Member States on procurement of services, works and supplies.[1] In certain situations, the EU public procurement rules (henceforth public procurement rules) may regulate the procedure through which the contracting authorities can procure services, works and supplies from economic operators.

The public procurement rules is setting up procedural rules for the award of public contracts to ensure that the public procurement market is open for competition.[2] Almost 30 years ago, in the *Bridge over the Storebaelt* case, the ECJ in particular emphasised the importance of ensuring the development of effective competition in the field of public contracts.[3] The public procurement rules and the case law of the ECJ explicitly allow for a great variety of collaboration types that can occur between economic operators when taking part in competition for public contracts.[4] However, the fact that collaboration between the economic operators is permitted under public procurement law does not mean that all collaborations automatically are in compliance with the EU competition rules (henceforth competition rules).

On the one hand, collaboration between economic operators may lead to anti-competitive behaviour with the result of reducing the competition for the given public contract. Furthermore, the traditional protest against joint tendering is that it may destroy competition by reducing the total number of bids that will be tendered.[5]

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[1] European Commission 2011, URL: https://ec.europa.eu/growth/single-market/public-procurement_en.
[2] Recital 1 of the preamble to Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC. See further in Chapter 3, where it is argued that many factors speak in favor for effective competition to be seen as an objective of the public procurement rules.
[3] Case C-243/89, Commission of the European Communities v Kingdom of Denmark, EU:C:1993:257, para 33.
[4] See further in Chapter 4.
[5] Smith. J. L. (1983). Joint Bidding, Collusion, and Bid Clustering in Competitive Auctions. Southern Economic Journal, Vol. 50, No. 2, 355-368, p. 355.

On the other hand, collaboration between economic operators may be the only way for certain economic operators to optimally fulfil the requirements of a public contract or to be able to participate in the tender at all. As the Commission has indicated in its Horizontal Guidelines,[6] collaboration can also lead to substantial economic benefits, in particular if the economic operators combine complementary activities and skills, share risks, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster. In some cases, it can therefore be argued that collaborations between economic operators may lead to economic benefits and affect the competition positively.[7]

From a public procurement perspective, it is however not new knowledge that some types of collaboration between economic operators can be anti-competitive. Over the years, both the Commission and the national competition authorities in several Member States have handled several cases of collusion in public procurement procedures.[8] For example, the case regarding the pre-insulated pipe cartel,[9] which was established in Denmark in 1990, where cartel members were engaged in anti-competitive actions such as market sharing, price setting, bid rigging, coordinated predation and delaying innovation.[10] Nevertheless, the Commission only sanctioned the cartel many years after in 1998.[11]

Until the adoption of the Public Sector Directive, anti-competitive behaviour and collusive practices in public procurement were primarily dealt with at EU level, from the perspective of competition law.[12] However, the Public Sector Directive has introduced provisions that can help to facilitate that public procurement ensures development of effective competition. One of these is the last sentence of Article 18(1) in the Public Sector Directive which prescribes that a contracting authority shall ensure that the design of the procurement is not being made with the intention of artificially narrowing competition.[13] Furthermore, one of the most important changes in this respect was the

[6] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 1.2.
[7] See further in Chapter 3. Chapter 3 contains an analysis that is based on economics theory, and in which it is examined when economic operators have incentives to collaborate in the competition for public contracts, as well as under which circumstances this collaboration can be harmful to the competition in the internal market.
[8] See, for example, Cases IV/31.572 and 32.571, Commission Decision of 5 February 1992, the SPO case; Case IV/35.691/E-4, Commission Decision of 21 October 1998, the Pre-Insulated Pipe Cartel case and; Case COMP/E-1/38.823, Commission Decision of 21 February 2007, the Elevators and Escalators case/ the Kone case.
[9] Case IV/35.691/E-4, Commission Decision of 21 October 1998, Pre-Insulated Pipe Cartel case.
[10] Møllgaard, P. (2006). Assessment of Damages in the District Heating Pipe Cartel. Copenhagen Business School, CBS. Working Paper/ Department of Economics. Copenhagen Business School No. 10-2006, p. 1.
[11] Case IV/35.691/E-4, Commission Decision of 21 October 1998, Pre-Insulated Pipe Cartel.
[12] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, para 1.3.
[13] See Chapter 4 for a discussion of this provision and whether there is an independent procurement law principle.

introduction of Article 57(4)(d) in the Public Sector Directive, which indicates that a contracting authority may exclude or be required by a Member State to exclude any economic operator from participating in a procurement procedure if the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.[14] In March 2021, the Commission also issued specific guidance on how to fight collusion in public procurement, which covered how to apply the related exclusion ground in the Public Sector Directive.[15]

In Scandinavia, there has been a renewed special interest in collaboration between economic operators and joint tendering in public procurement procedures, which mostly can be observed in connection with three recent cases at national level.[16] From these national cases, it can be deduced that there may be a Scandinavian trend of increased enforcement against joint tendering and an approach to the issue that view joint tendering as a by object restriction of competition.[17] Currently, there are only a handful of cases from the Commission and one case from the European Free Trade Association (EFTA) Court dealing with joint tendering.[18] Furthermore, the ECJ has not yet assessed a case concerning joint tendering from a competition law perspective.[19]

1.2. Interaction between the Public Procurement Rules and the Competition Rules

This thesis focuses on the regulation of collaboration between economic operators tendering in public procurement procedures. In this situation, there are two sets of rules that in particular are relevant.

[14] Kuzma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding (first ed.). Elgar European Law and Practice, p. 2.
[15] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, Notice 2021/C 91/01.
[16] Judgment of the Stockholm District Court of 21 January 2014 in case T 18896-10, Swedish Competition Authority v. Däckia and Euromaster; Judgment of the Borgarting Court of Appeal of 17 March 2015 in case 13-075034ASD-BORG/01, Staten v/ Konkurransetilsynet v. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba. This decision was confirmed by the Norwegian Highest court on 22 June 2017 in case HR-2017-1229-A. Decision of the Danish Competition Council of 24 June 2015 in case 14/04158, Danish Competition Council v Eurostar A/S and GVCO A/S. The Danish Supreme Court gave support to the interpretation applied by the Competition Council in Judgment by the Danish Supreme Court of 27 November 2019 in the case 191/2018, Danish Competition Council v Eurostar A/S and GVCO A/S.
[17] For this specific point, see Tveit, S. T. (2020). Joint bidding: A Smelly Looking Fish or a Rockpool goby? An Update from the Nordics. European Competition Law Review, 41(7) 2020, 335-344, p. 336. See further in section 3 State of the art in this chapter.
[18] Advisory Opinion by the European Free Trade Association Court of 22 December 2016 in Case E-03/16, Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet.
[19] Ritter, C. (2017). Joint Tendering Under EU Competition Law. Journal of European Competition Law & Practice, Vol. 6, No. 9, 629-638, p. 631.

First, the public procurement rules, which derive from two main sources, namely the Treaty on the Functioning of the European Union (TFEU) and the Public Procurement Directives. Above certain thresholds, the Public Procurement Directives regulate the procedure through which contracting authorities and certain public utility operators procure goods and services from the market. The rules are addressed towards the Member States (contracting authorities).[20]

Second, the competition rules, which mostly derive from Articles 101 to 109 of the TFEU as well as a series of regulations and directives. The competition rules are addressed towards undertakings and this concept is therefore decisive for the application of the rules.[21]

Additionally, these sets of rules are enforced through two separate enforcement systems. The enforcement of the public procurement rules is regulated by the Remedies Directive.[22] This directive sets a minimum level for national review standard with regards to the enforcement of the rules. However, the enforcement relies profoundly on private enforcement, either through complaints to the national complaint boards, the national courts in the Member States or the European Commission.[23] The EU-level enforcement of the rules is pursued by the European Commission.[24]

The enforcement of the competition rules is regulated in the Enforcement Regulation[25], which decentralizes enforcement of the Articles 101 to 109 of the TFEU to the national competition authorities of the Member States, which may affect trade between Member States.[26] The Commission is the principal enforcer of the EU competition rules, and it has the responsibility to investigate suspected anti-competitive conducts and ensure that the national competition authorities of the Member States adhere to the EU competition rules in a uniform manner. Due to the separate

[20] Article 1(1) of Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC.
[21] The concept of an undertaking has been developed through the case law of the ECJ. This concept is clarified and discussed in chapter 4 of the thesis.
[22] Directive 2007/66/EC of the European Parliament and of the Council of 11 of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts
[23] Ølykke, G. S. (2012). How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive? In Ølykke, G. S., Risvig Hansen, C. and Tvarnø, C. D. (eds.). EU public procurement: Modernisation, growth and innovation: Discussions on the 2011 proposals for procurement directives (first ed.). DJØF Publishing, p. 63. For more on the enforcement of procurement rules the rules see Lichére, F. and Treumer, S. (2011). Enforcement of the EU Public Procurement Rules (first ed.). European Procurement Law Series vol. 3, DJØF Publishing.
[24] Article 258 of the The Treaty on The Functioning of The European Union.
[25] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty with amendments.
[26] Article 3(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

enforcement systems, disputes are usually handled under one set of the rules, while competition law aspects of public procurement procedures are rarely assessed.[27]

The public procurement rules and the competition rules are considered as separate legal disciplines.[28] These rules regulate two different sides of public procurement procedures, which are those of respectively the contracting authorities and the economic operators.[29] However, to a limited extent, the Public Procurement Rules directly regulate the behaviour of economic operators in public procurement procedures, and this behaviour will mainly be regulated by the competition rules.[30] Furthermore, in some cases, the competition rules may apply to the actions performed by the contracting authorities. The conditions for the competition rules to apply to the actions of the contracting authority are clarified and analysed in chapter 4 in this thesis. Therefore, there cannot be a strict division of the rules.

In a situation where economic operators collaborate when they tender for a public contract, the public procurement rules and the competition rules can both provide the legal basis for an assessment of whether the collaboration is legal or not. The rules may overlap so that, during a tender procedure and in the interpretation of the rules, doubts may arise, such as to whether there is a violation of one or both of the separate legal disciplines or potentially which set of rules that can apply in a given situation.[31] Hence, there may be situations in which it is not clear whether a collaboration is legal or not, which is also referred to as grey zones.[32] This is illustrated in Figure 1 below.[33]

[27] Ølykke, G. S. (2011). How does the Court of Justice of the European Union Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), pp. 179-192, p. 179.
[28] Drijber, B. J. and Stergiou, H. (2009). Public procurement law and internal market law. Common Market Law Review 46(3), 805–846, pp. 805-806.
[29] Ølykke, G. S. (2011). How does the Court of Justice of the European Union Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), pp. 179-192, p. 180.
[30] Munro, C. (2006). Competition law and public procurement: two sides of the same coin? Public Procurement Law Review, 6, 2006, 352-361, p. 360.
[31] It is important to ensure that the results reached under both sets of rules are coherent. See e.g. Levenbook, B. B. (1984). The Role of Coherence in Legal Reasoning. Law and Philosophy, 3(3), 355–374, p. 355; see also Balkin, J. M. (1993). Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence. The Yale Law Journal, 103(1), 105–176, pp. 115-116.
[32] The legal consequences of the identified gray zones will be discussed in Chapter 7.
[33] The figure is inspired by Cohenmiller, A. S. (2019). A Model for Developing Interdisciplinary Research Theoretical Frameworks. Qualitative Report 24(6):1211-1226, p. 1212.

Figure 1 ***Grey zones between the public procurement rules and the competition rules***

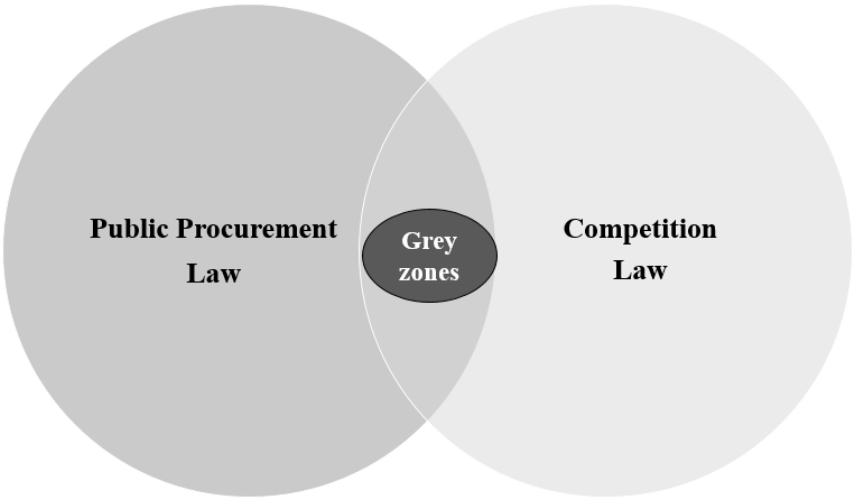

Figure 1 shows that grey zones are located in the intersection between the public procurement rules and the competition rules. There are several areas in which an overlap between the two sets of rules can be observed yet this thesis exclusively focuses upon the collaborations between economic operators bidding on public contracts.[34]

2 Purpose and Problem Statement

The purpose of the thesis is to clarify, analyze and discuss the current state of law on collaborations between economic operators competing for public contracts. The thesis applies economic theory to the specific public procurement contexts in order to explain the different forms of collaborations between economic operators, as well as to examine what effects collaborations between economic operators in the competition for public contracts can have on competition in the internal market.[35] Hence, the thesis applies an interdisciplinary approach to illuminate the topic.

[34] For other areas where both the tender rules and the competition rules are particularly relevant to address, see; Graells, A. S. (2015). Public Procurement and the EU Competition Rules (second ed.). Hart Publishing

[35] This thesis will focus on three different types of collaborations. First, when an economic operator relies on the capacity of other economic operators in order to document whether they are capable of fulfilling the tendered contract. Second, when economic operators form a bidding consortium for the purpose of tendering for and eventually fulfilling a public contract. Third, when economic operators use subcontractors to fulfil a public contract. These types of collaborations will be presented in section 4 of this chapter.

The problem statement is divided into three main research questions in order to address the research purpose of the thesis. These are categorised according to the disciplines of the thesis (i.e. one economic, one legal, and one interdisciplinary question), but, in some cases, the structure of the analyses may be more integrated than this. Accordingly, the research questions are as follows:

> 1) What effects can collaborations between economic operators in the competition for public contracts have on competition in the internal market?
>
> 2) When are collaborations between economic operator in the competition for public contracts considered legal under public procurement law but not under competition law?
>
> 3) How is it possible to reconcile a potential conflict between public procurement law and competition law?

The main assumption behind these research questions is that there is no coherence between the legal positions under public procurement law and competition law.[36] However, if it turns out that the legal position under both sets of rules can be considered coherent, it will be examined why this is the case from an economic perspective.

The first research question is answered by applying economics theory, which therefore will have the economic operators as the unit of analysis. This part of the thesis must be considered as a supplement to the legal analysis. The reason why the thesis begins with this question is that the results of this analysis will be included in a further analysis of collaborations from a legal perspective.

The second research question is answered by looking at both the public procurement rules and the competition rules. The legal analysis focuses on the legal framework within which the economic operators must act. This question will be assessed by first conducting two separate analyses of the collaborations types under the public procurement rules and the competitions rules respectively. Parts of the economic analysis will be included in both analyses, but, in the analysis of the legal position under competition law, there will be a greater integration of the results obtained from the first research question. Subsequently, the results of the two separate analyses will be compared to

[36] MacCormick, N. (1994). Legal Reasoning and Legal Theory (first ed.). Clarendon Press, p. 106. MacCormick states: "The basic idea is of the legal system as a consistent and coherent body of norms whose observance secures certain valued goals which can intelligibly be pursued all together". MacCormick's view and the view of this thesis are that there should be coherence between the norms in a legal system. In this case, the legal system means the legal system of the EU.

determine whether there are any differences between the legal positions under the public procurement rules and competition rules.

The third research question is normative in the sense that the question will be answered to ensure that the results reached under both sets of rules are coherent and to contribute to the interpretation and interaction of the rules. This analysis will be based on the results that have been deduced from the previous research questions.

With a specific focus on public procurement law, this thesis will contribute with new knowledge to the fields of public procurement law and competition law. It will analyse both competition law and public procurement law without explaining the fundamentals behind the principles of transparency, equal treatment and discrimination in its public procurement application. Accordingly, these principles will be applied with no explication in the analysis. Instead, it allows for the thesis to provide an in-depth description for relevant concepts and conditions in the application of relevant competition rules. In addition, only the particular parts of the competition rules relevant to the various collaboration types in the competition for public contracts will fall within the scope of the thesis. However, a brief introduction will be included to cover the basic models that are used to explain competition and collaboration in order to fully comprehend incentives to collaboration in the competition for public contracts. Finally, there will also be a description of how economic theory can be applied generally and specifically.

3 State of the Art

This section will provide a description of the current knowledge on the research topic through a presentation of case law and similar published works, which will provide an overview of the extant research field as well as an outline of what should be further investigated.

As stated in the introduction, there has been a special focus in Scandinavia on joint tendering for public contracts. This can be seen in connection with three recent cases at national level: (1) the *Däckia/Euromaster* case in Sweden from January 2014, (2) the *Ski Taxi/ Follo Taxi* case in Norway from June 2015, and (3) the *Road Markings* case in Denmark from November 2019.[37] These national

[37] Judgment of the Stockholm District Court of 21 January 2014 in case T 18896-10, Swedish Competition Authority v. Däckia and Euromaster; Judgment of the Borgarting Court of Appeal of 17 March 2015 in case 13-075034ASD-BORG/01, Staten v/ Konkurransetilsynet v. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba. This decision was confirmed by the Norwegian Highest court on 22 June 2017 in case HR-2017-1229-A. Decision of the Danish Competition Council of 24 June 2015 in case 14/04158, Danish Competition Council v Eurostar A/S and GVCO A/S. The Danish Supreme Court gave support to the interpretation applied by the Competition Council in Judgment by the

cases in the Scandinavian countries have caused a lot of discussion in the literature regarding the competition law assessment of joint bidding.[38] What the national cases seem to have in common is that joint tendering in public procurement procedures can be considered as leading to price-fixing and market sharing between the members of a bidding consortium.[39]

From a competition law perspective, such actions are classified as object restrictions, and thus no detailed analytical assessment of whether there is an appreciable negative effect on competition has been conducted.[40] The assessment only involves limited consideration to the economic and legal context in which the agreement was entered into, and it is restricted to what is deemed strictly necessary to establish the existence of a restriction of competition by object. Consequently, it can be deduced that there may be a tendency in the Scandinavian countries to characterise a violation of the competition rules as a result of joint bidding in public procurement procedures as an object restriction of the competition.[41]

Furthermore, as stated in the introduction, the EFTA Court has also delivered a judgement that deals with joint bidding.[42] In 2016, the EFTA Court handed an Advisory Opinion in the *Ski Taxi/ Follo Taxi* case.[43] In this case, the EFTA Court dealt with the question of whether a joint bid for a public

Danish Supreme Court of 27 November 2019 in the case 191/2018, Danish Competition Council v Eurostar A/S and GVCO A/S.

[38] See e.g. Anchustegui, I., H. (2017). Joint Bidding and Object Restrictions of Competition: The EFTA Court's Take in the Taxi Case. European Competition and Regulatory Law Review, Vol. 1 2017, Issue 2, 174-179; Sanchez-Graells, A. (2017). Ski Taxi: Joint Bidding in Procurement as Price-Fixing? Journal of European Competition Law & Practice, Vol. 9, Issue 3, March 2018, 161–163; Tveit, S. T. (2020). Joint bidding: A Smelly Looking Fish or a Rockpool goby? An Update from the Nordics. European Competition Law Review, 41(7) 2020, 335-344.

[39] In Däckia/Euromaster, the Stockholm District Court ruled that the collaboration between Däckia and Euromaster was a sales collaboration agreement, which included joint price setting, which is characterised by a lack of benefits for the production or distribution. In Ski Taxi/ Follo Taxi, the Norwegian Supreme Court found that the collaboration contained an element of coordination of resources, the joint bidding, in this case, was considered anti-competitive by nature. In Road Markings, the Danish Supreme Court held that the consortium was, in fact, a means to distribute the parties' individual services through joint tendering and joint pricing. Subsequently, a judgement has been handed down in the criminal-law part of the Road Markings case. The City Court of Copenhagen ruled that LKF Vejmarkering and Eurostar Denmark do not have to pay fines for violating the Danish Competition Act. According to the judgment, even though the companies did violate the Danish Competition Act, the City Court of Copenhagen did not find that the conditions for punishment were met. The Danish Public Prosecution Authority (Anklagemyndigheden) has appealed for this judgement. Hence, it is the Danish Police, Special Crime Unit (National enhed for Særlig Kriminalitet) that must decide whether this judgement can be appealed or not. At the present moment, no decision has been made on this matter. See judgment of the City Court of Copenhagen of 11 February 2022 in case SS 3-3526/2020, Anklagemyndigheden mod Eurostar Denmark A/S and LKF Vejmarkering ApS.

[40] Agreements with an anti-competitive object are those that are particularly high risk and are presumed to have a negative impact on markets. Therefore there is no need to prove that there is an actual negative effect on competition.

[41] Tveit, S. T. (2020). Joint bidding: A Smelly Looking Fish or a Rockpool goby? An Update from the Nordics. European Competition Law Review, 41(7) 2020, 335-344, p. 335.

[42] Advisory Opinion of the EFTA Court of 22 December 2016 in case E-03/16, Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet.

[43] Judgment of the Borgarting Court of Appeal of 17 March 2015 in case 13-075034ASD-BORG/01, Staten v/ Konkurransetilsynet v. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba. This decision was confirmed by the Norwegian Highest court on 22 June 2017 in case HR-2017-1229-A.

contract can constitute an object restriction of the competition. The EFTA Court found that joint bidding for patient transportation can be qualified as a form of horizontal price fixing, which means that it is highly likely to amount to an object restriction of competition.[44] This case as well as those mentioned above point to the practical importance of the topic in the thesis, and they signal the timeliness of the proposed research, which in the light of the obligation is to ensure the uniform application of EU law in all the Member States.[45]

As stated above, the legislative provisions governing collaborations between economic operators, which should provide the answers to the questions posed above, can be found both in public procurement law and in competition law. It has been observed that there is an increased interest in the literature on the interaction between procurement law and competition law,[46] which also has given rise to various discussions in recent academic literature on topics that focus on joint tendering. With few exceptions,[47] most legal scholars addresses this topic in a unilateral manner, mainly from an EU competition law perspective. [48]

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[44] Whether the submission of joint bids by SFD on behalf of Ski Taxi and Follo Taxi in the two tender procedures is to be considered a restriction of competition by object is a matter of fact and as such for the referring court to assess.

[45] In January 2021, Heidi Sander Løjmand published a PhD thesis titled "Et retligt og økonomisk perspektiv på tilbudskontorier i lyset af konkurrencelovens forbud mod konkurrencebegrænsende aftaler [a legal and economic perspective on joint bidding in the light of competition law prohibition of anti-competitive agreements]". This thesis investigates the analytical approach undertaken by the Danish Competition and Consumer Authority and the courts in the assessment of joint tendering under the prohibition of restrictions of competition. This thesis focuses on the national development within joint tendering primarily from a competition law and economics perspective. See Løjmand, H. S. (2021). Et retligt og økonomisk perspektiv på tilbudskontorier i lyset af konkurrencelovens forbud mod konkurrencebegrænsende aftaler. Southern University, PhD thesis.

[46] See among others Munro, C. (2006). Competition law and public procurement: two sides of the same coin? Public Procurement Law Review, 6, 2006, 352-361; Ølykke, G. S. (2012). "How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?" In Ølykke, G. S., Risvig Hansen, C. and Tvarnø, C. D. (eds.). EU public procurement: Modernisation, growth and innovation: Discussions on the 2011 proposals for procurement directives (first ed.). DJØF Publishing, 57-83; Graells, A. S. (2015). Public Procurement and the EU Competition Rules (second ed.). Hart Publishing; Bovis, C. (2016). Public Procurement and Competition: Some Challenges Arising from Recent Developments in EU Public Procurement Law in Bovis, C. (ed). Research Handbook on European Public Procurement (first ed.). Edward Elgar, 423-451. Balshøj. D. K. (2018). Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context. Aarhus University, PhD thesis; Moldén, R. (2021). Competition Law or the New Competition Principle of Public Procurement Law – Which is the more suitable legal instrument for making public procurement more pro-competitive? Stockholm School of Economic, PhD thesis.

[47] An example of academics that also takes a public procurement perspective on joint tendering is the two Polish practitioners Katarzyna Kuźma and Wojciech Hartung, in the book: Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding (first ed.). Elgar European Law and Practice. Their book, similar to this thesis, seeks to consider the interaction between thre public procurement rules and the competition rules in the context of joint tendering for public contracts, and the potential distortion of competition. This, of course, entails some overlaps with the analyses in the book and this thesis.

[48] See, among others, Thomas, C. (2015). Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law. Journal of European Competition Law & Practice, 2015, Vol. 6, No. 9; Ritter, C. (2017). Joint Tendering Under EU Competition Law. Journal of European Competition Law & Practice, Vol. 6, No. 9, 629-638; Tveit, S. T. (2020). Joint bidding: A Smelly Looking Fish or a Rockpool goby? An Update from the Nordics. European Competition Law Review, 41(7) 2020, 335-344; Petr, M. (2020). Joint Tendering in the European Economic Area. International and Comparative Law Review, 2020, Vol. 20, No. 1, 201–219; Kuzma, K. & Hartung, W.

However, it seems that the unilateral approach towards the rules now appears to be undergoing a transformation towards a more holistic approach. As stated in the introduction, the Public Sector Directive has introduced provisions that can help to facilitate that public procurement ensure development of effective competition. Furthermore, in the Bid Rigging Exclusion Notice, the Commission mentions the competition rules in a procurement law context and states that: *"[E]ffectively tackling collusion in public procurement requires a comprehensive approach by contracting authorities, making use of knowledge and expertise on both procurement and competition.*[49] This thesis has a similar focus with the application of knowledge and expertise on both procurement law and competition law. Hence, this thesis will make a contribution to the ever-growing academic literature, which focuses on the interaction between procurement law and competition law.

The thesis takes an interdisciplinary approach that considers the need to place public procurement law and competition law in a dialogue. The thesis wishes to contribute by pushing the approach in EU law from a unilateral perspective to a more holistic perspective and thus understand how the relationship between public procurement law and competition law can be complementary.[50]

Furthermore, the thesis contributes by emphasising and showing that an economic-based perspective provides an additional understanding that is overlooked in much legal literature on public procurement. Although the thesis is based on EU public procurement law and EU competition law, the results that have been found in the thesis may also be useful for future national legislation. National developments point to the practical importance of the topic and signals the timeliness of the proposed research, in the light of the obligation to ensure the uniform application of EU law in all the Member States.

(2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding (first ed.). Elgar European Law and Practice; Løjmand, H. S. (2021). Et retligt og økonomisk perspektiv på tilbudskontorier i lyset af konkurrencelovens forbud mod konkurrencebegrænsende aftaler. Southern University, PhD thesis.

[49] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, C(2021) 1631 final, para 4.

[50] Ølykke, G. S. (2011). How Does the European Court of Justice Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), 179-192, p. 180.

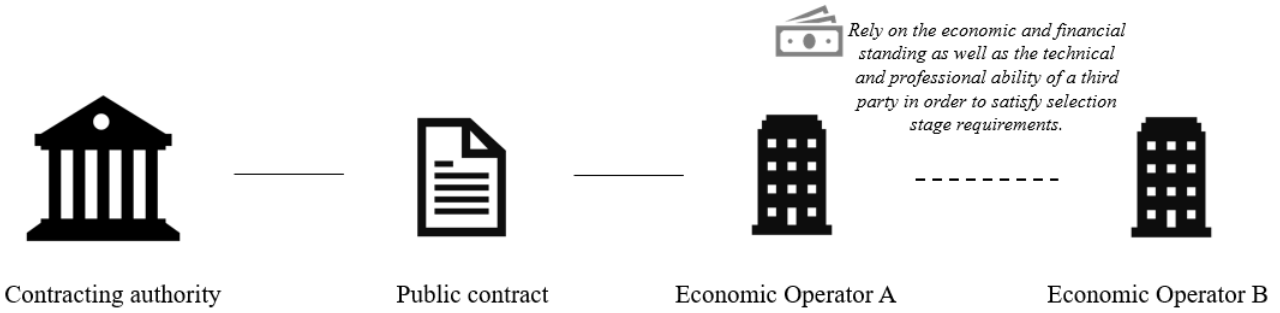
4 Types of Collaborations

Public procurement law and case law explicitly allow for collaborations between economic operators[51] when they are competing for a public contract, which can take place in a variety of forms. This thesis will focus on three different types of collaborations. First, when an economic operator relies on the capacity of other economic operators in order to document whether they are capable of fulfilling the tendered contract (hereinafter referred to as reliance on the capacities of other entities). Second, when economic operators form a bidding consortium for the purpose of tendering for and eventually fulfilling a public contract (hereinafter referred to as bidding consortia). Third, when economic operators use subcontractors to fulfil a public contract (hereinafter referred to as subcontracting). These types of collaborations and their differences will be further described below. However, these definitions must be considered general understanding of these concepts. This will be explored in more detail in the analyses where there will be an analysis on how these are to be understood from both an economic and legal perspective (public procurement law and competition law).

4.1 Reliance on the Capacities of Other Entities

An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of its links to those entities. In the thesis, this type of collaboration will be understood as such that an economic operator has submitted an *independent tender* using, for example, a statement of support from other entities.

Figure 2 ***Reliance on other economic operator's capacity***



[51] The concept of economic operators are according to subsection 10 of Article 2(1) of the Directive 2014/24/EU defined as:"(…) any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market (…)". The concept of economic operators is defined in more detail in Chapter 4 in section 4.4.

As illustrated by Figure 2, Economic Operator A submits an independent tender using, for example, a statement of support, as illustrated by the dashed line.[52] Economic Operator A is free to choose the type of proof that it will use to illuminate the existence of its relationship to Economic Operator B.

Economic Operator A can rely on the economic and financial standing as well as the technical and professional abilities of Economic Operator B in order to meet the requirements of the contracting authority. The contracting authority may choose to impose requirements in the tender documents in order to ensure that the economic operator possess the necessary capacities to perform the tendered contract.

However, Figure 2 is simplified as Economic Operator A can rely on several economic operators in relation to the same tender and not just Economic Operator B. In case the public contract is awarded to Economic Operator A, there will be a contractual relationship between the contracting authority and Economic Operator A.

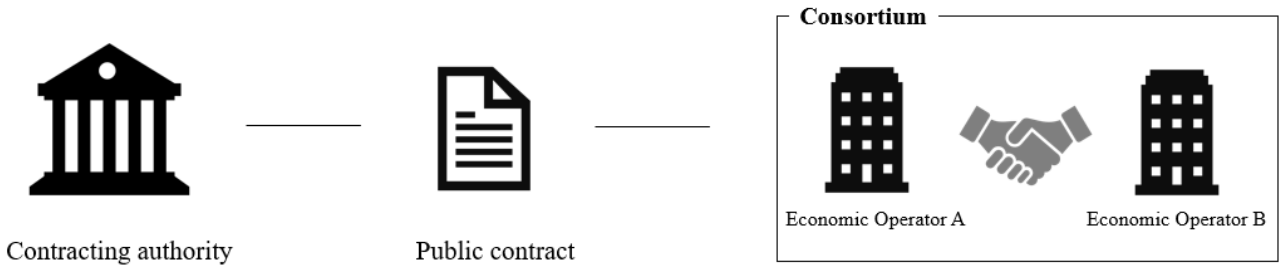
As a starting point, Economic Operator A does not need to include Economic Operator B to perform a part of the contract. Nevertheless, there is an exception to this when Economic Operator A relies on Economic Operator B with regards to their educational and professional qualifications, and economic operator A can only do this when Economic Operator B will be performing the works or services to which these capacities are required.

4.2 Bidding Consortia

This type of collaboration refers to a situation where two or more economic operators collaborate by submitting a *joint bid* in public procurement tender. The economic operators have the possibility of participating in a bidding consortium and jointly submit tenders regardless of the legal relations binding them and the legal form that they choose.

[52] Author's own creation.

Figure 3 ***Bidding Consortia***



As illustrated in Figure 3, Economic Operator A and Economic Operator B may come together to submit a joint bid for a tendered public contract by the contracting authority.[53] Within the consortium, each participant retains their separate legal status, and the consortium's control over each participant is limited to the activities involved in the joint bid.

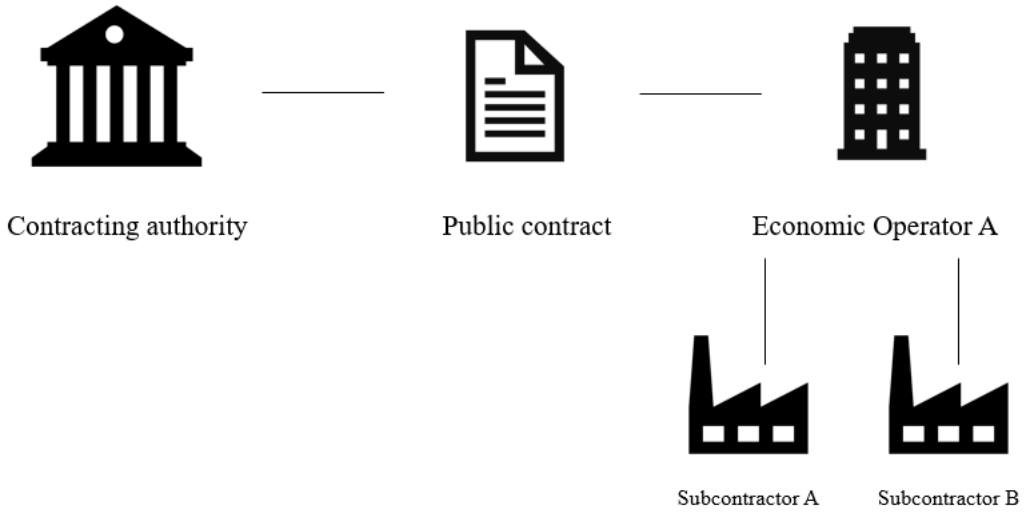
The consortium is often formed by contract, which delineates the rights and obligations of each member, including the division of profits. Economic Operator A and Economic Operator B shall reveal the names of all the consortium members in the tender documents. If the contracting authority awards the contract to the consortium with Economic Operator A and Economic Operator B, there will be a contractual relationship between all these parties.

4.3 Subcontracting

This type of collaboration occurs when an economic operator that has been awarded a public contract entrusts another entity with the performance of part of the works or services that are the subject matter of the contract. The entity that is entrusted with the performance of part of the works or services is referred to as a subcontractor. Hence, the role of the subcontractor is limited to the performance of a part of the contract on the terms and conditions agreed upon with the main contractor, and it does not have a contractual relationship with the contracting authority. In the thesis, this type of collaboration will be understood as such that an economic operator has submitted an *independent bid* to the contracting authority.

[53] Author's own creation.

Figure 4 ***Subcontracting***



As illustrated in Figure 4, Economic Operator A submits a bid for the tendered public contract by the contracting authority.[54] In case the public contract is awarded to economic operator A, there will be a contractual relationship between the contracting authority and Economic Operator A. However, Economic Operator A can get some part of the work performed by a number of subcontractors. In this case, Subcontractor A and Subcontractor B, but they do not have a direct contractual relationship with the contracting authority.

5 Introduction to Delimitations and Clarifications

To ensure the research depth in the thesis, the problem statement requires a number of delimitations and clarifications to the research field of the thesis. These are presented below.

This thesis is concerned with solving the problem statement on the sole basis of EU law as specified in section 2 of this chapter. Hence, national legislation as well as internal agreements, such as the Government Procurement Agreement, have been left out of the thesis.[55] However, it is acknowledged that some of the problems may be able to be solved on national level, such as in situations where Member States have adopted certain measures in their national legislation. Furthermore, the thesis

[54] Author's own creation.

[55] The Agreement on Government Procurement also referred to as the GPA, is an international agreement regulating public procurement. The GPA is a plurilateral agreement within the framework of the WTO, meaning that not all WTO members are parties to the Agreement. The latest version of the Agreement entered into force in 2012.

will focus exclusively upon collaborations between economic operators and will thus not include collaborations between public entities.

Even though the thesis briefly mentions the enforcement related to both the public procurement rules and the competition rules, it will not deal with the enforcement of the rules and considerations of remedies. However, a remark is attached to the national enforcement of the rules, where the case law of courts in the Member States and one case brought by the EFTA Court are highlighted. These cases have been applied to a limited extent and they merely function to illustrate that there may be a potential problem with the interpretation of the rules.[56] Moreover, they are used for the purpose of addressing whether this interpretation also will apply when the rules are to be enforced from an EU perspective.

5.1 Public Procurement Law - Delimitations and Clarifications

The public procurement rules govern the procurement of the public sector, where the concept of procurement covers the process leading up to the conclusion of a public contract.[57] Hence, this focus persists throughout the thesis, where the subject matter of the analysis mainly will deal with the establishing of collaborations between economic operators and thus choices that were made before the award of the public contract.

However, public procurement rules may also have an impact on the ex-post contract phase. According to the Public Sector Directive, there are rules governing the possibilities for making modifications of public contracts during their term. This will also apply in this thesis, which, among other things, addresses how much economic operators are allowed to change in the composition of a bidding consortium before and after the award of the public contract.

The thesis addresses the rules regarding three types of collaboration, which is based solely on the rules contained in the Public Sector Directive. Thus, the rules in the other Public Procurement Directives have been left out of the thesis. However, in the context of an analysis of the objectives of the Public Sector Directive, it is stated as the starting point of the analysis that the Public Procurement Directives all share the same objective. This statement and analysis of the position can

[56] The application of the case Law of the EFTA Court and the National Courts is dealt with in Chapter 2 of Section 3.3.
[57] Arrowsmith, S. (2014). The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (3rd ed.). Sweet & Maxwell, p. 1.

be found in section 3 of chapter 4. Therefore, some parts of the analysis are also relevant to an interpretation of the rules of the other Public Procurement Directives.

The Public Procurement Directives must be implemented by Member States into their national legislation, while leaving the choice of form and methods to the national authorities.[58] This leads to different systems in the individual Member States as to how the Public Sector Directives have been implemented. In the thesis, there are situations where a clear answer to the legal position cannot be given since the Member States are free to regulate the area in question. In this case, the national legislation is not included in the analysis, although, in some cases, this could be relevant.

As stated above, the collaboration forms of relying on the capacity of other economic operators, consortia, and subcontracting will be the focal points in the analysis of the thesis. However, there may be other types of collaborations between economic operators when competing for public contracts. An example of this could be organizational collaboration as well as other kinds of relations between the tenderers in a tender. In this regard, the ECJ has accepted that economic operators, which are organizationally related, may in principle compete against each other for public contracts.[59] This has also been confirmed in the subsequent case law of the ECJ.[60]

5.2 Competition Law - Delimitations and Clarifications

The substantive competition rules can be found in Articles 101 and 102 TFEU, which deal with the prohibition of undertakings entering into anti-competitive agreements and the prohibition on the abuse of a dominant position by undertakings, respectively. In addition, Article 106 TFEU contains rules on public undertakings and those granted special or exclusive rights, and Articles 107-109 TFEU contain rules on state aid. The focal point of this thesis deals with how contractual arrangements between undertakings have an impact on competition. Therefore, this gives rise to a delimitation from other parts of competition law.

In this thesis, the application of Article 101 TFEU will focus exclusively on the elements that are particularly relevant when assessing collaboration between economic operators when they compete

[58] Article 288 The Treaty on The Functioning of The European Union.
[59] Case C-538/07, Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano, EU: C:2009:317, para 31-32. In this case, the national law required automatic exclusion of tenderers with organisational relations. The purpose of the national law was to prevent collusion. The ECJ acknowledged this purpose and effect of the national legislation. However, the ECJ held that automatic exclusion of two tenderers from the same concern (mother and daughter) would not be proportional, as there was no possibility to rebut the assumption of collusion.
[60] Case C-425/14, Impresa Edilux srl and Società Italiana Costruzioni e Forniture srl (SICEF) v Assessorato Beni Culturali e Identità Siciliana – Servizio Soprintendenza Provincia di Trapani and Others, EU:C:2015:721, paras 36-39.

for public contracts. The delimitations that have been made in this respect as well as which elements that are considered important will be explained below.

The wording of Article 101(1) TFEU causes the prohibition to apply when the following conditions are met cumulatively:

1. There shall be an undertaking or an association of undertakings.
2. There shall be an agreement, a decision by an association of undertakings or concerted practices.
3. The agreement shall have as object or effect the prevention, restriction or distortion of competition.
4. The agreement may affect the trade between Member States.

In addition to these conditions, though Article 101(1) TFEU does not contain the word appreciable, it is clear from the case law of the ECJ that there must be:[61]

5. An appreciable impact on competition.

In the following, the question of whether there is an appreciable impact on competition in the relevant market will be seen as a separate condition for the application of Article 101(1) TFEU. However, this concept is either obsolete or absorbed into the distinction between anti-competitiveness by object or effect, which is why this approach is not always applied.[62] In the thesis, focus will be on the first, third and fifth condition, as listed in the above. The rationale for this will be discussed in the below.

5.2.1 First condition - An undertaking or an association of undertakings

The first condition, hereafter referred to as 'the undertaking criterion', is relevant for the analysis. The competition rules are addressed towards undertakings, and thus the application of the rules to the activities of economic operators is conditional on the existence of an undertaking. The TFEU does not contain a definition of an undertaking, and the concept of an undertaking has therefore been developed through the case law of the ECJ. Hence, the concept of undertaking is decisive for whether the competition rules apply to the activities of the economic operators. The concept of an undertaking within the meaning of the competition rules will be addressed and analysed in section 5.1 of chapter

[61] Faull, J. and Nikpay, A. (2014). The EU Law of Competition (third ed.). Oxford University Press, p. 235;
[62] For a discussion of whether this should be treated as a separate condition, see Bergqvist, C. (2020). What Does an Appreciable Negative Effect on Competition Mean? The University of Copenhagen Faculty of Law Legal Studies Research Paper Series, Dec. 2020, No. 2021-106.

4. Furthermore, the competition law provisions may apply to state activity in some situations, which is addressed and analysed in section 5.4 of chapter 4. In connection with the analysis and application of the undertaking condition, there are delimitations from the award of public undertakings and the concept of a public undertaking.

5.2.2 Second condition - Agreement, a decision by an association of undertakings or concerted practices

As stated above, there will be no focus on the condition regarding the presence of agreements, decisions by associations of undertakings, or concerted practices, as it will not give rise to any challenges in relation to possible collaborations between economic operators, including joint tendering. The scope of the prohibition in Article 101(1) TFEU is broader than the scope of an agreement in the traditional sense, as decisions by associations of undertakings and concerted practices are covered by the prohibition as well.

The aim of the prohibitions of Article 101(1) TFEU to entail different forms of coordination and collusion between undertakings of their conduct on the market.[63] Article 101(1) TFEU distinguishes between agreements between undertakings, concerted practices, and decisions by associations of undertakings. The wording of Article 101(1) TFEU entails different forms of coordination and collusion between undertakings of their conduct on the market.[64] The broad scope is confirmed by the fact that the prohibition laid down in Article 101(1) TFEU covers concerted practices whereby there is a form of coordination between undertakings that does not lead to the conclusion of an agreement as such.[65] Hence, the decisive factor for the existence of an agreement in the context of competition law is that at least two distinct undertakings both have expressed their joint intention of conducting themselves on the market in a specific way.[66]

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[63] Case C-48/69, Imperial Chemical Industries Ltd. v Commission of the European Communities, EU:C:1972:70, para 64; Case C-49/92 P, Commission of the European Communities v Anic Partecipazioni SpA, Para 112; Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc), EU:C:2006:734, para 32; and Case C-382/12 P, MasterCard Inc. and Others v European Commission, EU:C:2014:2201 para 63.

[64] Case C-48/69, Imperial Chemical Industries Ltd. v Commission of the European Communities, EU:C:1972:70, para 64; Case C-49/92 P, Commission of the European Communities v Anic Partecipazioni SpA, Para 112; Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc), EU:C:2006:734, para 32; and Case C-382/12 P, MasterCard Inc. and Others v European Commission, EU:C:2014:2201 para 63.

[65] Case C-49/92 P, Commission of the European Communities v Anic Partecipazioni SpA, para 115; and Case T-99/04, AC-Treuhand AG v Commission of the European Communities, EU:T:2008:256, para 118.

[66] Case T-99/04, AC-Treuhand AG v Commission of the European Communities, EU:T:2008:256, para 118.

Furthermore, it is sufficient that an act or conduct expresses the concurrence of wills of at least two or more undertakings. The form expressing the concurrence of wills is not decisive in itself.[67] Therefore, the concurrence of wills does not have to take the form of a legally binding contract for an agreement to exist under Article 101(1) TFEU. The concept of an agreement is wide enough to catch 'gentlemen's agreements', simple understandings, and non-binding marketing guidelines.[68]

As a result, in order for an agreement to exist, the expression of a joint intention or the concurrence of wills must be between two undertakings or more, i.e. it requires two undertakings or more. In addition, it has been observed that the broad scope entails many different types of agreements to be covered by the concept of an agreement. In this thesis, the term *agreement* should be read as covering concerted practices as well as decisions of associations.

A collaboration between economic operators, including joint tendering, meet the requirement of two or more undertakings. Furthermore, the existence of an expression of a joint intention or the concurrence of wills is expected to be easy to establish when dealing with a case of a bidding consortium. In the majority of cases, there will be a written agreement between the economic operators, specifying the division of responsibilities for the common bidding and the subsequent execution if the economic operators win the public tender. However, the agreement to submit a joint bid or parts of its content may also be expressed via e-mail correspondence or oral communication without this having significance for whether the collaboration between the economic operators is covered by the concept of an agreement. Hence, in this thesis, it will be assumed that this condition is met.

5.2.3 Third condition - object or effect the prevention, restriction or distortion of competition

The third condition, hereinafter referred to as *the restriction of competition criterion*, is considered as a condition that can create a lot of uncertainty when it is to be applied to collaborations between economic operators competing for public contracts. Therefore, this is one of the conditions that will be focused upon in the competition law analysis of the thesis.

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[67] T-41/96, Bayer AG v Commission of the European Communities, EU:T:2000:242, para 69; Case T-99/04, AC-Treuhand AG v Commission of the European Communities, EU:T:2008:256, para 118; and Case C-74/04 P, Commission of the European Communities v Volkswagen AG, EU:C:2006:460, para 37.

[68] Faull, J. and Nikpay, A. (2014). The EU Law of Competition (third ed.). Oxford University Press, p. 204. See also Case C-41/69, ACF Chemiefarma NV v Commission of the European Communities, EU:C:1970:71 regarding gentlemen's agreements.

5.2.4 Fourth condition - may affect the trade between Member States

The fourth condition, hereinafter referred to as *the trade criterion*, will not be included in the analyses. The trade criterion is a jurisdictional criterion, which defines the scope of application of EU competition law, and thus EU competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States. However, the Member States are free to adhere to their national competition law when a conduct does not appreciably affect the trade between them. The concept of 'trade between Member States' is broad and covers all economic activities related to goods or services, and it is not limited to the traditional exchanges of goods and services across borders.[69] Thus, the concept covers all cross-border economic activities involving two or more Member States.[70]

The application of the effect on trade criterion is independent from the definition of relevant geographic markets.[71] Therefore, trade between Member States may also be affected in cases where the relevant market is national or sub-national. In *Irish Sugar*,[72] the meaning of the words "may affect" and the reference to "a sufficient degree of probability" was interpreted accordingly: "[It is] *not necessary to demonstrate that the conduct complained of actually affected trade between Member States in a discernible way; it is sufficient to establish that the conduct is capable of having that effect*."[73] Thus, the establishing of the jurisdictional criterion does not require that the agreement or practice will actually have or has had an effect on trade between Member States.

Actually, it is sufficient if the agreement or practice simply is capable of having such an effect.[74] Hence, it can be assumed that there may be a connection between the announcements of EU tenders, according to the public procurement rules, and the application of the trade criterion, as the public tenders may contribute to it being met.

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[69] Lianos, I., Korah, V., & Siciliani, P. (2019). Competition Law, Analysis, Cases, & Materials (first ed.). Oxford University Press, pp. 62-68.

[70] Case C-172/80, Gerhard Züchner v Bayerische Vereinsbank AG, EU:C:1981:178, para 18. See also Case C-309/99, J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, EU:C:2002:98, para 95; Case C-475/99, Firma Ambulanz Glöckner v Landkreis Südwestpfalz, EU:C:2001:577, para 49; and Case C-41/90, Klaus Höfner and Fritz Elser v Macrotron GmbH, EU:C:1991:161, para 33.

[71] Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. (2004/C 101/07), para 22.

[72] Case T-228/97, Irish Sugar plc v Commission of the European Communities, EU:T:1999:246.

[73] Ibid, para 170.

[74] According to the Guidelines on the effect on trade concept, three elements, in particular, should be addressed on the application of the effect on trade criterion: The concept of 'trade between Member States', the notion of 'may affect', and the concept of 'appreciability'. The assessment of the effect on trade is based on objective factors, and the subjective intent on the part of the undertakings concerned is not required. See Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (2004/C 101/07), para 18.

The reason for this delimitation is due to the focus of the thesis, which exclusively is upon EU law and not national competition law. Therefore, it is presumed that that the criterion is met. However, the effect of the trade criterion is an autonomous EU law criterion, which must be assessed separately in each case.[75] Therefore, an assessment of this must always be made to determine whether this condition has been met.

5.2.5 Fifth condition - an appreciable impact on competition

The fifth condition is hereafter referred to as 'the appreciable effect on competition test'. In this thesis, it will be to investigate whether there is an appreciable negative effect on competition. In practice, this can be seen as an extension to the third condition, however, this test should be considered a separate condition and not to be confused with the issue of finding a restriction by object or effect.[76] In this regard, the analysis in the thesis will focus exclusively on the presence of an appreciable negative effect on competition and not if this can be precluded based on its ancillary nature or insignificant impact.

[75] See, e.g., Joined Cases 56/64 and 58/64, Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community, EU:C:1966:41, p. 429; and Joined Cases 6/73 and 7/73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities, EU:C:1974:18, p. 223. See also Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, (2004/C 101/07), para 12.

[76] Bergqvist, C. (2020). When Does Agreements Restrict Competition in EU Competition Law? University of Copenhagen Faculty of Law Research Paper, p. 3.

6 Structure of the Thesis

The thesis is divided into four parts. The structure of the thesis is illustrated below.

Figure 5 ***The structure of the thesis***

Part	Chapter	
PART I INTRODUCTION & METHODOLOGY	1	Introduction and Framework
	2	Methodology
PART II FOUNDATIONS	3	Competition and Collaboration from an Economic Perspective
	4	Objectives, Means and Scope of the Rules
PART III LEGAL FRAMEWORK FOR COLLABORATION	5	Collaboration between Economic Operators from a Public Procurement Law Perspective
	6	Collaboration between Economic Operators from a Competition Law Perspective
PART IV GREY ZONES & CONCLUSIONS	7	Grey Zones between Public Procurement Law and Competition Law
	8	Conclusions and Final Remarks

PART I – Introduction & Methodology

In addition to comprising the introduction and framework, part I of thesis will also cover methodology in the subsequent chapter. Chapter 1 presents the introduction to the thesis, where it is established that the thesis is concerned with the interaction between public procurement law and competition law. Next, the purpose and the problem statement of the thesis have been presented to emphasis the focus of the thesis, which was followed by a state-of-the-art section. Subsequently, a section with clarification of the definitions for the three types of collaborations that will be subject to

analysis in this thesis followed. Finally, the delimitations and important clarifications to the thesis were presented, and they are now followed by a section on the structure of the structure of the thesis.

Chapter 2 will describe the methodological approach of the thesis. Here, it is discussed what can be regarded as valid law, and to do this, it is relevant to define the philosophy of law, the valid legal sources of law as well as the legal dogmatic method as a basis for the understanding of valid law. Then, the value of the applied sources of law is discussed, in particular on the matter of applying soft law instruments and the challenges associated with the limited amount of competition case law regarding the topic. The chapter concludes with considerations regarding the use of economic theory and methods.

PART II – Foundations

Part II consist of chapter 3 and chapter 4. The former contains an analysis based on economic theory, in which it is examined when economic operators have incentives to collaborate in the competition for public contracts, as well as under which circumstances this collaboration can be harmful to the competition in the internal market. The analysis will largely focus upon what competition is and how collaboration between economic operators can affect competition when bidding on public contracts.

The latter chapter then discusses the objectives of the public procurement rules and competition law, and the means used for achieving these. Furthermore, it will be discussed who the addressees of the public procurement rules and the competition rules are, and whether there is an interaction between these rules. These two chapters should be considered a compound foundation for the further analysis, where the results from these chapters will be applied.

PART III – Legal Framework for Collaboration

Part III consist of chapter 5 and chapter 6. Chapter 5 includes an analysis of the legal framework for the three collaboration types from a public procurement law perspective. In addition, there is also a discussion of the collusion-related exclusion grounds. In Chapter 6, the thesis moves into an analysis of the legal framework for the three collaboration types from a competition law perspective. These two chapters will be kept separate, so if there are legal positions under the public procurement law and competition law that are not in coherence, these will first be addressed in part IV of the thesis.

PART IV – Grey Zones & Conclusions

Part IV consist of Chapter 7 and chapter 8. Chapter 7 discuss whether there are situations with a discrepancy of legality between the three collaboration types under public procurement law and competition law. In addition, this chapter will also try to answer how it can be become possible to reconcile this discrepancy or conflict between the legal positions under the two sets of rules. In Chapter 8, the results, proposals and final conclusions of the thesis are presented. Thus, there will be a summary of all the conclusions and findings of the thesis along with the final remarks regarding the conclusions in the thesis.

CHAPTER 2

Methodology

1 Introduction

This chapter sets out the methodological considerations that have been made in order to ensure an adequate treatment of the research questions of the thesis. As stated, it initially seeks to investigate what effects collaborations between economic operators in the competition for public contracts can have on competition in the internal market. Subsequently, the thesis will examine when collaborations in the mentioned forms (reliance on the capacities of other entities, bidding consortia, and subcontracting) are legal under public procurement law but not under competition law. Finally, it is explored how a potential conflict between public procurement law and competition law can be reconciled.

The formulation of the research questions entails an inclusion both legal and economic theory, which are associated with different methods. In this chapter, the application of these methods shall be addressed.

1.1 Outline

The methodology chapter will start with a clarification on what can be considered valid law. Hereafter, there will be a reflection on the applied philosophy of law.[77] In this connection, it will be discussed which philosophy of law that is the typical starting point for most legal scholars in their research of EU law as well as how the applied philosophy of law applied influences the choice of methods and legal sources in the thesis. This will be followed by a section on the legal dogmatic method and the doctrine of the sources of the law. Furthermore, there will be a presentation of the sources of law applied in the thesis.

Subsequently, the thesis will move on to present the applied economic methods and theories. In addition to this, a discussion of the role of economic analysis in competition law will also be included. Here, a special focus will be devoted to the importance of a social market economics framework as

[77] Philosophy of law is also referred to as research methodology and legal theory. For more on a general presentation of philosophy of law see for example Cryer, R., Hervey, T. K., and Sokhi-Bulley, B. (2011). Research Methodologies in EU and International Law. Bloomsbury; Barron, A.; Collins, H., Jackson, E., Lacey, N., Reiner, R., Ross, H., Teubner, G., Penner, J., Schiff, D. and Nobles R. (2005). Introduction to Jurisprudence and Legal Theory: Commentary and Materials. Oxford University Press; and Tvarnø, C. D., and Nielsen, R. (2021). Retskilder og Retsteorier. DJØF Publishing.

well as the influence this it has on the development of competition law in the EU. Furthermore, there will also be a discussion of the so-called modernization of the EU competition rules, which in particular encompasses the promotion of *the more economic approach to the competition rules*. This section ends by addressing the fact that economic theory is not applied in the same way in public procurement law as seen in competition law.

2 Defining Valid Law

This thesis aims to answer when different types of collaborations can be considered legal under EU law.[78] The legality of these collaborations will be assessed based on two sets of rules: the public procurement rules and the competition rules. In this regard, it is relevant to define the philosophy of law, valid legal sources of law and the legal dogmatic method as a basis for the valid law. The various philosophies of law define valid law differently which result in alternative concepts of valid law as well as distinct views on the doctrine of the sources of law.[79] Therefore, the section on philosophy of law shall determine the criteria for legal validity and the legal sources of the applied law in the thesis. The following two steps define what is considered valid law. First, it will be discussed in light of the applied philosophy of law in this thesis and, secondly, the applied legal method will be set out.

2.1 Philosophy of Law

As the thesis concerns EU law, it influences the choice of applied philosophy of law.[80] Since the nineteenth century, legal positivism has been the prevailing legal theory in Europe.[81] Currently, a variant or further development of legal positivism will be the typical starting point for most EU legal scholars in their research.[82]

[78] These types of collaborations are presented in section 4 in Chapter 1.
[79] Neergaard, U., and Nielsen, R. (2013). European legal method: Towards a New European Legal Realism? Jurist-og Økonomforbundets Forlag, p. 78.
[80] In the literature, there a discussion about the fact that there is no common legal method concerning legal sources and interpretation in relation to EU law see, for example, Hesselink, M., W. (2009). A European Legal Method? On European Private Law and Scientific Method. European Law Journal, Vol. 15, No. 1, pp. 20-45.
[81] Nielsen, R. (2013). Changes in the - Relative Importance of Sources of Law Towards an Interactive Comparative Method for Studying the Multi-Layered EU Legal Order. In Neergaard, U., and Nielsen, R. (Eds.). European legal method: Towards a New European Legal Realism? (first ed.). Jurist- og Økonomforbundets Forlag, p. 81
[82] Cryer, R., Hervey, T. K., and Sokhi-Bulley, B. (2011). Research Methodologies in EU and International law, 2011, p. 39. See also, Nielsen, R. (2013). Changes in the - Relative Importance of Sources of Law Towards an Interactive Comparative Method for Studying the Multi-Layered EU Legal Order. In Neergaard, U., and Nielsen, R. (Eds.). European legal method: Towards a New European Legal Realism? (first ed.). Jurist- og Økonomforbundets Forlag, p. 81.

The legal positivism that is applied in research today can be traced back to the philosopher Comte. In its narrowest sense, positivism refers to the views of Comte who invented the term 'positivism'.[83] In Comte's view, the starting point is that all valid research and science can only deal with acknowledging positive facts. Accordingly, Comte states:

> *"As we have seen, the first characteristic of the Positive Philosophy is that it regards all phenomena as subject to invariable natural Laws. Our business is, - seeing how vain is any research into what are called Cause, whether first or final, - to pursue an accurate discovery of these Laws, with a view to reducing them to the smallest possible number. By speculation upon causes, we could solve no difficulty about origin and purpose. Our real business is to analyse accurately the circumstances of phenomena, and to connect them by the natural relations of succession and resemblance."*[84]

Thus, legal positivists share with other philosophers who claim to have a positivist approach a commitment to the idea that the phenomena comprising the domain at issue must be accessible to the human mind.[85] The core of legal positivism is the view that the validity of law can be traced to an objectively verifiable source, which is subject to objective scientific requirements that strive for certain (positive) knowledge.[86] The fundamental principles of legal positivism are that all laws are created and laid down by human beings and that the validity of a rule of law depends on its formal legal status.[87] Thus, valid law can be defined simply as rules that come from certain people in accordance with certain procedures that society enforces.

2.1.1 The Pure Theory of Law by Hans Kelsen

A prominent figure in modern legal positivism is Hans Kelsen. In 1934, Kelsen developed the pure theory of law (German: *Reine Rechtslehre*), which during the 20th century became the most dominant theory of law in Europe.[88] In this theory, legal science is free from any moral or political ideology as well as sociology.[89] The object of the Pure Theory of Law is the norms - both general and individual. Kelsen stated:

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[83] Priel, D. (2012). Jurisprudence Between Science and the Humanities. Washington University Jurisprudence Review, Volume 4, Issue 2, pp. 269-323, p. 276.
[84] Comte, A. (2000), The Positive Philosophy, translated by Harriet Martineau, Batoche Books, p. 31.
[85] Priel, D. (2012). Jurisprudence Between Science and the Humanities. Washington University Jurisprudence Review, Volume 4, Issue 2, pp. 269-323, p. 275.
[86] Tvarnø, C. D., and Nielsen, R. (2021). Retskilder og Retsteorier. Jurist- og Økonomforbundets Forlag, p. 421.
[87] Cryer, R., Hervey, T. K., and Sokhi-Bulley, B. (2011). Research Methodologies in EU and International Law. Bloomsbury, p. 37.
[88] Tvarnø, C. D., and Nielsen, R. (2021). Retskilder og Retsteorier. Jurist- og Økonomforbundets Forlag, p. 433.
[89] Kelsen, H. and Treviño, A. J. (2005) [1954], General Theory of Law and State. Routledge, pp. 35-36.

> *"The theory of law which is presented here is a juristic theory (…) It shows the law to be a system of valid norms. Its object is norms, general and individual. It considers facts inly insofar as they are in some way or other determined by norms."*[90]

Hence, law is a system of valid norms. However, as distinct from the natural law philosophy,[91] Kelsen does not justify the validity of law as being based on certain moral and ethical principles that are considered inherent in nature. Kelsen perceives legal norms as being part of a hierarchy of norms:

> *"An analytical description of positive law as a system of valid norms is, however, no less empirical than natural science restricted to a material given by experience. A theory of law loses its empirical character and becomes metaphysical only if it goes beyond positive law and makes statements about some presumed natural law. The theory of positive law is parallel to the empirical science of nature, natural-law doctrine to metaphysics."*[92]

As Kelsen explains, the validity of law is derived from a hierarchy of norms:

> *"The legal order is a system of norms (…) All norms whose validity may be traced back to one and the same basic norm forma system of norms, or and order. The basic norm constitutes, as a common source, the bond between all the different norms of which an order consists."*[93]

Thus, in order to determine the validity of a legal norm, it is necessary to trace the back to the basic norm through higher legal norms. According to Kelsen, a legal norm is therefore valid if it has been created in line with the procedures laid down in higher norms. As a result, the *grundnorm* (i.e. basic norm) is a norm where validity is not created from any other higher-ranking norm.

Since Kelsen, legal positivism has experienced considerable modifications and development.[94] However, a number of legal philosophers state that it is still the leading theory of law today.[95] As stated above, the pure theory of law was developed in 1934 before the EU was formally established. Kelsen observed public international law as being based on the generally accepted principle of *pacta*

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[90] Ibid, p. 162.
[91] For more on the natural law philosophy see, for example Isaacs, N. (1918). The Schools of Jurisprudence. Their Places in History and Their Present Alignment. Harvard Law Review, Vol. 31, no. 3, pp. 373–411.
[92] Kelsen, H. and Treviño, A. J. (2005) [1954], General Theory of Law and State. Routledge, p. 163.
[93] Ibid, pp. 110-111.
[94] An example is critical legal positivism, which thus builds on Legal Positivism and institutional legal theory. Furthermore, it should be mentioned that European realistic legal positivism by Tvarnø and Nielsen, creates a synthesis between legal positivism as it is designed by Kelsen and Hart and further developed in Tuori's critical legal positivism. For more about European realistic legal positivism see Tvarnø, C. D., and Nielsen, R. (2021). Retskilder og Retsteorier. Jurist- og Økonomforbundets Forlag.
[95] Tamanaha, B. Z. (2007). The Contemporary Relevance of Legal Positivism. This paper can be downloaded here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=960280, p. 2.

sunt servanda between states.[96] According to Kelsen, public international and national laws are unified systems of norms.[97] Consequently, Kelsen must be considered as having a monistic approach to public international law. In addition, there may also be arguments for a monistic approach to EU law based on principle of *pacta sunt servanda*. There are several people who believe that the application of Kelsen's theory can serve as a basis for understanding the EU law of today.[98] For instance, Kelsen's theory of the legal system has been used to understand the supremacy of EU law over national laws in the Member States.[99] Hence, this thesis chooses to apply legal positivism.

The thesis seeks to analyse, clarify and discuss the assessment of collaboration between economic operators in the competition for public contracts. It will contain a description and explanation of the law along with an analysis of the application and interpretation of valid law. Valid law must be determined by interpreting the sources of law that are validly made and articulated by a recognised law-making body or bodies. In order to determine the validity of a legal norm, it is necessary to trace the norm through higher legal norms back to the basic norm. In this thesis, the higher norm is perceived to be residing in the EU treaties.[100] Therefore great emphasis will be placed on the provisions of the EU treaties and the legal context of the relevant rules.

Furthermore, the importance of the actual application of law by the EU Courts is acknowledged in this thesis.[101] Thus, the thesis seeks to establish how the ECJ could be expected to rule on the matter. Case law contains written records of what the EU Courts determine and interpret valid law. Consequently, case law is used to understand and examine the law. The application of case law in the thesis will be discussed in Section 3.3.1 of this chapter.

The applied method and the legal sources will be influenced by the philosophy of law in the thesis. Below, there is a presentation of the legal dogmatic method where there also will be a description of the legal sources applied in the thesis.

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[96] Kelsen, H., Paulson, B. and Paulson, S. (1992). Introduction to the Problems of Legal Theory. Clarendon Press, pp. 35-36.
[97] Ibid, pp. 111-112.
[98] See Tvarnø, C. D., and Nielsen, R. (2021). Retskilder og Retsteorier (sixth ed.). Jurist- og Økonomforbundets Forlag, p. 433, Tuori, K. (2002). Critical Legal Positivism (first ed.). Routledge, and Bindreiter, U (2000), Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine (first ed.). Kluwer Law International.
[99] Weyland, Ines: The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved, Law and Philosophy. An International Journal for Jurisprudence and Legal Philosophy, 2002, p. 1.
[100] The background for this is stated in section 3.1. in this chapter.
[101] See section 3.3.1. in this chapter for the definition of EU Courts.

2.2 The Legal Dogmatic Method and the Doctrine of the Sources of the Law

The thesis will apply the legal dogmatic method. This implies that valid law must be determined by interpreting the available legal sources. In addition, the thesis seeks to systematize the legal norms and their coherence, and to analyze case law from the ECJ in order to find the expected application of the sources of law.[102]

The legal dogmatic method is applied to create an overview of an unclear legal situation, and it is therefore a method that is used to meet the purpose of the thesis. As the purpose of the thesis is to clarify, analyze and discus the current state of law on collaborations between economic operators competing for public contracts, the thesis will derive how the relevant sources of law should be applied and interpreted in specific cases.[103]

The legal dogmatic method identifies relevant sources of law which it then interprets and balances against each other in line with the doctrine of the sources of law[104], which is used to place a legal source in the legal hierarchy. The doctrine of the sources of law means that lower-ranking sources of law, such as secondary sources of law, must respect higher-ranking sources of law.

The sources of law used in this thesis are identified on the basis of the philosophy of law: legal positivism. The sources of law used in the thesis will be set out below. Hereafter, the method used to interpret these sources is described.

3 The Applied Sources of Law

The purpose of this section is to introduce the sources of law that are applied in the thesis. The legal research in the thesis is methodologically founded in legal positivism, meaning that valid law is identified to confer to the legal positivist approach to law. When investigating collaboration between economic operators in the competition for public contracts, the relevant sources of law are primarily the public procurement rules and the competition rules. EU legislation can be divided into primary law and secondary law.[105] This division will also be used in the sections below, where these will be treated separately. These are described in Section 3.1 and in Section 3.2, respectively.

[102] Tvarnø, C. D., & Nielsen, R. (2021). Retskilder og Retsteorier (sixth ed.) Jurist- og Økonomforbundets Forlag, p. 55.
[103] See Bengoetxea, J. (1993). The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence (first ed.). Oxford University Press, p. 29.
[104] Neergaard, U., and Nielsen, R. (2013). European Legal Method: Towards a New European Legal Realism? Jurist- og Økonomforbundets Forlag, p. 77.
[105] Neergaard, U., and Nielsen, R. (2020). EU ret (eighth ed.). Karnov Group Denmark, p. 121.

3.1 Primary Law

The Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights of the European Union, and the general principles of law are at the top of the legal hierarchy, which are also referred to as the primary sources of law.[106] The primary sources of law are considered in the case law of the ECJ and in the literature as EU's constitutional basis.[107] The primary sources of law are of great importance to both the competition rules and the public procurement rules.

EU primary law is considered in the case law of the ECJ and in the literature as the EU constitutional basis. The ECJ stated in *Les Verts* that:[108]

> *"(…) the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty (…)"*[109]

Hence, the ECJ found that the treaty should be considered as the basis constitution.

The competition rules mostly derive from Articles 101 to 109 of TFEU as well as from a series of regulations and directives. The competition rules are addressed towards undertakings.[110]

The rules on public procurement derive from two main sources: the TFEU and the Public Procurement Directives.[111] Historically, the EU's treaties have not contained special provisions to regulate the opening up of public procurement,[112] however these are general provisions found in a number of provisions in the EU treaties. These are the following provisions: Article 18 TFEU on discrimination on grounds of nationality and the rules on free movement provisions.[113]

The rules on free movement provisions are relevant to public procurement, which is highlighted in the Public Procurement Directive.[114] The first citation of the Public Sector Directive sets out the legal context of the rules, and, according to the this, the rules on free movement are the legal basis - in

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[106] Ibid p. 121.
[107] See e.g. Koen, L. and Nuffel, P. V. (2005). Constitutional Law of the European Union, p. 705; Bogdandy, V, A (2010). Founding Principles of EU Law: A Theoretical and Doctrinal Sketch. European Law Journal, p. 95.
[108] Case 294/83, Parti écologiste "Les Verts" v European Parliament, EU:C:1986:166, para 23.
[109] Emphasis added.
[110] The TFEU does not contain a definition of an undertaking. The concept of an undertaking has been developed through the case law of the ECJ. In Chapter 3, this concept will be clarified.
[111] Bovis, C. (2015), The Law of EU Public Procurement (second ed.), Oxford University Press, p. 23.
[112] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third edition), Sweet & Maxwell, p. 156.
[113] Steinicke. M., & Vesterdorf. P. L. (2018). Brussels Commentary on EU Public Procurement Law (first ed.). C.H. Beck-Hart-Nomos, p. 4.
[114] Radical (1) of Directive 2014/24/EU.

particular Article 34 TFEU on the free movement of goods, Article 49 TFEU on the freedom of establishment, and Article 56 TFEU on the freedom to provide services.

Thus, the principles of the TFEU and the rules on free movement contributes to the interpretation of the Public Procurement Directive. Furthermore, when public procurement is outside the scope of Public Procurement Directives, the contracting authorities are in some cases obliged to follow the EU Treaties and the derived principles when awarding public contracts.[115]

The TFEU determines the objective and means of the EU in the preamble and the opening provisions (e.g. Article 3-6 TFEU, Article 119 TFEU and the Protocol on the Internal Market). These provisions are used in the thesis when determining the legal context of the competition rules and the public procurement rules. The award of public contracts has to comply with the principles of the TFEU.[116] The principles derived from the EU treaties are part of the primary sources of law, and they possess equivalent status to the treaties because they originate from them.[117] In the analysis of collaboration between economic operators in the competition for public contracts, emphasis will be placed on the principles of transparency and equal treatment.

3.2 Secondary Law

The secondary sources of law are listed in Article 288 TFEU as regulations, directives, decisions, recommendations, and opinions. The secondary law must respect the provisions and principles set out in primary law.[118]

Secondary law plays an essential role in thesis when it comes to the public procurement rules. As stated above, the rules on public procurement derive from two main sources, which are the TFEU and the Public Procurement Directives. Since the early 1970s, directives have been adopted as a supplement to the TFEU because the TFEU was considered insufficient in opening up public markets.[119] The EU has adopted specific rules on public procurement, which are currently set out in

[115] Public contracts with cross-border interest are subject to the EU Treaties and the principles derived from these. For more information on contracts below the thresholds and cross-border interest see, for example, Telles, P. (2013). The Good, the Bad and the Ugly: EU's Internal Market, Public Procurement Thresholds and Cross-Border Interest. Public Contract Law Journal, Fall 2013, Vol. 43, No. 1, pp. 3-27; Dragos, D. C., & Vornicu, R. (2015). Public Procurement below Thresholds in the European Union: EU Law Principles and National Responses. European Procurement & Public Private Partnership Law Review, 10(3), 187–206; and Hansen, C. R. (2012). Contracts not covered, or not fully covered, by the Public Sector Directive (first ed.) DJØF Publishing.
[116] Directive 2014/24/EU, radical 1.
[117] Tridimas, T. (2019). The General Principles of EU Law. Oxford University Press (third ed.), p. 51.
[118] Case 294/83, Parti écologiste "Les Verts" v European Parliament, EU:C:1986:166, paras 23-25.
[119] See, Arrowsmith, S. (2012). The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies. Cambridge Yearbook of European

four Directives: The Public Sector Directive,[120] the Utilities Directive,[121] the Concession Directive,[122] and the Defense Directive.[123] The Public Procurement Directives are addressed to the Member States and thus requires implementation by the Member States themselves.[124] As the Public Procurement Directives are secondary law, the rules of which cannot be in conflict with primary law.[125]

The applicability of the Public Procurement Directives depends on certain financial thresholds.[126] Here, there are different thresholds depending on three factors: (1) the sector, (2) the subject of the contract (works, goods, or services), and (3) the contracting authority (central government authorities or sub-central contracting authorities). Above certain thresholds, the Public Procurement Directives regulate the procedure through which public authorities and certain public utility operators procure goods, services and works from economic operators. The Public Procurement Directives apply to contracts above the threshold; there is no assessment of their impact on the internal market. Contracts above the threshold is ever check for cross-border interest.[127]

However, if the public contract is below the thresholds, it is excluded from the scope of the Public Procurement Directives.[128] Below the thresholds, only national rules would be applicable in cases with no cross-border interest. Nevertheless, as held above, the contracting authorities are in some cases obliged to follow the EU treaties and the derived principles when awarding public contracts. The ECJ

Legal Studies, Volume 14, 2, p. 4. See also, Bovis, C. (2015), The Law of EU Public Procurement (second ed.), Oxford University Press, p. 23.

120 Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement (henceforth "the Public Procurement Directive"), repealing Directive 2004/18/EC.

121 Directive 2014/25/EU of The European Parliament and of The Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (henceforth "the Utilities Directive"), repealing Directive 2004/17/EC.

122 Directive 2014/23/EU of The European Parliament and of The Council of 26 February 2014 on the award of concession contracts (henceforth "the Concession Directive").

123 Directive 2009/81/EC of The European Parliament and of The Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security (henceforth the Defence Directive).

124 According to Article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

125 Moukiou, C. P. (2016). The Principles of Transparency and Anti-Bribery in Public Procurement: A Slow Engagement with the Letter and Spirit of the EU Public Procurement Directives. European Procurement & Public Private Partnership Law Review, 11(2), 72–87, p. 78.

126 Threshold values are set in Article 4 of the Public Procurement Directive, Article 15 of the Utilities Directive, Article 8 of the Concession Directive, and Article 8 of the Defence Directive. The different EU public procurement thresholds are set every by the European Commission vi According to EU Commission Regulation No. 2019/1828 / EU, 2019/1829 / EU, 2019/1827 / EU and 2019/1830 / EU of 30 October 2019, the threshold values for the Public Procurement Directive, the Utilities Directive, the Concession Directive and the Defence Directive have been amended by effect from 1 January 2020.

127 Telles, P. (2013). The Good, the Bad and the Ugly: EU's Internal Market, Public Procurement Thresholds and Cross-Border Interest. Public Contract Law Journal, Fall 2013, Vol. 43, No. 1, pp. 3-27, p. 11.

128 For more on calculating the estimated value of procurement see for example Nowicki, P. and Halonen, K. M. (2021). Article 5 Methods for calculating the estimated value of procurement in Caranta, R. and Sanchez-Graells (eds.). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, pp. 48-63.

concluded in *Telaustria* that contracts with a cross-border interest should be subject to the treaty principles even if their value was under thresholds and are excluded from the scope of the directive in question.[129] In this thesis, the focus is exclusively on public contracts above the thresholds.

As stated in Section 5.1. of Chapter 1, this thesis addresses the rules regarding three types of collaboration, which is based solely on the rules contained in the Public Sector Directive.[130] While the wording of the Public Sector Directive is the central source of law in the thesis, other elements related to the Public Procurement Directive are also included in the interpretation in order to identify the intention behind the wording of the provisions and the purpose of the rules. Normally, directives contain a preamble and provisions. The citations of the preamble place a directive in its legislative context.[131] The recitals are used by EU Courts to interpret directives. In particular, this is seen in cases where a relevant provision contains unclear wording. The recitals may shed light on the interpretation of a provision but they cannot constitute such a rule on their own.[132] Hence, the recitals in the preamble of the Public Sector Directive are included in the thesis as inspirational assistance.[133]

Occasionally, directives contain an article stating the purpose of the directive, yet this is not the case for any of the Public Procurement Directives. Nevertheless, the preamble contains statements regarding the objective of the Public Procurement Directives. There can be no doubt that legal basis in an article of directive would be more persuasive than a statement from the preamble to support an interpretation. However, the analysis of the objective(s) of the Public Procurement Directives will include recitals in the preamble. This analysis will also include sources of law other that the Public Procurement Directives.[134]

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[129] Case C-324/98, Telaustria Verlags GmbH v. Telekom, EU:C:2000:669, para 60.

[130] The rules in the other Public Procurement Directives concerning the types of collaboration have been left out of the thesis. However, in the context of an analysis of the objectives of the Public Sector Directive, it is stated as the starting point of the analysis that the Public Procurement Directives all share the same objective. This statement and analysis of the position can be found in Section 3 of Chapter 4. Therefore, some parts of the analysis are also relevant to an interpretation of the rules of the other Public Procurement Directives.

[131] The citations of the preamble begins with "having regard to".

[132] This has been established by the ECJ, see Case 215/88, Casa Fleischhandels-GmbH v Bundesanstalt für landwirtschaftliche Marktordnung, EU:C:1989:331, para 31.

[133] The ECJ has stated that the preamble may be an interpretative tool, see Case 215/88, Casa Fleischhandels-GmbH v Bundesanstalt für landwirtschaftliche Marktordnung, EU:C:1989:331, para 31. See also Riley, A. J. (1989). The European Social Charter and Community Law. European Law Review, 4 1989, pp 80–86, p. 83. Riley states that the preamble can be considered `inspirational assistance´.

[134] See the discussion of the objective(s) of the Public Procurement Directives in Section 3 in Chapter 4.

3.3 Case Law of the EU Courts, the EFTA Court and National Courts

Case law of EU Courts can be considered as an essential element when analysing both the public procurement law and the competition law.[135] In this thesis, case law of the Court of Justice of the European Union[136] will therefore play a central role in the understanding of the legal position when regarding collaborations that are legal under public procurement law but not under competition law. In addition, it has also been found relevant to include options and views of the Advocates Generals, case law of the EFTA court and National courts in the thesis. Below is a presentation of how the case law and options are applied in the thesis.

3.3.1 Case Law of the EU Courts

The institutional focus of this thesis is on the Court of Justice of the European Union.[137] The primary task of the Court of Justice of the European Union is to ensure that, in the interpretation and application of the EU treaties, the law is observed and directly or indirectly interpreted in the text of EU law for its proper application.[138] The thesis will include case law from both the ECJ and the General Court, yet the primary focus is on case law of the ECJ.[139]

The choice to approach the legal position regarding collaborations between economic operators competing for public contracts from the perspective of the ECJ and the General Courts case law can provide insights into the interplay between both sets of rules. The ECJ preliminary receives questions with regards to both public procurement law and competition law when concrete cases of conflicts arise before national courts in the Member States. Additionally, the ECJ and the General Court have the task of acting as appeal and final instances for challenging the legality of the Commission's

[135] For more on the role of the EU Courts in public procurement law, see e.g. Bovis, C. (2006). Developing public procurement regulation: jurisprudence and its influence on law making. Common Market Law Review 43, pp. 461-495; and Panasiuk, A., & Jarocki, L. (2017). The Court of Justice of the European Union and Its Influence on European and National Public Procurement Regulations: the Case of Poland. European Procurement & Public Private Partnership Law Review, 12(2), 192–200.

[136] According to Article 19(1) TEU, the Court of Justice of the European Union (CJEU) comprises the Court of Justice (ECJ), the General Court and specialized courts.

[137] The legal basis can be found in article 19 TEU, Articles 251 to 281 TFEU and in Protocol No 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union.

[138] See Article 19 TEU and Evallier, R. M. (1965). Methods and Reasoning of the European Court in its Interpretation of Community Law. Common Market Law Review, Volume 2, Issue 1, 1965, 21 – 35, p. 21.

[139] The case law of the General Court is not binding on the ECJ, however can be considered as an inspiration to the ECJ and can therefore influence the development of the case law of the ECJ. Hence, the case law of the General Court can be an indicator of future case law of the ECJ. This will be the approach to case law of the General Court in this thesis.

decisions regarding infringements of competition law.[140] However, these challenges are generally made in the first instance to the General Court.[141]

Hence, this provides EU Courts with a portfolio of cases stemming from the enforcement of both public procurement law and competition law. Furthermore, the role of the EU Courts has been vital in ensuring that EU law is interpreted and applied the same way in every Member State while ensuring Member States and EU institutions abide by EU law.[142] The role of ensuring the coherence of the EU legal system and a coherent interpretation of EU law entails that the EU Courts can be considered as the best suited institution to study the relationship between the public procurement rules and competition rules.

The case law concerning collaborations between economic operators competing for public contracts can reach the ECJ through preliminary references from national courts in Member States requesting for clarification on the correct interpretation of EU law.[143] Furthermore, these cases can also reach the ECJ through direct actions by natural or legal persons that have been influenced by, for example, a Commission decision under EU competition law.[144]

Depending on the type of proceeding, the legal reasoning in the judgment of the EU Courts differs. An example of this is that preliminary ruling proceedings by the ECJ are sometimes short and can leave a degree of discretion to the national courts in the Member States.[145] Hence, this will have an impact on the degree to which a judgement of the ECJ can be applied in this thesis. Another element that is important for the application of case law is the insight into the methods of interpretation used in the decisions. This will be looked at in more detail below.

[140] According to Article 263 TFEU, all Commission decision subject to review by the ECJ. Furthermore, the General Court shall have jurisdiction to hear and determine at first instance actions or proceeding referred to in Article 263 TFEU under Article 256 TFEU. The decision of the General Court may be appeal to the ECJ.
[141] The General Court has considerable competition law expertise and competition law cases form a significant part of the the work of the General Court, see Jones, A., & Sufrin, B. (2019). EU competition law: Text, cases, and materials (seventh ed.). Oxford University Press, p. 81.
[142] See e.g. Schröter, M. W. (2006). European Legal Reasoning: a coherence-based Approach. ARSP: Archiv Für Rechts-Und Sozialphilosophie/ Archives for Philosophy of Law and Social Philosophy, 92(1), 82–92.
[143] The preliminary ruling procedure pursuant to Article 267 TFEU.
[144] According to Article 263 TFEU.
[145] Beck, G. (2012). The Legal Reasoning of the Court of Justice of the EU (first ed.). Hart Publishing, p. 227.

3.3.1.1 Interpretation method

In order to be able to interpret and apply case law of the ECJ, it is important to cover the ECJ's methods of interpretation.[146] This is because the way in which the ECJ applies different elements of interpretation can be decisive for how EU law is to be interpreted.

The ECJ interprets the wording of the provision in order to clarify the legal situation and it often involves the legal context of that provision.[147] The ECJ applies the method of teleological interpretation where the text of the provision is interpreted according to its purpose of the EU law and the purpose of the EU treaties.[148] The teleological method or approach is an expression frequently employed in writings, in arguments by parties before the EU Courts, and occasionally by Advocates General - though rarely by the ECJ itself.[149]

In *CILFIT*, the ECJ has held that "*every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."*[150] According to the ECJ, the rationale of the provision and its state of evolution at the date on which the provision in question is to be applied must be taken into account. Therefore, the rationale behind the provision must be considered in the interpretation of EU law.[151]

In this thesis, the legal context and the purpose of both the procurement rules and the competition rules will be clarified in order to interpret the rules and apply case law of the ECJ. In addition, the rationale of the provision and its state of evolution at the date on which the provision in question is to be applied is also taken into account. Furthermore, with the application of case law from the ECJ, the thesis takes into account that the ECJ has emphasized that the interpretation of EU law must be seen in light of the fact that EU law is drafted in several different languages and that all language

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[146] Neergaard, U. & Nielsen, R. (2020). EU-ret. (eight ed.) Karnov Group, p. 128.
[147] Roth, W. H. (2011). The Importance of the Instruments Provided for in the Treaties for Developing a European Legal Method in Neergaard, U. and Nielsen, R. (eds.). European Legal Method – Paradoxes and Revitalisation (first ed.). DJØF Publishing, p. 76.
[148] See Evallier, R. M. (1965). Methods and Reasoning of the European Court in its Interpretation of Community Law. Common Market Law Review, Volume 2, Issue 1, 1965, 21 – 35, p. 23; and Fennelly. L. (1996). Legal Interpretation at the European Court of Justice. Fordham International Law Journal. Volume 20, Issue 3, 1996, p. 664. Furthermore, see also the discussion of the teleological interpretation in Brittain, S. (2016). JUSTIFYING THE TELEOLOGICAL METHODOLOGY OF THE EUROPEAN COURT OF JUSTICE: A REBUTTAL. Irish Jurist, 55, 134–165. This paper examines definition of teleological interpretation of the ECJ. In this paper, Brittain states that "the essence of teleology is the expansion of legal texts in pursuit of the objectives of the law or legal system", see p. 143.
[149] Fennelly. L. (1996). Legal Interpretation at the European Court of Justice. Fordham International Law Journal. Volume 20, Issue 3, 1996, p. 664.
[150] Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, EU:C:1982:335, para 20.
[151] See e.g. Hesslink, M. (2011). A Toolbox for European Judges in Neergaard, U. and Nielsen, R. (eds.). European Legal Method – Paradoxes and Revitalisation (first ed.). DJØF Publishing, p. 204.

versions are authentic.[152] Thus, an analysis of the different language versions may be necessary to determine a given legal position, which in fact is the case at one instance in the thesis in Section 3.4 of Chapter 4 which regards competition as an independent procurement law principle.

3.3.2 Opinions of the Advocates Generals

Opinions of the Advocates Generals will be included in the analysis of the legal situation as an interpretative contribution. According to Article 252 TFEU, the role of the Advocates Generals is:

> *"The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.*
>
> *It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement".*

These options of the Advocates Generals are not required in all cases of the ECJ.[153] However, if options from Advocates General are given, they are produced before the ECJ makes it decision in the cases. The opinion of an Advocate General is not sought in cases tried by the General Court. However, the General Court may appoint a judge to perform the duties of an Advocate General in a particular case.[154]

The role of the Advocates Generals is to propose to the ECJ a legal solution to cases for which the ECJ is responsible.[155] Hence, the opinions from the Advocates Generals are not binding to the ECJ, but in some cases the ECJ refers to an option by the Advocate General.[156] Although these opinions are not binding on the ECJ, they can contribute to the understanding of judgements of the ECJ. In addition, the options of the Advocates General that are not followed by the ECJ can show an alternative understanding of an issue or indicate an interpretation that has been considered by the

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[152] Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, EU:C:1982:335, para 18.
[153] See the Rules of Procedure of the Court of Justice of the European Communities adopted on 19 June 1991, as last amended on 24 May 2011, Official Journal of the European Union, L 162 of 22 June 2011, p. 17. According to Article 20(5) of the ECJ Statute provides that "When it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General".
[154] See Article 3(3) and Article 3(4) in Rules of procedure of the General Court of 4 March 2015 as last amended on 11 July 2018, OJ 2015 L 105/1, 4.3.2015, as amended on 11 July 2018 (OJ 2018 L 240/68, 11.7.2018,
[155] For more on the role of the Advocates Generals see e.g. Tridimas, T. (1997). The Role of the Advocate General in the Development of Community Law: Some Reflections. Common Market Law Review, Volume 34, Issue 6, 1349 –1387.
[156] For examples of the ECJ referring to the opinions of the Advocates Generals see e.g. C-387/14, Esaprojekt sp. z o.o. v. Województwo Łódzkie, EU:C:2017:338, paras 43, 52 and 86; C-298/15, Borta UAB v. Klaipėdos valstybinio jūrų uosto direkcija VĮ, EU:C:2017:266, para 28; and C-546/16, Montte SL v. Musikene, EU:C:2018:752, para 45.

ECJ, which has been positively rejected. Hence, in areas where the legal situation has not yet taken hold, the statements often give a good impression of the issues and opposing views.[157] Furthermore, the opinions from the Advocates Generals often contain more extensive theoretical discussions and a greater involvement of the legal literature than the judgments of the ECJ.

Consequently, in the thesis, the options from the Advocates Generals are interpretative contributions in relation to case law where there may be doubts about what lies behind the judgement of the ECJ. In the thesis, the opinions of the Advocates Generals are included concretely in relation to specific judgments of the ECJ.

3.3.3 Case Law of the EFTA Court and National Courts

National public procurement and competition legislation have been left out of the thesis.[158] However, as stated in the introduction of the thesis, there has been a special focus in Scandinavia on joint tendering for public contracts, which can be seen in connection with three recent cases at national level: (1) the *Däckia/Euromaster* case in Sweden from January 2014, (2) the *Ski Taxi/ Follo Taxi* case in Norway from June 2015, and (3) the *Road Markings* case in Denmark from November 2019.[159] These cases at national level are handed down under national legislation in the Member States and by national courts. As a result, these cases will be included to a very limited extent in the thesis in the following ways. On the one hand, these cases are applied to illuminate potential uncertainties regarding the interpretation of the EU rules. On the other hand, they are used to question whether the national trends in the interpretation of the rules will also apply from an EU perspective.

Furthermore, the EFTA Court has also delivered an Advisory Opinion that deals with joint tendering.[160] In the thesis, this Advisory Opinion will be applied as an interpretative contribution in order to clarify the applicable EU law. Hence, the following is relevant to highlight in connection with the application of the Advisory Opinion in question. In the Advisory Opinion in the *SKI Taxi*

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[157] Tvarnø. T. D. & Nielsen. R. (2021). Retskilder & Retsteorier (sixth ed.). DJØF Publishing. p. 178

[158] See Section 5 in Chapter 1 regarding delimitations and clarifications.

[159] Judgment of the Stockholm District Court of 21 January 2014 in case T 18896-10, Swedish Competition Authority v. Däckia and Euromaster; Judgment of the Borgarting Court of Appeal of 17 March 2015 in case 13-075034ASD-BORG/01, Staten v/ Konkurransetilsynet v. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba. This decision was confirmed by the Norwegian Highest court on 22 June 2017 in case HR-2017-1229-A. Decision of the Danish Competition Council of 24 June 2015 in case 14/04158, Danish Competition Council v Eurostar A/S and GVCO A/S. The Danish Supreme Court gave support to the interpretation applied by the Competition Council in Judgment by the Danish Supreme Court of 27 November 2019 in the case 191/2018, Danish Competition Council v Eurostar A/S and GVCO A/S.

[160] Advisory Opinion of the EFTA Court of 22 December 2016 in case E-03/16, Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet.

case, the EFTA Court dealt with the applicable test to determine whether a joint bid for a public contract constitutes an object restriction of competition pursuant to Section 10 of the Norwegian Competition Act, which is corresponding to Article 53 of the Agreement on the European Economic Area (hereinafter the EEA Agreement) and Article 101 of the TFEU. The EFTA Court corresponds to the ECJ in matters relating to the EEA EFTA states and deals with infringement actions brought forth by the EFTA Surveillance Authority (ESA) against an EFTA state with regard to the implementation, application or interpretation of provisions in the EEA Agreement.[161] The EFTA Court has an obligation to interpret this prohibition in conformity with case law of the ECJ.[162] However, it must be borne in mind that the ECJ is not required to take into account the case law of the EFTA Court.[163]

Although the ECJ does not have an obligation to take into account the case law of the EFTA Court, it is conceivable that this may affect the case law of the ECJ. It has, among other things, been highlighted in legal literature that "*a form of dialog appears to have evolved between the EFTA Court and the ECJ, in which the latter seem to regard EFTA Court case-law as a relevant source for interpreting EEA-relevant EU law".*[164] Therefore, the Advisory Opinion in the *SKI Taxi case* of the EFTA Court will be applied in the thesis as an input on how the ECJ may assess joint tendering. This Advisory Opinion will be one of several interpretative contributions applied in order to clarify how the ECJ may assess joint tendering as well as to clarify, analyze and discus the current state of law on collaborations between economic operators competing for public contracts.

[161] For more on the EEA Agreement see e.g. Lazowski, A. (2008). Enhanced multilateralism and enhanced bilateralism: Integration without membership in the European Union. Common Market Law Review. 45 (5), 1433-1458.
[162] Pursuant to the statement in the fifteenth paragraph of the preamble and Article 6 of the EEA Agreement. However, the EEA Agreement do not contain a corresponding obligation on the ECJ to consider case law of the EFTA Court. See Agreement on the European Economic Area, *OJ L 1, 3.1.1994*.
[163] The ECJ can take this into account explicitly or implicitly of opinions of the Advocates Generals and it is seen that case of the EFTA Court has been mentioned in an opinion of an Advocates General see Opinion by Advocate General Bobek, Case C-228/18, Gazdasági Versenyhivatal v. Budapest Bank Nyrt, EU:C:2019:678, para 42, footnote 21. In the footnote, Bobek refers to the judgement of the judgement of the EFTA Court in SKI Taxi case regarding the concept of restrictions by object. However, the statement of the EFTA Court regarding that restrictions by object is "commonly accepted and easily identifiable" was not applied by the ECJ in the judgement in the case.
[164] This quote is from Fredriksen, H. H. (2010). THE EFTA COURT 15 YEARS ON. The International and Comparative Law Quarterly, 59(3), 731–760, p. 732.

3.4 Soft Law Instruments

The concept of soft law is unclear in EU law.[165] In EU studies, some define soft law in opposition to hard law[166] which refers to binding legal instruments that usually takes the form of regulations, directives and decisions, as laid down in Article 288 TFEU. Thus, European hard law is defined as having binding legal force as it produces general and external effects that are being adopted by the community institutions according to specific procedures and that have a legal basis in the EU treaties.[167]

Accordingly, soft law can be defined by its lack of hard law characteristics. The concept of soft law therefore covers quasi-legal instruments that are characterized by their non-binding force.[168] Article 288 TFEU explicitly provided for two soft law instruments, which are recommendations and opinions[169], yet soft law instruments can also include notices, guidelines, communications etc.

In the judgement of the ECJ, the court interprets both hard law and soft law.[170] To some extent, the ECJ refers to soft law in support of its rulings.[171] In *Grimaldi,*[172] the CJUE ruled on the effects of non-binding legal instruments, which was the Commission's recommendations on occupational diseases. In this connection, the ECJ stated that:

> *"(…) the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions".*[173]

Accordingly, the CJUE found that the recommendations did not have legal effect. However, national courts are bound to consider recommendations, in particular, if they are capable of casting light on the interpretation of other provisions of national law or EU law.

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[165] Neergaard, U. & Nielsen, R. (2020). EU-ret. (eight ed.) Karnov Group, p. 150. See also Terpan. F. (2015). Soft Law in the European Union — The Changing Nature of EU Law. European Law Journal, Vol. 21, Issue 1, pp. 68-96, p. 67.
[166] Stefan, O., Avbelj, M., Eliantonio, M., Hartlapp, M., Korkea-aho, E. & Rubio, N (2019). EU Soft Law in the EU Legal Order: A Literature Review. King's College London Law School Research Paper Forthcoming, Available here: https://ssrn.com/abstract=3346629, p. 9.
[167] Senden, L. A. J. (2004). Soft Law in European Community law (first ed.). Hart Legal Publishing, Oxford, p. 45.
[168] According to Article 263 TFEU, soft law instruments cannot be enforced through judicial proceedings. Article 263 TFEU explicitly excludes soft law instruments under Article 288 from the scope of the ECJ's authority.
[169] Soft law is not a new phenomenon in EU law and has always been explicitly provided. Previously found in Article 249 EC Treaty.
[170] For an interpretation of soft law see e.g. C-9/73, Carl Schlüter v Hauptzollamt Lörrach, EU:C:1973:110 and C-113/75, Giordano Frecassetti v Amministrazione delle finanze dello Stato, EU:C:1976:89.
[171] See Case C-222/84, Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, EU:C:1986:206.
[172] Case C-322/88, Salvatore Grimaldi v Fonds des maladies professionnelles, EU:C:1989:646.
[173] Ibid, para 18.

The application of soft law as an interpretation tool was also addressed in *Einstein*[174]. Here, the ECJ stated that the Commission's explanatory notes to the nomenclature of the Customs Cooperation Council constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States.[175] Thus, the explanatory notes are considered as not legally binding. However, they can be considered a valid aid to the interpretation of the EU rules.

Therefore, soft law instruments are seen as a valid means for interpreting EU law. However, given the uncertain status of soft law instruments, one might question the validity of soft law instruments as well as their legal effects.

The use and status of EU soft law is largely debated issues in academic writing. Snyder defines soft law as "(…) *rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects' and also legal effects"*[176]. Accordingly, soft law does not have legally binding force, but it may have practical and legal effects.

Senden suggests a relatively analogous definition by stating that soft law is "*rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and (that) are aimed at and may produce practical effects".*[177] It appears from the definitions of the literature that even though these instruments in principle lack a legally binding force, they may have certain indirect legal effects and be able produce practical effects.

In this thesis, the application of soft law instruments will primarily be within the fields of competition law. From its early age, soft law instruments started to influence competition law. Below, there is an investigation of application of soft law in a competition law perspective and how this will be reflected in the thesis.

3.4.1 The Commission's Issued Soft Law Instruments

In the following, the focus will be on examining the soft law that primarily has been developed by the Commission. Although the Council and the Parliament also can create soft law instruments, the Commission's soft law has been an important source of EU rules, especially in the field of

[174] Case C-35/93, Develop Dr. Eisbein GmbH & Co. v Hauptzollamt Stuttgart-West, EU:C:1994:252.
[175] Ibid, para 21.
[176] Snyder. F (1993). The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques. 56 The Modern Law Review 19, p. 64.
[177] Senden, L. A. J. (2004). Soft law in European Community law. Hart Legal Publishing, Oxford, p. 112.

competition law. As stated above, soft law is characterized by its non-binding force. However, in competition law, in particular, the non-binding nature of soft law can be questioned.[178].

The Commission's issued soft law instruments are binding on the Commission itself, and it often refers to it in its decision-making practices. Furthermore, the Commission must not depart from the content of that soft law without being in breach of the general principles of law.[179] Therefore, it must be assumed that the Commission's issued soft law instruments play significant roles in its decision-making processes. However, while the Commission is required to observe its own issued soft law instruments in the cases it deals with, no such obligation exists for national competition authorities and national courts.[180] Whereas decisions of the Commission must be respected and complied with by national competition authorities and national courts.[181] Therefore, the Commission's issued soft law instruments that applied in the decisions may give rise to indirect legal effects. Moreover, they may produce practical effects for the application of law at national level, although they are not formally binding but rather binding on national competition authorities and national courts.

Given the importance of the Commission's issued soft law instruments, such instruments are included in the thesis as a tool to interpret the sources of hard law. However, the value of each soft law instrument will vary depending on the field to which the instrument relates. In this thesis, the Commission's issued soft law instruments that play the biggest role are Guidelines on horizontal cooperation agreements, Guidelines on Vertical Restraints, De Minimus Notice, Market Definition Notice, and Notice on Bid rigging Exclusion.[182]

A remark should be attached to the last-mentioned soft law instrument, which is the Notice on Bid rigging Exclusion. These guidelines are addressed to the Member States and their contracting

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[178] Discussions on soft law in competition law see Stefan, O. A. (2013), Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst. CPI Antitrust Chronicle (1), Available at SSRN: https://ssrn.com/abstract=2294541; Fejø, J. (2004). Den nye EU-konkurrenceregulering med lovgivning gennem meddelelser: Fremskridt, retlig sikkerhed, eller blot komplicerethed? In Julebogen 2004 (pp. 57-66). Djøf Forlag.

[179] See, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission, paragraph 211; and Sag C-226/11, Expedia Inc.v Autorité de la concurrence and Others, EU:C:2012:795, para 28.

[180] Case C-23/14, Post Danmark A/S v Konkurrencerådet, EU:C:2015:651, para 52.

[181] According to Article 258 TFEU: If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

[182] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01); Guidelines on Vertical Restraints, (2010/C 130/01), Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, (2014/C 291/01); Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03); and Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, (2021/C 91/01).

authorities and thus not the economic operators bidding on public contracts.[183] The primary focus of the notice is to support the Member States and contracting authorities in building capacity to address the problem of fight collusion in public procurement and to provide guidance on how to apply the related exclusion ground in the Public Sector Directive.[184] Furthermore, the Notice on Bid rigging Exclusion abstractly refers collusion in public procurement procedures and its interplay with competition law is very general in nature. Despite the fact that the guidelines deal with the public procurement rules, these guideless can still be used to understand when competition rules should be addressed in connection with public procurement procedures as well as to recognize the interaction between public procurement rules and the competition rules.

Additionally, a proposal for a new soft law instrument from the Commission will also be included in the thesis. On 1 March 2022, the Commission published its draft for reviewed guidelines on the application of Article 101 TFEU to horizontal cooperation agreements.[185] As the proposal for a new soft law instrument from the Commission is not binding, it could be discussed whether these should be taken into consideration. However, although these guidelines are not final, it can be expected that they can provide an indication of how the Commission will assess bidding consortia in the future. As something new in the proposed horizontal guidelines, a whole section specifically deals with the competition law assessment of bidding consortia.[186] Hence, this proposal is applied exclusively as an interpretative contribution in the analysis.

4 Economic Method and Economic Theories

This thesis will apply economic theory in a public procurement context in order to explain the different forms of collaborations between economic operators as well as to examine what effects collaborations between economic operators in the competition for public contracts can have on competition in the internal market. It should be emphasised that the purpose of this thesis is not to contribute to economic science. While the economic literature does play a role in the thesis, it is

[183] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, (2021/C 91/01), para 2.3.
[184] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, (2021/C 91/01), para 3.
[185] Approval of the content of a draft for a communication from the commission. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final.
[186] The section concerning bidding consortia can be found in Section 5.5 in the draft for reviewed guidelines on the application of Article 101 TFEU to horizontal cooperation agreements.

primarily by contributing to substantiate the legal arguments. Hence, the thesis applies existing economic literature and will not develop any economic theory.

It has been found relevant to include economics analysis in the thesis based on the following arguments. First, there will throughout the thesis be focus on competition, which is a key concept in both procurement law and competition law. Furthermore, a theory of harm is outlining why the conduct constitutes a breach of competition law and explains in particular why that conduct causes harm to competition.[187] Hence, in order to examine the competition law approach to the assessment of the different types of collaborations, it is relevant to have knowledge of how these types of collaboration affect competition. In addition, it is also relevant understand the different perceptions of competition from an economic perspective.

Secondly, economic theory and its application have become more integral part of the application of law, especially when it comes to the application of the competition rules. In answering the research question on how to reconcile a potential conflict between public procurement law and competition law, the results of the economic analysis will be included. In this connection, there will be a special focus on the different views of the concept of competition under the different set of rules. Hence, economic theory will be applied to analyze and understand the objective of the rules.

Below is a presentation of economic theories applied in the thesis. These are used in order to be able to answer the research questions. Hereafter, there will be a section describing how economic theories are applied along with a presentation on the use of assumptions. The role of economic analysis will include a discussion of various schools of competition analyses, theories and concepts, which are affecting competition law. In this regard, there will be a special focus on the importance of a social market economics framework as well as the influence this has on the development of competition law in the EU. Furthermore, there will also be a discussion of the so-called modernization of the EU competition rules. Here, it will be addressed that in public procurement law, economic theory is not applied in the same way as seen in competition law.

This chapter will end with a presentation of legal policy and how this will be applied in the thesis. As stated in section 2.2 of this chapter, the legal dogmatic method is used to answer the research question regarding when the collaborations types are legal under public procurement law but not under competition law. However, in relation to the research question on how to reconcile a potential conflict

[187] There will be a discussion of the significance of theories of harm and their application in Chapter 6.

between public procurement law and competition law, there is a need for the application of other approaches, as the focus is not on applicable law but on how applicable law should be.

4.1 Economic Theories

The methodological approach to the economic analysis is deductive, implying that the arguments are based on general principles and existing theories that are tested on concrete observations. From these theories, concrete applications and reasoning are deduced, which are then transposed into the conclusions in the thesis.[188]

There are many different economic theories, each of which analyzing a given area of society. It can be society as a whole, the market, a company, an industry or a contractual relationship between two or more parties.[189] In this thesis, the economic level of analysis is a market perspective of the internal market.

The thesis applies microeconomics and industrial organization (a branch of microeconomics), which belongs to neoclassical theory.[190] Furthermore, the thesis also applies auction theory and game theory, which both are further developments of neoclassical theory.[191] Neoclassical theory builds upon the classical economic theory.[192] Within the neoclassical theory, the company is considered as a production function and is seen as a complete rational individual with the aim of maximizing utility.[193]

Microeconomic theory is not only concerned with how supply and demand interact in individual markets for goods and services but also the roles of market structure and prices in this process.[194] Microeconomics is applied in the thesis to introduce the basic approach to the market and competition. The model of perfect competition and the model of monopoly will be presented and

[188] Knudsen, C. (1994). Økonomisk metodologi bind 2: Virksomhedsteori og industriøkonomi (second ed.). Jurist- og Økonomomforbundets Forlag, p. 58.
[189] Tvarnø, C. D. (2021). Hvad koster juraen? In Christensen, M. J., Herrmann J. R., Madsen, M. R., and Holtermann, J. V. H. (Eds.), De juridiske metoder: Ti bud (first ed.). Hans Reitzels Forlag, pp. 189-212, p. 195.
[190] The categorization of economic theories are assessed based on the assumptions on which they are based, see Knudsen, C. (1997). Økonomisk metodologi bind 2: Virksomhedsteori og industriøkonomi (second ed.). Jurist- og Økonomomforbundets Forlag, pp. 23-26.
[191] Ibid, p. 83.
[192] More about classical economic theory see the highlights of some the most prominent developments in classical economics by Adam Smith in Smith, A. (1776). An Inquiry into the Nature and Causes of the Wealth of Nations.
[193] Knudsen, C. (2014). Erhvervsøkonomi: Virksomheden i organisatorisk, økonomisk og strategisk belysning (second ed.), Samfundslitteratur, p. 407.
[194] For an introduction to microeconomic theory, see e.g. Perloff, J. M. (2018). Microeconomics (eight ed.). Pearson Education Limited.

used to explain the implications of market structure and competition. Moreover, the implications that the market structure can have on consumer welfare will also be discussed.

Industrial organization is a field of economics dealing with markets and industries and, in particular, the way in which firms compete with each other.[195] Moreover, the main focus of industrial is on the strategic behavior of firms and the regulatory policy, including competition policy. The main reason for considering industrial economics a separate subject from microeconomics is due to its emphasis on the study of the firm strategies that are characteristic for market interaction including price competition.[196] In this thesis, industrial organization is used to explain how firms acquire and maintain market power. In addition, the thesis will also address dynamics aspects of competition with a focus on the relationship between competition and innovation.

Auction theory explores how auctions shape prices, how auction participants behave, and how auction design can achieve optimal or efficient outcomes. Auction theory has been the basis for much fundamental theoretical work and important in developing the understanding of the methods of price formation.[197] Moreover, there is a close analogy between the theory of optimal auctions and the theory of monopoly pricing.[198] This thesis will draw parallels between the model of monopoly and the auction theory analysis of the effect on competition of collaboration between economic operators in the competition for public contracts. Furthermore, auction theory deals with how bidders act in auction markets, and it thus explores the features of auction markets incentives. Hence, auction theory will be applied to understand public tenders. An auction can be explained as a market institution with an explicit set of rules for determining resource allocation and prices on the basis of incoming bids from market participants.[199] In this connection, the tender situation can be perceived as an auction where the economic operators are competing for the right to sell their goods or services to the contracting authority.[200]

Additionally, theories of joint bidding in auctions and horizontal mergers will be applied to review the basic economics of joint bidding and the effects that joint bidding can have on competition, coordination among the economic operators, exploitation of other synergies, and market entry. Auction theory will help bring out the main trade-offs involved in public procurement and thereby

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[195] Cabral. L. M. B. (2000). Introduction to industrial Organization (first ed.). The MIT press, p. 3.
[196] Ibid, p. 3.
[197] Klemperer, P. (1999). Auction Theory: A Guide to the Literature. Journal of Economic Surveys, Vol. 13, Issue 3, pp. 227-286, p. 2.
[198] Klemperer, P. (2004). Auctions: Theory and Practice (first ed.). Princeton University Press, p. 10.
[199] McAfee, R. P. and McMillan, J. (1987). Auctions and Bidding. Journal of Economic Literature, Vol. 25, No. 2, 699-738, p. 701.
[200] Krishna, V. (2002). Auction Theory. Academic Press (first ed.), pp. 1-2.

highlight the judicial issues. In particular, auction theory will be used to understand the consequences of allowing independent firms to collaborate and thus coordinate their actions.

Game theory is a theoretical framework to understand social situations among competing firms as a game, which serves as a model of an interactive situation among the competing firms.[201] In opposition to game theory, decision theory deals with situations where each decision maker can make its own choices, in isolation.[202] Hence, the monopoly problem is addressed by using the tools of decision theory, whereas oligopoly markets should be investigated using game theory. In this thesis, game theory will be applied to analyse the strategic behaviour of companies in oligopolistic markets. Additionally, game theory will be used as a basis for the analysis of when firms have incentives to collaborate.

4.2 Application of Economic Theory

An economic theory consists of assumptions and predictions. In order to apply the theory, these assumptions must be clarified. Despite their diversity, the economic theories presented above have multiple features in common and the theories either belong to or constitute themselves a further development of neoclassical theory. However, each theory also comes with its own set of assumptions. In 1966, the economist Friedman stated that economists need to make assumptions in order to provide useful predictions:

> *"(…) the entirely valid use of "assumptions" in specifying the circumstances for which a theory holds is frequently, and erroneously, interpreted to mean that the assumptions can be used to determine the circumstances for which the theory holds, and has, in this way, been an important source of the belief that a theory can be tested by its assumptions."*[203]

Thus, assumptions of economists are used to determine the circumstances for an economic theory. The economic theories are simplified interpretations of the real world. Hence, the purpose of an economic theory is to explain reality through simplified models which can say what happens if something occurs. Furthermore, the goal of economists is to make assumptions that can create a theory with consistency and general applicability.

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[201] More about game theory see e.g. Von Neumann, J., & Morgenstern, O. (2007). Theory of games and economic behavior. Princeton University Press.

[202] Belleflamme, P. and Peitz, M. (2015). Industrial Organization: Markets and Strategies (second ed.). Cambridge University Press, pp. 6-7.

[203] Friedman, M (1966). The Methodology of Positive Economics in Essays in Positive Economics (Chicago: Univ. of Chicago Press, 1966), 3-16, p. 13.

In this thesis, the assumptions will be presented before the theories have been applied. As stated above, economic theories are simplified interpretations of the real world and this entails that some economic theories may seem oversimplified or that some assumptions are unrealistic compared to the real world. However, some unrealistic assumptions will be presented in the thesis and these will also be highlighted. An example of this is the model of perfect competition, as itis a theoretical construct and thus difficult to find real-life examples of perfect competition.[204]

4.3 The Role of Economic Analysis in Competition law

4.3.1 A Social Market Economic Framework and Ordoliberalism

The EU has among its constitutional objectives the goal of achieving a highly competitive social market economy. In particular, by the formulation of Article 3(3) TFEU which stipulates that the EU should follow the path leading towards a highly competitive social market economy. According to 3(3) TFEU:

> "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability,* ***a highly competitive social market economy****, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*".[205]

Hence, a highly competitive social market economy appears in connection the statement of the objectives of the EU. The first reference to a social market economy was found in the Treaty of Rome.[206] The concept of a social market economy contains central elements of a free market economy combined with social objectives.[207]

The concept of a social market economy has German origins[208] with Müller-Armack as one of the founders of the social market economy concept, which he defines as: "*Regulative policy which aims to combine, on the bases of a competitive economy, free initiative and social progress*".[209] Hence, the concept of a social market economy actively implements regulatory measures, in particular, with respect to

[204] See more about the model for perfect competition and assumptions in Chapter 3, Section 3.1.
[205] Emphasis added.
[206] Hildebrand. D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 2.
[207] Tvarnø, C. D., and Nielsen, R. (2021). Retskilder og Retsteorier. DJØF Publishing, p. 536.
[208] Lianos, I., Korah, V., & Siciliani, P. (2019). Competition Law, Analysis, Cases, & Materials (first ed.). Oxford University Press, p. 123.
[209] Müller-Armack, A. (1989). Germany's Social Market Economy: Origins and Evolution in The Meaning of the Social Market Economy, pp. 82-86, pp. 82-83.

protecting free market forces. However, in contrast to free market economy, the state is not passive and integrated within the regulative policy are social policy objectives that include a balancing of the distribution of gains between the different economic actors.[210] Müller-Armack was part of the Common Market Group when the EU competition rules were drafted for the Rome Treaty.[211] Hence, one might argue that the wording 'social market economy' is referring to the German Soziale Marktwirtschaft of the ordoliberal school of thought.[212] There has been discussion about the influence of ordoliberal school of thought[213] on the drafting of the competition provisions and whether this school of thought can be considered as valid means to guide the application of the competition rules.[214] However, there are several examples of the legal research in the field of competition law that argue that the ordoliberal school of thought has a strong influence on the development of competition law in the EU and the interpretation of the rules by the EU Courts.[215]

In this thesis, the social market economic framework and the ordoliberal school of thought are considered as important means to understand the competition rules. Therefore, ordoliberalism will be highlighted in the interpretation and application of competition law.[216] Furthermore, the ordoliberal school of thought is also considered compatible with the more economic approach to the application of the competition rules.[217]

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[210] Tvarnø, C. D., and Nielsen, R. (2021). Retskilder og Retsteorier. DJØF Publishing, p. 536.

[211] Hildebrand. D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 37

[212] Gerber, D. (1994). Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe. The American Journal of Comparative Law, 42(1), pp. 25-84.

[213] The ordoliberal school of thought (also known as the Freiburg School) originates from 1930s Germany and was fostered at the University of Freiburg by Eucken and Grossmann-Doerth. See Crane, D. A., and Hovenkamp, H. (2013). The Making of Competition Policy: Legal and Economic Sources. Oxford University Press, p. 252

[214] See e.g. Jones, A., & Sufrin, B. (2019). EU competition law: Text, cases, and materials (seventh ed.). Oxford University Press, p. 44; Anchustegui, I., H. (2015). Competition Law through an Ordoliberal Lens. Oslo Law Review, 2015, Issue 2, 139-174; and Akman, P. (2009). Searching for the Long-Lost Soul of Article 82 EC. Oxford Journal of Legal Studies, 29(2), 267-303.

[215] See e.g. Talbot, C. (2016). Ordoliberalism and Balancing Competition Goals in the Development of the European Union. The Antitrust Bulletin, Vol. 61(2) 2016, 264-289; Faull, J. and Nikpay, A. (2014). *The EU Law of Competition* (third ed.). Oxford University Press, p. 229; and Giocoli, N. (2009). Competition Versus Property Right: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy, Journal of Competition Law and Economics, 1-40.

[216] The Ordoliberal School of thought sometimes clashes with the classic way of thinking of the Chicago School. The central purpose of Ordoliberalism is the protection of competition, and the main premise of the Ordoliberal theory is that only the state can secure the freedom and rights of its citizens against the abuse of market power. In contrast, the Chicago School does not believe that government intervention is necessary for protecting competition. As stated above, the competition rules include social policy objectives which is not the case in the Chicago School. Insights of the Chicago School have been developed and refined in modern industrial organization. Hence, theories belonging to the Chicago School may still be used in connection with a competition law analysis. See Fudenberg, D., and Tirole, J. (1987). Understanding Rent Dissipation: On the Use of Game Theory in Industrial Organization. The American Economic Review, 77(2), pp. 176-183. Retrieved June 10, 2021, p. 179.

[217] This is acknowledged by Anchustegui, I., H. (2015). Competition Law through an Ordoliberal Lens. Oslo Law Review, 2015, Issue 2, 139-174, p. 166.

4.3.2 The More Economic Approach to the Application of Competition Rules

In the beginning of the1990s, the European Commission started a mission of a *more economic approach* which required a re-thinking of the economic approach in competition law.[218] The more economic approach aims at shaping the substance of EU competition law according to contemporary economic thinking.[219] Modernisation is often used to describe this reform of the competition rules.[220]

The modernisation of the competition rules that started to gain traction in the mid-1999s and the first impetus for this modernisation came from the presentation of the first EU Merger Regulation that required predictions of mergers' economic effects on the market.[221] The second impetus for the modernisation came from discussions in academic and policy circles that called for a more lenient approach towards vertical restraints under Article 101 TFEU.[222] Additionally, this modernisation as also led to the enhancement of consumer welfare at the centre of competition law analysis.[223] The consumer welfare standard in competition law and consumer welfare as an objective of the competition rules are discussed in Chapter 4 under Section 8.6.

Furthermore, as part of the modernisation, the Commission committed itself to carrying out more in-depth assessments of the investigated conduct's effects, instead of relying on form-based presumptions of illegality in competition law cases.[224] Hence, the more economic approach entails that the assessment of each specific competition law case will not be undertaken based on the form or the intrinsic nature of a particular conduct, which is also referred to as the 'form-based approach'. However, the assessment should be based on the assessment of the particular conduct anti and procompetitive effects, which is also referred to as the 'effects-based approach'.

In relation to the assessment of collaboration between economic operators, the more economic approach has had an impact, in particular on the interpretation and application of the concept of

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[218] Witt, A. (2018). The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning? 64(2) Antitrust Bulletin 172-213, University of Leicester School of Law Research Paper No. 18-10, p. 1.
[219] Monti, M. (2000). A European Competition Policy for Today and Tomorrow. World Competition 23(2), 1-4, 2.
[220] See e.g. Jones, A., & Sufrin, B. (2019). EU competition law: Text, cases, and materials (seventh ed.). Oxford University Press, p. 46.
[221] Council Regulation, No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[222] Hildebrand. D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 16.
[223] See e.g. Gerber, D. (2008). Two Forms of Modernization in European Competition Law. 31(5) Fordham International Law Journal, 1253-1254, p. 1235; and Witt, A. (2016). The More Economic Approach to EU Antitrust Law (first ed.) Hart Publishing, p. 59.
[224] Witt, A. (2018). The European Court of Justice and the More Economic Approach to EU Competition Law – Is the Tide Turning? 64(2) Antitrust Bulletin 172-213, University of Leicester School of Law Research Paper No. 18-10, p. 1.

restriction by object under Article 101 TFEU, which will be included in this thesis. Moreover, though the more economic approach is moving towards the application of the effects-based approach, whereby most agreements should be judged by their actual or likely effects on competition, it may be questioned whether this is the case when the different types of collaborations are to be assessed. This will therefore be clarified and deliberated in the thesis. The modernisation of the competition rules may have an impact on the assessment of the collaborations between the economic operators in the future. Furthermore, when looking into the possibilities to reconcile a potential conflict between public procurement law and competition law, it will be discussed whether one can hope for a similar modernisation of the public procurement rules, which can facilitate are more economic approach to the public procurement rules.

PART II

FOUNDATIONS

CHAPTER 3

Competition and Collaboration from an Economic Perspective

1 Introduction

This chapter focuses on competition and collaboration from the perspective of economics. In order to understand how collaborations between economic operators in the competition for public contracts can be considered a relevant practical problem, this chapter will apply economic theory to particular public procurement contexts in order to explain what effects these collaboration can have on the competition in the internal market.

In addition, this chapter will also serve as the foundation of economic theory for the further analyses. As mentioned, this part of the thesis must be considered as a supplement to the legal analyses. Throughout the thesis, the focus is on three different types of collaborations. The first type being when an economic operator relies on the capacity of other economic operators in order to document whether they are capable of fulfilling the tendered contract. The second focus will be on when economic operators form a bidding consortium for the purpose of tendering for, and eventually fulfilling, a public contract. The third and last focus will be on economic operators who use subcontractors to fulfil a public contract. This will also be reflected predominantly in the chapter.

Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments used to achieve smart, sustainable, and inclusive growth while ensuring the most efficient allocation of public funds.[225] According to the Commission, the value of public procurement amounts to approximately 14 per cent of the EU's gross domestic product with a total value of 2 trillion euro.[226] Hence, the public procurement market constitutes a significant proportion of the economy in the EU and, hence, can be considered an important instrument for ensuring the competition on the internal market. Within the legal framework, economic operators may choose to collaborate when they bid on public contracts. In addition, collaborations between economic operators bidding on public contracts can have both positive and negative effects on the competition depending on the collaboration in question.

[225] COM(2010) 2020 final, Europe 2020: A strategy for smart, sustainable and inclusive growth.
[226] European Commission, Public Procurement Indicators 2017 (2019), https://ec.europa.eu/docsroom/documents/38003.

1.1 Outline

In order to answer the question of what effects collaborations between economic operators in the competition for public contracts might have on the competition in the internal market, it seems necessary to cover the concept of competition. Therefore, this chapter will commence with a presentation of various notions of competition. This will be followed up by a presentation of how to conduct a static analysis of competition that also will include a presentation of the model of perfect competition as well as of the model of monopoly. The static analysis of competition will also include an analysis of imperfect competition in which the Bertrand model will be applied.

Further, there will also be an introduction to the dynamic analysis of competition. In this part of the chapter, the dynamic view of the relationship between competition and innovation as well as the concept of effective competition will also be clarified.

The chapter will conclude with an analysis of the expected effects of the collaborations between economic operators. This part of the analysis will apply auction theory, which will be introduced together with the assumptions that form the basis for the application of the theory. In regard to auction theory, focus will be on both positive and negative effects on competition.

2 The Concept of Competition

The concepts of 'competition' and 'competitiveness' are often used within both business and public discussions regarding the topic of economic units, including their environment as well as ability to perform according to certain strategic or political goals, yet the meanings of these two terms depend on the context at hand.[227] There are economic, legal, and political dimensions to the notion of competition, and this becomes even more complicated as the same notion can be applied to different understandings.

The term 'competition' originates from the Latin words of *competitionem* and *competitio*, which can be translated into the action of seeking/endeavouring to gain by one party at the same time as another party.[228] A similar definition is also proposed by Stigler who defines competition as "*a rivalry between*

[227] Listra, E. (2015). The concept of competition and the objectives of competitors. Procedia - Social and Behavioral Sciences 213, 25 – 30, p. 25.
[228] See Online Etymology Dictionary, "Competition (n.)"

individuals (or groups or nations), and it arises whenever two or more parties strive for something that all cannot obtain".[229]

While Stigler's definition of competition can be considered to be broad, the economic definitions of competition are often based on assumptive models. Here, economists use the word competition in two different senses. In the first sense, competition is used to refer to the structural situation of multiple firms competing in a market, which also is referred to as 'the static analysis of competition'. In the second sense, competition is used to refer more broadly to the process of rivalry among firms in whatever form or intensity it may occur, which is known as 'the dynamic analysis of competition'.

The meaning and process of competition in the dynamic analysis may seem very different from the former, yet the dynamic analysis builds further on the static analysis of competition. [230] The static analysis will typically take its origin from the model of perfect competition, which will also be the case in the presentation of the static concept of competition.

In the following sections, there will be a presentation of the static analysis of competition and the dynamic analysis of competition. These perceptions of competition will not only be used in the economic analysis but also to understand the notion of competition from a legal point of view. It is generally acknowledged among EU competition law researchers that the dynamic competition underlies the economic model behind EU competition law.[231] In addition, it has also been proclaimed by some that the rules of competition neatly fit into the concept of 'workable competition' or 'effective competition', which will be discussed later in the thesis.[232]

3 Introduction to the Static Analysis of Competition

In neoclassical theory, economic markets can be grouped into types of markets structures. Specifically, these various market structures represent the conditions of an industry, such as the number of sellers, the difficulty of establishing a new firm to enter the market, and the type of

[229] Stigler, G. (1987). Competition. In Eatwell, J., Milgate, M., and Newman, P. (eds.), The New Palgrave: A Dictionary of Economics, Palgrave Macmillan UK, pp. 531-536.
[230] See Clark, J. (1955). Competition: Static Models and Dynamic Aspects. The American Economic Review, 45(2), 450-462.
[231] Baskoy, T. (2005). Effective Competition and EU Competition Law. Review of European and Russian Affairs vol. 1 no.1, p. 4.
[232] Blaug, M. (2001). Is Competition Such a Good Thing? Static Efficiency versus Dynamic Efficiency. Review of Industrial Organization 19: 37–48, p. 45.

products that are being sold. Each market structure has its own set of characteristics and assumptions, while impacting the welfare in the industry in its own unique way.[233]

The neoclassical concept of competition is generally associated with the market structure that is commonly known as 'perfect competition'.[234] In this thesis, the model of perfect competition will form the basis for understanding the importance of the presence of competition and economic behaviour, and - as described above - it will typically the focal point of the static analysis of competition.

3.1 The Model of Perfect Competition

The model of perfect competition represents a situation for a market in which welfare is maximised, and it is based on five key assumptions:[235]

1. There is a large number of sellers and buyers in the market, where each individual seller is so small that their actions have no significant impact on other suppliers.
2. The products are homogeneous. This means that the products supplied by the different sellers are the same, or - in simple terms - the buyers do not care which seller they buy the product from as long as all sellers charge the same price.
3. Buyers and sellers in the market are assumed to have perfect information about the market.[236]
4. There are no entry barriers.
5. There are no exit barriers.

Consequently, each seller becomes insignificant in relation to the market as a whole and, in this sense, it has no influence on the price of the product. As a result, sellers are considered as price-takers and not price-markers. In addition, all sellers aim to maximize profit, yet in a perfectly competitive market, the price is equal to the marginal revenue, which is also referred to as 'the competitive price'.[237] This may lead to the essential question of whether the undertaking(s) has/have the sufficient market power

[233] In economics, welfare is the concept that is used to measure how well an industry performs. In each industry, welfare is given by total surplus, which is the sum of consumer surplus and producer surplus. See e.g. Motta, M. (2009). Competition Policy: Theory and Practice (twelfth ed.). Cambridge University Press, p. 18.
[234] Hildebrand, D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 96.
[235] The assumptions for perfect competition are presented differently depending on the author. These assumptions are often divided into four or five assumptions. In this thesis, the starting point is Cabral's presentation of the assumptions. See Cabral, L. M. B. (2000). Introduction to industrial Organization (first ed.). The MIT Press, pp. 85-87.
[236] Perfect information is the assumption of that all sellers and buyers know the prices set by all sellers.
[237] Marginal revenue is defined as the additional income generated from the sale of one more unit of a good or service. The significance of this relationship will be explained later in this chapter. See Cabral, L. M. B. (2000). Introduction to industrial Organization (first ed.). The MIT Press p. 86.

to raise prices above the competitive price and keep them sustained at that level.[238] This question is sought to be answered in the sections below, which clarify the monopoly model and address how monopoly affects the welfare on the market.

The model of perfect competition describes a market structure with strong assumptions and is therefore unlikely to exist in most real-world markets. However, the neoclassical theory of perfect competition is frequently used by competition authorities to explain real-world behaviour as well as to predict the economic consequences of changes in the different variables that comprise the model of perfect competition. Similarly, this also the case with the model of monopoly.[239]

3.2 The Model of Monopoly

A monopoly is at the opposite extreme of the market structure spectrum compared to perfect competition. The model of monopoly is based on the following single assumption:[240]

1. A well-defined market with one single supplier.

In the model of monopoly, the supplier is the price setter. Since there is only one supplier in the market, market demand is equal to the demand for the specific product of the monopolist. Therefore, the monopolist may choose the optimal quantity that it wishes consumers to buy while also being able to determine the corresponding price.[241] Posner describes monopoly as follows:

> *"A monopolist is a seller (or a group of sellers acting like a single seller) who can change the price at which his product will sell in the market by changing the quantity that he sells. This ´power over price´, the essence of the economic concept of monopoly, derives from the fact that the price that people are willing to pay for a product tends to rise as quantity of the product offered for sale falls. Some people will value the product more than other people do and will therefore bid more for it as the quantity available shrinks in order to make sure that they get it. The seller who controls the supply of a product can therefore raise its price by restricting the amount supplied".*[242]

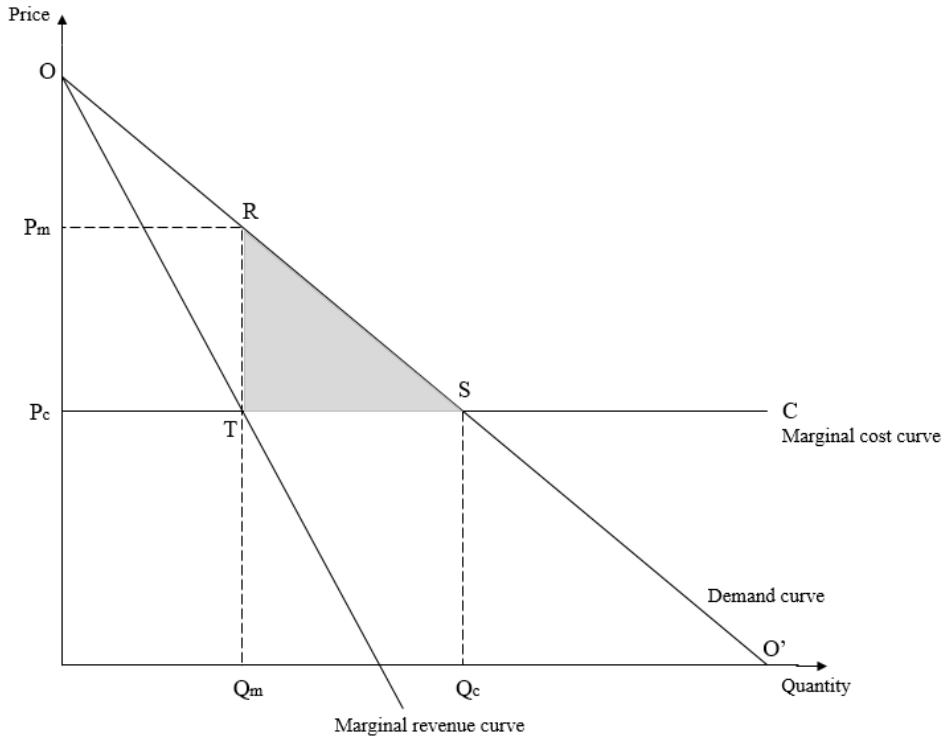
[238] Jones, A., & Sufrin, B. (2019). EU Competition Law: Text, Cases, and Materials (seventh ed.). Oxford University Press, p. 11.
[239] Hildebrand, D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 97
[240] Cabral, L. M. B. (2000). *Introduction to Industrial Organization* (first ed.). The MIT Press, p. 69.
[241] Ibid, p. 70.
[242] Posner, R. A (1976) [2001]. *Antitrust Law* (second ed.). University of Chicago Press, p. 8.

Monopolies do exist in real markets and may be created and maintained by state regulation. However, the markets rarely fulfil the assumptions of this model.[243] The model of monopoly is useful to explain the problems that may arise with a high concentration of market power. The ability to exercise market power means raising the price above the marginal cost at the expense of consumer welfare, which is why a high concentration of market power can be seen as problematic.[244] The implications of monopoly will be analysed in the section below.

3.2.1 Graphical Analysis of Welfare Loss from Monopoly

In the following, a simple graphical analysis of how monopoly affects welfare is presented, where the model of perfect competition will be used as a benchmark to illustrate the welfare loss from monopoly. The difference between the model of perfect competition and the model of monopoly emphasises the significance that a market structure may have for the welfare on the market, as well as whether the firm(s) has/have the necessary market power to raise prices above the competitive level and subsequently keep them there.

Figure 6 *Welfare loss from monopoly*[245]



[243] In reality, most markets lie somewhere between perfect competition and monopoly.
[244] Motta, M. (2009). Competition Policy: Theory and Practice (twelfth ed.). Cambridge University Press, p. 115.
[245] Figure 6 is based on the graph in Motta, M. (2009). Competition Policy: Theory and Practice (twelfth ed.). Cambridge University Press, p. 42. A similar figure has also been seen in competition law literature, see, e.g. Faull, J. and Nikpay, A.

In Figure 6, there is a linear downward-sloping demand curve, illustrated by the OO´ line.[246] The graph illustrates a production technology with constant returns to scale, which then results in a constant marginal cost represented by the marginal cost curve line.[247] The marginal revenue curve is always under the demand curve, and only in the situation of perfect price discrimination will the marginal revenue curve and the demand curve be the same.

As previously stated, the model of perfect competition is the benchmark case. Here, the price is the competitive price P_c and the quantity that is sold to consumers is equal to Q_C. The competitive price equals marginal cost (the equilibrium under the model of perfect competition).[248] Under the perfect competition model, welfare is indicated by the OP_cS triangle, which also corresponds to the consumer surplus.[249] The consumer surplus is the area placed between the segment OS in the demand line and the line P_cC.[250]

The price in the model of monopoly will be above the one in the perfect competition model. Here, the price that the monopolist charges is affected by demand and is therefore - to some extent - constrained by products from outside the market.[251] The monopolist faces a downward-sloping demand curve, meaning that the higher the price it charges, the lower the demand will be for its product. As a result, the monopolist will only sell units up to the point at which the marginal revenue equals the marginal cost, where its marginal revenue is below the market price.[252] The price of the monopolist is indicated by P_m. The quantity that will be produced by the monopolist is Q_m (i.e. the equilibrium under the model of monopoly).

The graph also reveals the main disadvantages of monopoly. The monopolist sells output Q_m, which is less than the output Q_C under the model of perfect competition, and the price that the consumers have to pay for the product is therefore higher (the difference between P_m and P_c). The model can explain the price formation in tenders, but 'consumer' must be translated to 'contracting authority'.

This has the following welfare effects: A welfare loss occurs not just for the monopoly price, but for any price above the marginal costs. In the graph, the welfare loss can be identified by comparing the

(2014). The EU Law of Competition (third ed.). Oxford University Press, p. 22; Jones, A., & Sufrin, B. (2019). EU Competition Law: Text, Cases, and Materials (seventh ed.). Oxford University Press, p. 9.

246 The significance of the demand curve will be described below.

247 A constant return to scale is when an increase in input cause the same proportional increase in output.

248 A firm is in equilibrium when it has no tendency to change its level of output.

249 The consumer surplus or consumer welfare is the aggregate measure of the surplus of all consumers.

250 Motta, M. (2009). Competition Policy: Theory and Practice (twelfth ed.). Cambridge University Press, p. 42.

251 Jones, A., & Sufrin, B. (2019). EU Competition Law: Text, Cases, and Materials (seventh ed.). Oxford University Press, p. 9.

252 Cabral, L. M. B. (2000). Introduction to Industrial Organization (first ed.). The MIT Press, p. 69.

welfare level achieved under the model of perfect competition ($P_c = C$) with the attained under any arbitrary price ($p > C$).

There is a transfer of income from the consumer to the monopolist, which makes the consumer surplus scale down. The welfare under the model of monopoly is set by the area described by the points O P_cTR, which also corresponds to the sum of both the producer surplus P_m P_cTR and the consumer surplus OP_mTR.[253] An increase in the price at which goods are sold respectively decreases the consumer surplus and increases the producer surplus.

In Figure 6, the RTS area is also known as the deadweight welfare loss of monopoly, as illustrated by the grey area in the graph. Deadweight denotes that the consumer surplus is "lost" and is thus not acquired by anyone in the market (a loss of consumer surplus, which is not turned into profit for the producer). The loss that results from the absence of sale (the monopolist sells less than under the model of perfect competition) is the allocative inefficiency implied by monopoly or market power.[254]

Furthermore, in economic literature, some argue that firms with greater market power have a lesser incentive to be cost-efficient.[255] Therefore, market power may entail a second type of inefficiency, which is the productive inefficiency.[256] This was described by Leibenstein as X-inefficiency, which is internal inefficiencies and rising cost due to the lack of need to minimise the cost of production.[257]

Figure 6 can be used to illustrate how competition affects the welfare in the market. Furthermore, this analysis can also be used to explain the reasons for emulating the effects of monopoly by colluding. In economics, collusion is defined as a market outcome and refers to situations where firms set prices that are close enough to monopoly prices (i.e. higher than the competitive benchmark).[258] Bid rigging is the typical mechanism of collusion in public procurement.[259] Bid rigging refers to illegal agreements between economic operators with the aim of distorting competition in award procedures in public tenders. The illegal agreements between economic operators may assume various forms,

[253] Producer surplus is the sum of all profits made by producers in the industry. The surplus of an individual producer is the profit it makes by selling the goods in question.
[254] Cabral, L. M. B. (2000). Introduction to Industrial Organization (first ed.). The MIT Press, p. 8. Allocative efficiency requires that resources are being allocated to their most efficient use and that output is being allocated at the appropriate level.
[255] Ibid, p. 8.
[256] Productive inefficiency can be defined as the increase in costs resulting from market power.
[257] Leibenstein, H. (1966). Allocative Efficiency vs. "X-Efficiency. The American Economic Review Vol. 56, No. 3, pp. 392-415.
[258] Motta, M. (2009). Competition Policy: Theory and Practice (twelfth ed.). Cambridge University Press, p. 138. See also Kühn, K., Matutes, C., & Moldovanu, B. (2001). Fighting Collusion by Regulating Communication between Firms. Economic Policy, 16(32), 169-204.
[259] See e.g. Porter, R. H., & Zona, J. D. (1993). Detection of Bid Rigging in Procurement Auctions. Journal of Political Economy, 101(3), 518–538.

such as fixing the content of their tenders beforehand in order to influence the outcome of the procedure, refraining from submitting a tender, allocating the market based on geography, contracting authority or the subject of the procurement, or setting up rotation schemes for a number of procedures.[260] Hence, the price under the model of monopoly (P_m) might have been set had there been full collusion among several identical economic operators operating under constant marginal costs.

This is particularly relevant when investigating collaboration in relation to bids on public tenders. The traditional objection to joint bidding is that it may suppress competition by reducing the total number of bids tendered for the contract.[261] As stated above, a welfare loss occurs not just for the monopoly price but for any price above marginal costs. In the event of a reduction in total bids, the degree of competition may be decreased and the prices that the contracting authorities (consumers) have to pay for the product are higher. However, collaboration between economic operators, including joint bidding, entails both positive and negative effects, which will be analysed in section 4.2 of this chapter.

As stated above, the model of perfect competition and the model of monopoly represent opposite extremes within both the spectrum of market structures and the market-power scale. What these models have in common is that each firm does not have to worry about the action of its rivals.[262] Although these are useful points of reference, empirical observation suggests that most real-word markets are somewhere between these two extremes.[263] Hence, real-word markets deviate from the model of perfect competition and the model of monopoly not only in their structure but also in the conduct of the firms. In real-word markets, there will typically be imperfect competition, which is the competitive situation in any market where the assumptions of perfect competition are not satisfied.[264] Public procurement can be considered as an oligopoly with imperfect competition, and in the section below a presentation of imperfect competition will be outlined in relation to public procurement.

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[260] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, Official Journal of the European Union, (2021/C 91/01), para 1.1.

[261] Smith, J. L. (1983). Joint Bidding, Collusion, and Bid Clustering in Competitive Auctions. Southern Economic Journal, Vol. 50, No. 2, pp. 355-36, p. 355. See also Markham, J. W. and Papanek, G. F. (1970). "The Competitive Effects of Joint Bidding by Oil Companies for Offshore Oil Leases" in Industrial Organization and Economic Development. Houghton Mifflin Company, p. 119.

[262] Cabral, L. M. B. (2000). Introduction to Industrial Organization (first ed.). The MIT press, p. 101.

[263] Ibid, p. 102.

[264] Imperfect competition can be found in the following types of market structures: monopolies, oligopolies, monopolistic competition, monopsonies, and oligopolies that result from a change in the assumptions underlying the model of perfect competition discussed above. The theory of imperfect competition, which can be considered as a revolution in neoclassical theory was initiated by Sraffa with the basic assumption that real competition is imperfect. See Sraffa, P. (1926). The Laws of Returns under Competitive Conditions. The Economic Journal, 36 (144), 535-550. For more about Sraffa and imperfect competition, see Newman, P., and Vassilakis, S. (1988). Sraffa and imperfect competition. Cambridge Journal of Economics, 12(1), 37-42.

3.3 Imperfect Competition & Public Procurement

Public procurement refers to the process by which contracting authorities purchase work, goods or services from economic operators. As highlighted earlier, public procurement is subject to different sets of rules, including the public procurement rules. The Public Sector Directives establishes rules on the procedures for procurement by contracting authorities with respect to public contracts, whose value is estimated not to be less than the thresholds, including the obligation of contracting authorities to conduct public tenders.[265]

The award of public contracts normally takes place through public tenders where economic operators bid against each other in order to win a public contract. Public tenders are typically sealed bids that are submitted directly to the contracting authority at the same time. The economic operators are not able to see the other bids that have been submitted to the contracting authority. After receiving the bids, the contracting authority will award the public contract to the economic operators in accordance with the chosen award criteria. The contracting authorities will find the most economically advantageous tender based on an exclusive assessment of either price (i.e. lowest price) or cost (i.e. lowest costs), or the best price-quality ratio.[266] The prices are typically individually determined for each contract, and the contracting authority is able to compare the bids and decide whether to purchase the goods or services in question.

Oligopolies are characterised by a limited number of suppliers in a market - though at least two.[267] An important assumption of oligopolies is that of strategic interdependence between competitors.[268] Hence, the individual actions of the suppliers concerning, for example, price and output have an appreciable influence on the market outcome and is therefore likely to influence the reactions from competitors.

An oligopolist can be either cooperative or non-cooperative with its competitors, and the degree to which it leans towards either of the two influences market prices and outputs to a large extent.[269] Oligopoly can approach a monopoly situation if there is close enough collaboration among the sellers.

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[265] The threshold values and their significance are discussed in chapter 2.
[266] See Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC, Article 67. According to 67, price or cost is a mandatory element that has to be assessed by contracting authorities. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach.
[267] It is called a duopoly when there are two sellers.
[268] Cabral, L. M. B. (2000). Introduction to Industrial Organization (first ed.). The MIT Press, p. 101.
[269] Hildebrand, D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 101.

As stated above, the price under the model of monopoly might be set if there is full collusion among several identical firms operating under constant marginal costs.

The model of oligopoly can be used explain the actions of economic operators when bidding for public contracts. The section below outlines the models that characterize the process of interdependent strategic decision making under oligopoly in a public procurement setting.

3.3.1 Price Competition - The Bertrand Model

The two most used competition strategies are the Cournot model and the Bertrand model.[270] In the Cournot model, firms simultaneously choose the quantities that they will produce, which they then sell at the market price. In the Bertrand model, firms simultaneously choose the prices of their products and then must produce enough output in order to meet the demand after the price choices have become known.[271]

The question of whether the competition strategies of quantity or prices is the appropriate choice variable has been discussed in the literature.[272] However, in practice, suppliers seem to make both types of decisions. Hence, the relevant oligopoly model for a particular industry depends on the structural features existing in that industry. An important insight of oligopoly theory is that the market outcome under imperfect competition depends on whether the variable of price or quantity is chosen for analysis.[273]

The model that can best explain the strategic decisions in a public procurement setting is the Bertrand model. The structural features of the public procurement market are characterised by public tenders. Hence, the Public Procurement Rules set the framework for competition. The quality of the products or services must be determined by the contracting authority in connection with the design of tenders and the preparation of tender documents. From this perspective, the competition for public contracts may affect the price of the tendered contract. Therefore, it stands to reason that the Bertrand model is more accurate than the Cournot model for explaining the behaviour in the public procurement

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[270] Cournot competition was developed by Antoine Augustin Cournot. Cournot outlined this oligopoly analysis in 1838 in Recherches sur les Principes Mathematiques de la Theorie des Richesses. Whereas Bertrand competition was developed by Joseph Louis François Bertrand, who investigated and criticized the Cournot model. See Bertrand, J. (1883) Book review of theorie mathematique de la richesse sociale and of recherches sur les principles mathematiques de la theorie des richesses, Journal de Savants 67: 499–508.

[271] Fudenberg, D. and Tirole, J. (1991). Game Theory (first ed.). The MIT Press, p. 12.

[272] See Qin, C., & Stuart, C. (1997). Bertrand versus Cournot Revisited. Economic Theory, 10(3), 497-507; Friedman, J. (2000). The Legacy of Augustin Cournot. Papers in Political Economy, (37), 31-46.

[273] Belleflamme, P. and Peitz, M. (2015). Industrial Organization: Markets and Strategies (second ed.). Cambridge University Press, p. 66.

market. As a result, pricing is considered to be the overriding factor for competition. This is also supported by economic literature which states that price competition appears to be the appropriate modelling choice when prices are more difficult to adjust in the short run compared to quantities.[274] The contracting authorities are subject to the Public Procurement Rules, and it is therefore not generally permitted for a contracting authority and an economic operator to agree on changing an existing contract. The Public Sector Directive explicitly regulates the circumstances of when and where modifications to a public contract are possible without having to start up a new tender process.[275] In several cases, the possibilities for changing prices are limited by the Public Procurement Rules.

The standard Bertrand model consists of two firms in a market with a homogeneous product (undifferentiated product) and assumes that firms simultaneously set their prices to maximise profit. Thus, the Bertrand model is based on a market situation with duopoly. The assumption of the Bertrand model is that firms compete in one period only, meaning that the chosen price is final.[276] As stated above, an important assumption of oligopolies is that there is strategic independence between competitors, which also applies to this model. Furthermore, the assumptions are that both firms have the same marginal cost, that the marginal cost is constant, and that the demand is linear.[277] Additionally, the firms do not have capacity constraints, and they are therefore able to serve all demands that are addressed to them. After the firms simultaneously set prices, consumers will most likely buy from the firm that sets the lowest price.[278] If the two firms charge the same price, the market (i.e. the demand of the consumers) is split evenly between the firms, and the firms will share both the market and the profits as a result of which.[279]

In the standard Bertrand model, the firms set prices equal to the marginal cost, which is also referred to as the Bertrand equilibrium.[280] The resulting equilibrium is a 'Nash equilibrium'.[281] Hence, the firms

[274] Ibid, p. 66.
[275] Olivera, R. D. (2015). Modification of Public Contracts: Transposition and Interpretation of the new EU Directives. European Procurement & Public Private Partnership Law Review, 10(1), 35-49, p. 41.
[276] Cabral, L. M. B. (2000). Introduction to Industrial Organization (first ed.). The MIT Press, p. 105.
[277] Ibid, p. 102. The Cournot model indicates that firms in duopoly will keep prices above the marginal cost and thus be quite profitable. Consequently, Bertrand challenged this with the Bertrand model.
[278] Simon, L. (1984). Bertrand, the Cournot Paradigm and the Theory of Perfect Competition. The Review of Economic Studies, 51(2), 209-230. p. 210.
[279] Belleflamme, P. and Peitz, M. (2015). Industrial Organization: Markets and Strategies (second ed.). Cambridge University Press, p. 45. This assumption represents that the own price elasticity is infinite.
[280] See the explanation for this in Dutta, P. K. (1990). Strategies and Games: Theory and Practice (first ed.). The MIT Press, pp. 51-52.
[281] As previously described, market power is defined as companies' the ability to set the price above the marginal cost.

in this Nash equilibrium do not enjoy market power.[282] As described above, the individual actions of the suppliers have an appreciable influence on the market outcome and are therefore likely to influence the reactions of competitors. Because the products by the firms are homogeneous, whichever firm that sets the lowest price will receive all of the demand. If one firm sets the price equal to the marginal cost while the other firm(s) then choose to raise the price above the marginal cost, then the latter will not make any earnings, as all of the consumers will be buying from the firm still setting the competitive price. However, if both firms set the same price above the marginal cost and share the market, then each firm has an incentive to undercut the other in order to capture the whole market.[283] Consequently, under price competition with homogeneous products and a symmetric constant marginal cost, firms will mostly set prices at the level of the marginal cost, which is also the price in the model of perfect competition. This situation is often referred to as 'the Bertrand paradox'.[284]

However, price competition that leaves the firms with zero profit is not the most realistic outcome for a model of oligopolistic interaction.[285] Hence, this is why the Bertrand model can be seen as a benchmark from which to start the analysis of the features of the real market, which is characterised by price competition. In a public procurement setting, the assumptions for the standard Bertrand model are unrealistic, and this is also the reason why the Bertrand paradox do not strictly apply to public tenders. This is due to the reasons discussed below.

It cannot be expected that economic operators will have same the marginal cost and that marginal cost is constant. In particular, the assumption that the economic operators can have a constant marginal cost is discordant with actual conditions.[286] Hence, economic operators will have different costs due to, for example, different capacity utilisations or product characteristics. If the Bertrand model introduces cost asymmetries, both firms will deviate from the Bertrand equilibrium and the

[282] A Nash equilibrium is defined as a profile of strategies, in which each player's strategy is an optimal response to the other players' strategies; see Fudenberg, D. and Tirole, J. (1991). Game Theory (first ed.). The MIT Press, p. 11.
[283] Cabral, L. M. B. (2000). Introduction to Industrial Organization (first ed.). The MIT Press, p. 102.
[284] The Bertrand paradox is paradoxical because if the number of firms goes from one to two, the price charged for the product or service decreases from the monopoly price to the price under the model of perfect competition. This is not a very realistic, as markets with a small number of firms with market power typically charge a price that is above the marginal cost. Other models of static imperfect competition, i.e. the Cournot model and the model with differentiated good price competition, do not share this result of a prices that is equal to the marginal cost.
[285] Kaplan, T. R.; and Wettstein (2000). The Possibility of Mixed-Strategy Equilibria with Constant-Returns-to-Scale Technology under Bertrand Competition. Spanish Economic Review. 2: 65–71.
[286] Simon, L. (1984). Bertrand, the Cournot Paradigm and the Theory of Perfect Competition. The Review of Economic Studies, 51(2), 209-230. p. 210.

firms will no longer have the incentive to set their price equal to the marginal cost.[287] The standard Bertrand model ignores capacity constraints. However, this cannot be expected to apply to the economic operators in a public procurement setting. The assumption that firms are willing and able to supply all demands has been challenged by Edgeworth[288], who argues that when suppliers face capacity constraints, the Bertrand equilibrium (the point at which firms set prices equal to the marginal cost) does not exists, which is sometimes referred to as the 'Edgeworth paradox'.[289]

In a public procurement setting, it cannot be assumed that products are always homogeneous as this will depend on the individual tender. If the products are merely substitutional, the market will feature product differentiation, and hence the demand may respond to prices changes. If the products offered are differentiated, firms can increase their market power and charge higher prices.[290] Furthermore, the standard Bertrand model is based on a situation with duopoly. In public tenders, there will often be more than two firms participating in the competition for public contracts. However, this will typically have a positive impact on price. As described in connection with the model of monopoly, more firms in an industry tend to lead to lower prices, higher output and lowers profits. Last but not least, the standard Bertrand model assumes that firms compete purely on price, thereby overlooking all types of non-price competition. Though it is considered that price is the overriding factor for competition, the contracting authority may choose that the economic operators may compete on various parameters that are, as described above, not exclusively related to price.

Although many of the assumptions for the standard Bertrand model are not present in a public procurement setting, this model can still be applied to explain the process of interdependent strategic decision making by the economic operators in public tenders. Because the public tender situation typically does not meet the assumptions of the standard Bertrand model, this will contribute to solve the Bertrand paradox. Hence, the economic actors will not set a price that occurs in the model of perfect competition, where the equilibrium price is equal to marginal cost. Furthermore, the prices

[287] Belleflamme, P. and Peitz, M. (2015). Industrial Organization: Markets and Strategies (second ed.). Cambridge University Press, p. 47.
[288] Edgeworth, F. (1897). La teoria pura del monopolio. Giornale Degli Economisti 40, 13–31. The work is explained by Chowdhury, P. R. (2005). Bertrand–Edgeworth duopoly with linear costs: A tale of two paradoxes. Economics Letters 88 (2005) 61 – 65. See also Fudenberg, D. and Tirole, J. (1991). Game Theory (first ed.). The MIT Press, pp. 38-39.
[289] See Dudey, M. (1992). Dynamic Edgeworth–Bertrand competition. Quarterly Journal of Economics, 57, 1661–77.
[290] Belleflamme, P. and Peitz, M. (2015). Industrial Organization: Markets and Strategies (second ed.). Cambridge University Press, p. 51.

will also not be assumed to be equivalent to the price under the model of monopoly, as there is a presence of competition in principle.[291]

The award of public contracts normally takes place through public tenders, and the public procurement markets have specific characteristics. Contracting authorities usually follow relatively stable purchasing patterns with frequently repeated award procedures, similar quantities and standard product or service specifications, without major changes compared to previous procedures.[292] In the public procurement market, competition between the economic operators only takes place within certain parts of the market, often with several years in between. Consequently, the economic operators that participate in the tenders know that the public procurement markets are a repeated competition. Furthermore, public tenders are typically categorised as winner-takes it all markets, so each economic operators either wins all or none of the tendered contracts.[293]

In the public procurement setting, the Bertrand competition must be regarded as the competition for the individual contract during the contract period in question. The economic operators compete in one period only, meaning that the price is set immediately and as final for the public contract in question. However, the economic operators will participate in the tenders knowing that this competition will be repeated and that the contracting authority will tender the public contract again when the winning contract(s) of the economic operators have expired.

The individual actions of the economic operators concerning price, output etc. is likely to influence the actions of the competitors. The economic operators participating in tenders set their prices based on own-cost parameters.[294] However, they do also recognise that their own current and past actions will be treated by rivals as signals of costs and intentions of the economic operators.[295] Hence, from a strategic point of view, it is unreasonable to expect the other firms to keep high prices indefinitely while selling nothing. Since public tenders can be categorized as 'winner-takes-it-all-markets', it must be assumed that economic operators will offer lower prices in connection with the next tender of the

[291] The presence of multiple suppliers in a market, that being two or more and thus the presence of competition, can be expected to lead to a price lower than that of the equilibrium price in the model of monopoly. However, the economic operators can approach a monopoly situation if the collaboration is close among the economic operators.
[292] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, Official Journal of the European Union, (2021/C 91/01), para 1.2.
[293] Anton, J. J., Brusco, S. and Lopomo, G. (2010). Split-award procurement auctions with uncertain scale economies: Theory and data. Games and Economic Behavior 69 (2010) 24–41, p. 41.
[294] Belleflamme, P. and Peitz, M. (2015). Industrial Organization: Markets and Strategies (second ed.). Cambridge University Press, p. 47.
[295] Scherer, F. M. and D. Ross, 1990, Industrial Market Structure and Economic Performance (third ed.), Houghton Mifflin Company, p. 215.

public contract or in connection with tenders for similar contracts. However, economic operators bidding on public tenders can also place very low or very high bids that do - not necessarily having to be related to their actual own or the cost parameter of their competitors, thereby using pricing of bids in a strategic way.

Economic operators may place very low bids because some may have unique competences in production methods that result in an entirely different cost structure or other avenues additional income compared to their competitors.[296] There may be economies of scale that can give rise to lower costs for the economic operators and they are hence able to set lower prices and create the possibilities for additional income compared to their competitors.[297] In addition, economic operators who present low bids may also be a result of calculation errors regarding the cost of the tendered contract.

However, there are also other reasons why a price might be set to a low amount, which in turn may be considered to be of a more strategic nature. An economic operator may offer an aggressive bid in order to win a public contract or a market.[298] In such a case, the economic operators may set their prices according to their calculated loss of profit or they will be able to use profits gained from, for example, other public contracts through cross-subsidisation.[299] This strategic bidding behaviour is analogous to a strategy of predatory pricing.[300] Predatory pricing is one of the most debated practices in the industrial organisation and competition policy literature.[301] Nevertheless, in a predatory pricing scheme, there is broad consensus that prices will be set low in an attempt to drive out competitors. Contracting authorities may benefit from lower prices in the short run, yet they will suffer if the predatory pricing scheme succeeds in eliminating competition, thereby causing a rise in prices in the long run.[302]

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[296]Alexandersson, G. and Hultén, S. (2006). Predatory bidding in competitive tenders: A Swedish case study. Eur J Law Econ 22,73–94, p. 75.

[297] Economies of scale or increasing returns to scale occur when increasing expenditures on all inputs (with input price constants) increase the output quantity by a larger percentage so that the average cost of producing each unit of output will decline. This definition is from Pugel, T. A. and Linert, P. H. (1999). International Economics (eleven ed.). Mcgraw-hill Education, p. 99.

[298]Alexandersson, G. and Hultén, S. (2006). Predatory bidding in competitive tenders: A Swedish case study. Eur J Law Econ 22,73–94, p. 75.

[299] Gilligan, T., and Smirlock, M. (1983). Predation and Cross-Subsidization in the Value Maximizing Multiproduct Firm. Southern Economic Journal, 50(1), 37-42, p. 39.

[300]Alexandersson, G. and Hultén, S. (2006). Predatory bidding in competitive tenders: A Swedish case study. Eur J Law Econ 22,73–94, p. 75.

[301] Niels, G. and A. Ten Kate. (2000). Predatory Pricing Standards: Is There a Growing International Consensus? Antitrust Bulletin 45: 787-809, p. 787.

[302] The theory of predation has been criticised by a number of writers. See e.g. McGee, J. (1980). Predatory Pricing Revisited. The Journal of Law & Economics, 23(2), 289-330; Easterbrook, F. (1981). Predatory Strategies and

If the economic operators place bids with prices over the average cost, then they will not be preventing an equally or more efficient economic operator from entering into the market, because any firm with more efficiency could offer lower prices while earning positive profits. On the contrary, it is conceivable that prices below the average variable cost must be predatory as such bids would be unprofitable - unless they form part of a strategy leading to even higher prices later on.[303]

In contrast to the above, the economic operators can also set the price at a very high level. One reason for which may be that they have cost disadvantages compared to other economic operators. Another may be that economic operators want to signal to their competitors that they have no interest in a particular public contract or particular market and therefore would like the competitors to signal back that they have no interest in other contracts or markets. Hence, the prices can be used strategically to divide markets which is considered tacit collusion, i.e. collusion without communication.[304] In public tenders, the economic operators may obtain approximately the same collusive gain as absent communication.[305] Hence, even if the economic actors do not openly talk together about prices, then their bids can be used as strategic tools.

3.4 Summary of Findings

The analysis of static competition shows that competition is used to refer to the structural situation of multiple firms competing in a market. The presence of competition affects both the quantity produced as well as the price of the products. In real-world markets, there will typically be imperfect competition, which means that the assumption guiding the model of perfect competition will not be satisfied. Hence, the price will be above the marginal cost and the firms will enjoy some degree of market power.

The competition for public contracts can be described as a price competition, i.e. Bertrand competition. The individual actions of the economic operators concerning price and output is likely to influence the reactions from competitors. This can contribute to price competition among the

Counterstrategies. The University of Chicago Law Review, 48(2), 263-337; Areeda, P., & Turner, D. (1978). Williamson on Predatory Pricing. The Yale Law Journal, 87(7), 1337-1352.

303 Spector, D. M. (2001). Definitions and Criteria of Predatory Pricing. Available at SSRN: https://ssrn.com/abstract=262027 or http://dx.doi.org/10.2139/ssrn.262027, p. 4

304 See e.g. Van Essen, M., & Hankins, W. (2013). Tacit Collusion in Price-Setting Oligopoly: A Puzzle Redux. Southern Economic Journal, 79(3), 703-726.

305 Blume, A., & Heidhues, P. (2008). Modeling Tacit Collusion in Auctions. Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft, 164(1), 163-184, pp. 182-183.

economic operators, resulting in low prices offered to the contracting authorities. Furthermore, economic operators know their own current and past actions will be treated by rivals as signals of its costs and intentions and price competition among economic operators may therefore be used as a strategic tool to either eliminate other economic operators from the competition (for the public tender) or to signal a lack of interest in the public contract in question.

4 Introduction to the Dynamic Analysis of Competition

Since the previous has only been concerned with the static analysis of competition, it represents a rather simplified representation of reality. However, it does contribute to the understanding of the basic concepts of perfect competition, monopoly, oligopoly, competition, and price competition. Nevertheless, this type of static analysis does not take the dynamic aspects of competition into account – especially innovation. In the graphical analysis of how monopoly affects welfare, technological developments are abstracted away by assuming that the level of technology as a constant (constant returns to scale which results in a constant marginal cost). However, in the real world, product and markets change over time due to innovation. As a consequence, a dynamic analysis of competition will be made below where the thesis will take a close look at the relationship between competition and innovation as well as the concepts of workable or effective competition.

4.1 Competition & Innovation

Although economists generally accept that competition encourages firms to improve product attributes closely related to price, they have not been so quick to argue that competition encourages innovation.[306] As a result, the effect of competition on incentives of incentives has been debated within economics.

Schumpeter argue that there is an inverse relationship between competition and innovation. Moreover, Schumpeter goes on to claim that:

> *"[A]s soon as we go into details and inquire into the individual items in which progress was most conspicuous, the trail leads not to the doors of those firms that work under conditions of comparatively free competition but precisely to the doors of the large concerns (…) and a shocking suspicion dawns*

[306] Baker, J. B. (2007). Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation. 74 Antitrust Law Journal No. 3, 575-602, p. 577.

upon us that big business may have had more to do with creating that standard of life than with keeping it down."[307]

Subsequently, Schumpeter also states that *"perfect competition is not only impossible but inferior, and has no title to being set up as a model of ideal efficiency."*[308] The scholar is especially known for two of the most important and controversial statements of mid-century economics: first, that innovation contributes a lot more to economic development than what simple competitiveness does under constant technology; second, that monopoly is the market structure most conducive to innovation.[309] While the first of these statements has weathered extremely well, the second statement, which arguably regards competitive markets as not necessarily being the most effective organisations for promoting innovation and thereby relating innovation positively to monopoly, has been considered to be controversial and given rise to debate.[310]

Arrow – one of the scholars who is taking part in this debate argues that *"[t]he preinvention monopoly power acts as a strong disincentive to further innovation".*[311] Furthermore, Arrow finds that "*[t]he only ground for arguing that monopoly may create superior incentives to invent is that appropriability may be greater under monopoly than under competition. Whatever differences may exist in this direction must, of course, still be offset against the monopolist's disincentive created by his preinvention monopoly profits."*[312]

Thus, Arrow argues that a monopolist does not have the same incentive to innovate as a competitive firm due to the monopolist's financial interest in the status quo. A firm earning substantial profits has an interest in protecting the status quo and is thus less likely to be the instigator of new and disruptive technology.[313] On the other hand, the competitors know that if they do not innovate, someone else will, and the incremental gains to innovation are therefore likely to be higher for the competitor than the monopolist. In addition, the incremental risks of not innovating are likely to be larger as well.[314]

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[307] Schumpeter, J. (1942) Capitalism, Socialism and Democracy (third ed.). Harper Perennial, p. 82.
[308] Ibid, p. 106.
[309] Crane, D. A., and Hovenkamp, H. (2013). The Making of Competition Policy: Legal and Economic Sources. Oxford University Press, p. 282.
[310] Ibid, p. 282.
[311] Arrow, K. (1962). "Economic Welfare and the Allocation of Resources to Invention" In The Rate and Direction of Inventive Activity: Economic and Social Factors, edited by Universities- National Bureau Committee for Economic Research and the Committee on Economic Growth of the Social Science Research Councils, 467– 692. Princeton University Press, p. 620.
[312] Ibid, p. 622.
[313] Shapiro. C. (2011). "Competition and Innovation: Did Arrow Hit the Bull's Eye?" in The Rate and Direction of Inventive Activity Revisited, 361-404, National Bureau of Economic Research, Inc., p. 362.
[314] Crane, D. A., and Hovenkamp, H. (2013). The Making of Competition Policy: Legal and Economic Sources. Oxford University Press, p. 283.

The opposing arguments of Schumpeter and Arrow have generated an extensive list of economics literature that seeks to relate competition and innovation.[315] Even though conclusions differ, most of the current literature on the relationship between innovation and competitive market structure finds that both the model of monopoly and the model of perfect competition tend to procure low rates of innovation.

In recent years, research has been made on the relationship between the perfect competition market structure and innovation, which suggests that this relationship best can be explained by an inverted U-shaped curve.[316] Hence, the highest rate of innovation occurs in moderately concentrated markets. Research tends to support Arrow´s view, and it is generally the view that competition provides better incentives for innovation, which is in contrast to monopoly and high market concentration both tending to limit and delay innovation.[317]

The dynamic aspects of competition show that competition may also be of importance for innovation, and companies that are under competitive pressure will therefore have more of an incentive to innovate and gain market share. This also speaks to the importance of competition, answering the question of why competition is facilitated through legislation. Chapter 4 will discuss whether the objectives of the Public Procurement Rules and the Competition Rules are to achieve competition as well as how competition is then to be assessed.[318]

According to the arguments presented in the above, the contracting authorities may play a direct role in fostering innovation by ensuring competition for public contracts. The importance of innovation is emphasised in the legislation, where according to the preamble of the Public Procurement Directive, contracting authorities should make the best strategic use of public procurement to spur innovation. Innovation is among the main drivers for future growth and has been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth.[319] Consequently, the ensuring

[315] See e.g. Gilbert. R. (2006). Looking for Mr. Schumpeter: Where Are We in the Competition -Innovation Debate? Innovation Policy and the Economy, Vol. 6 2006, pp. 159-215. The University of Chicago Press; Shapiro. C. (2011). "Competition and Innovation: Did Arrow Hit the Bull's Eye?" in The Rate and Direction of Inventive Activity Revisited, 361-404, National Bureau of Economic Research, Inc.

[316] Aghion, P., Bloom N, Blundell. R., Griffith. R., Howitt, P. (2005). Competition and Innovation: an Inverted-U Relationship. The Quarterly Journal of Economics, Volume 120, Issue 2, May 2005, 701–728, p. 707.

[317] For recent evidence verifying the theory of that competition provides better incentives for innovation, see Diez, F. J., Leigh, D, and Tambunlertchai, S. (2018). Global Market Power and its Macroeconomic Implications. WP No. 18/137.

[318] The concept of competition, which are undertaken in the two sets of rules, differ, see Chapter 4.

[319] Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC, Radial 47. See also Europe 2020: A strategy for smart, sustainable and inclusive growth, Communication from the Commission, COM(2010) 2020 final.

of competition for public contracts can thus both be contributing to ensuring innovation and smart, sustainable and inclusive growth.

As stated above, it is important to include the dynamic effects of competition. There are several theories that challenge the static model of competition. These include the theory of effective competition, which will be dealt with in the below.

4.2 Effective Competition

Economists have recognised the weaknesses of the model of perfect competition in framing policy for oligopolistic markets. Hence, they have attempted to define a more realistic standard of economic performance, which is referred to as workable or effective competition.[320]

The concept of effective competition was first used by Clark in 1940 under its original name: workable competition.[321] Clark criticised the model of perfect competition and developed the concept of effective competition as an attempt to go beyond the model of perfect competition.[322] Clark stated that workable competition should be defined as "*the most desirable forms of competition, selected from those that are practically possible, within the limits set by conditions we cannot escape*."[323] Thus, the assumptions in the model of perfect competition were thought of as being difficult to fulfil. In Clark's view, perfect competition is not achievable in many sectors, and the possible response is therefore to attempt to identify workable competition.

20 years later, Clark had developed the theory of workable or effective competition further. Here, Clark examines the objectives of competition, thereby shifting the emphasis from workable competition to the notion of effective competition. In the article, Clark criticised his own work since his assumptions were based on a static model of perfect competition. Instead, Clark chose to view competition as a dynamic process and stated that "*these moves and responses may influence production, products or prices, and their various combinations.*"[324] Thus, a dynamic process is the result of moves and response. Clark mainly focused on the effects of competition and on the dynamic process-oriented element,

[320] Markham, J. W. (1950). An Alternative Approach to the Concept of Workable Competition. The American Economic Review Vol. 40, No. 3, Jun., 1950, pp. 349-361, p. 349.
[321] Clark, J. (1940). Toward a Concept of Workable Competition. The American Economic Review, 30(2), pp. 241-256.
[322] Hildebrand, D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 102.
[323] Clark, J. (1940). Toward a Concept of Workable Competition. The American Economic Review, 30(2), 241-256, p. 242.
[324] Clark, J. (1955). Competition: Static Models and Dynamic Aspects. The American Economic Review, 450-462, 457.

thereby integrating the theory of Schumpeter in the concept of effective competition.[325] As stated above, Schumpeter also viewed competition as an ongoing process and focused on competition caused by innovation.

Clark's dynamic theory of workable competition has resulted in an extensive ongoing debate in the economics literature.[326] As described by Sosnick, there is a basic difficulty with the concept of 'effective competition' that been suggested in economic literature. Hence, the different concepts of effective competition have not provided operational criteria capable of being applied concretely.[327]

One of those who took part in the discussion of effective competition was Markham, who highlighted that most definitions of workable competition have been patterned largely after the traditional definition of perfect competition. Hence, the definitions consist of listing a set of conditions the fulfillment of which determines whether or not a specific industry is to be judged as workably competitive.

However, in the view of Markham, none of these definitions present challenging difficulties as long as their application is limited to near-perfectly competitive industries and well-defined market areas.[328] Subsequently, Markham suggested the following definition for effective competition:

> *"An industry may be judged to be workably competitive when, after the structural characteristics of its market and the dynamic forces that shaped them have been thoroughly examined, there is no clearly indicated change than can be effected through public policy measures that would result in greater social gains than social losses."*[329]

Hence, Markham found that a possible alternative approach to the concept of workable competition may be one that shifts the emphasis from a set of specific structural characteristics to an appraisal of a particular overall performance of an industry. However, Markham does not specify what is meant

[325] See Stigler, G. (1957). Perfect Competition, Historically Contemplated. Journal of Political Economy, 65(1); Sosnick, S. (1958). A Critique of Concepts of Workable Competition. The Quarterly Journal of Economics, 72(3), 380-423; Sosnick, S. (1968). Toward a Concrete Concept of Effective Competition. American Journal of Agricultural Economics, 50(4), 827-853; and Markham, J. W. (1950). An Alternative Approach to the Concept of Workable Competition. The American Economic Review Vol. 40, No. 3, June 1950, 349-361.
[326] Hildebrand, D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 107.
[327] Sosnick, S. (1968). Toward a Concrete Concept of Effective Competition. American Journal of Agricultural Economics, 50(4), 827-853, p. 827.
[328] Markham, J. W. (1950). An Alternative Approach to the Concept of Workable Competition. The American Economic Review Vol. 40, No. 3, Jun., 1950, 349-361, p. 350.
[329] Markham, J. W. (1950). An Alternative Approach to the Concept of Workable Competition. The American Economic Review Vol. 40, No. 3, Jun., 1950, pp. 349-361, p. 361.

by social gains and social losses. It is conceivable that this is a reference to neoclassical theory and an expression of the loss of welfare, as explained in connection with the model of monopoly. In addition, Markham states that the definition avoids the pitfall of listing specific market conditions that can have a very limited general applicability.[330] Currently, no consensus has been reached as to which of many potential criteria that should be used to determine competition to be considered effective. Hence, the concept of effective competition may not be capable of being applied concretely. However, as highlighted by Markham, effective competition may be seen as an alternative to identifying specific structural criteria by which to constitute effectiveness or workability. Although there is uncertainty regarding the concept of effective competition, it must be considered as a result of a dynamic process. Competition can occur on the basis of both price and product quality.[331] Despite the fact that it is difficult to define the concept of effective competition and how this should be assessed, the concept is often used in public procurement law and in competition law.[332] As will be analysed later in this thesis, the concept of effective competition will in particular play a key role when it comes to analysing the objective of both sets of rules.

4.3 Summary of Findings

The dynamic view of competition considers competition as a result of a dynamic process. The dynamic aspects of competition show that competition may also be of importance for innovation, and that companies who are under competitive pressure will have more of an incentive to innovate and gain market share from competitors. Furthermore, the concept of workable or effective competition is applied as an attempt to go beyond the model of perfect competition. However, no consensus has been reached as to which of many potential criteria that should be used to determine competition to be considered workable or effective. Even though there is uncertainty regarding the concept of workable or effective competition, this concept is also applied in competition law and in case law of the EU Courts.

[330] Ibid, p. 361.
[331] As described in connection with imperfect competition and oligopoly competition.
[332] See Chapter 4 where the concept of effective competition is analysed from both a procurement law and a competition law perspective.

5 Introduction to the Effects of Collaboration and Competition

In this section, there will be an analysis of the expected effects on competition from collaborations between economic operators bidding on public contracts. In the following, the effects of bidding consortia and subcontracting will be the focus of the analysis, and there will thus not be looked closer at reliance on the capacities of other entities. The reason for this is that no economic theory has been identified in which this form of collaboration is analysed.

Auction theory will be used for a large part of the analysis to determine the expected effects of these collaborations. Therefore, the section will start out with an introduction to the use of auction theory in order to explain public tenders and the assumptions that lie behind the further analyses.

5.1 Application of Auction Theory to Explain Public Tenders

Auction theory will be applied to understand public tenders. An auction can be explained as a market institution with an explicit set of rules for determining resource allocation and prices on the basis of incoming bids from market participants.[333] In this connection, the tender situation can be perceived as an auction where the economic operators are competing for the right to sell their goods or services to the contracting authority.[334] However, the auction models described in auction theory will typically proceed in a different way than the process of public tenders. Therefore, there are some models within auction theory that should be translated, for example, from an auction perspective, where the highest bidder wins the contract, into the public tender perspective, where the economic operators with the lowest price bid wins the public contract.

As previously seen, economic models are built on assumptions. These assumptions will be explained before the models are applied. There are different types of auctions, and the assumptions will vary depending on the auction type. Later in this section, it will be determined which type that best reflects the public tender situation.[335] Auctions are often used by a monopolist (e.g. an individual selling a unique work of art), or a monopsonist, which can be a contracting authority tendering out a public

[333] McAfee, R. P. and McMillan, J. (1987). Auctions and Bidding. Journal of Economic Literature, Vol. 25, No. 2, 699-738, p. 701.
[334] Krishna, V. (2002). Auction Theory. Academic Press (first ed.), pp. 1-2.
[335] For an introduction to the four standard auction types, see Klemperer, P (1999). Auction Theory: A Guide to Literature. Journal of Economic Surveys, Volume 13, No. 3, 227-286, pp. 231-232; McAfee, R. P. and McMillan, J. (1987). Auctions and Bidding. Journal of Economic Literature, Vol. 25, No. 2, 699- 738, p. 702.

contract.[336] In auction theory, it is therefore presumed that there is monopoly or monopsony on the market.[337]

Accordingly, auction theory sidesteps such bargaining problems by somewhat presuming that the monopolist or monopsonist has all of the bargaining power. Moreover, it is assumed that the organizers of the auctions have the ability to commit themselves in advance.[338] There are many ways in which commitment can be achieved, but in the case of public procurement, the contracting authority are required to follow the procedures that are set out in the Public Procurement Directive, which then can be considered a commitment.[339]

The type of auction that characterises the public tender procedure the best is called a 'first-price sealed-bid auction'.[340] In such situation, each bidder submits sealed bids without seeing the bids of the others, and the object is then sold to the bidder who has made the highest bid. This model needs to be translated into the public tender perspective where the economic operators submit bids and the lowest bid wins and receives the price of fulfilling the public contract on behalf of the contracting authority[341]

In auction theory, a distinction is made between auctions of private values and common values.[342] In this connection, it is necessary to determine whether a tender situation is best described by the private or the common values model in order to deduce the effects of collaboration between economic operators in the competition for public contracts. This is because the placement of bids by the bidders depends on the information they have available. The bidders submit bids that are functions of their valuations of the item for sale.[343] The estimation of an asset value by a buyer is only affected by their own perceptions of its value, and not by the perceptions of others, and the buyers are therefore willing to pay up to this valuation.[344] Hence, in a public tender situation, this would mean that the economic

[336] McAfee, R. P. and McMillan, J. (1987). Auctions and Bidding. Journal of Economic Literature, Vol. 25, No. 2, 699-738, p. 703.
[337] Monopoly was introduced in section 3.2 of this chapter. A monopsony is a market condition in which there is only one buyer; the monopsonist. Therefore, the difference between monopoly and monopsony is that a single buyer is able to fully dominate a monopsonized market while an individual seller only controls a monopolized market.
[338] McAfee, R. P. and McMillan, J. (1987). Auctions and Bidding. Journal of Economic Literature, Vol. 25, No. 2, 699-738, p. 703.
[339] Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC.
[340] Klemperer, P (1999). Auction Theory: A Guide to Literature. Journal of Economic Surveys, Volume 13, No. 3, 227-286, p. 231.
[341] As stated above, a public contract may also be awarded based on award criteria other than that of the lowest price bid.
[342] Krishna, V. (2002). Auction Theory. Academic Press (first ed.), p. 3.
[343] McAfee, R. P. and McMillan, J. (1987). Auctions and Bidding. Journal of Economic Literature, Vol. 25, No. 2, 699-738, p. 703.
[344] Bulow, J., & Klemperer, P. (2002). Prices and the Winner's Curse. The RAND Journal of Economics, 33(1), 1-21, p. 1.

operators would submit bids on the public contracts as functions of their own valuations of the contract, and the contracting authority would pay the price up to the own valuation of the public contract.

In private values auctions, bidders know with certainty their own value for the object in question but are left uncertain about the valuations of others. By contrast, common values auctions pertain to situations in which the object for sale is worth the same to everyone, but where bidders have different private information about its true value.[345] Thus, in both models there is presence of asymmetric information.[346] Private values and common values auctions are each other's opposing extremes, but almost no real-world situation is exclusively common values or private values.[347] Most assets have both a private values and a common values element.[348]

The tendered public contracts will vary greatly in scope, and the different types of contracts will also differ substantially in their degree of private values and/or common values components. An example of this is that both common values and private values components are important in auctions for highway and bridge construction contracts, while auctions of more homogeneous goods, such as road paving contracts are predominantly characterized as a private value auction.[349] Hence, the tendered public contracts are likely to contain aspects of both private values and common values components simultaneously.[350] In the public procurement situation, the valuations of economic operators may have both private and common value components, where uncertainty about future input prices could drive common values but differences in input efficiency across firms could drive private values.[351] This thesis therefore builds upon previous economic research by considering a model where valuations by bidders have both private and common value components.

Furthermore, although there is either monopoly or monopsony on one side of the public procurement market, this does not mean that the seller can extract all of the gains from the trade due to its control of the bargaining power. The contracting authority does not know any of the valuations

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345 Klemperer, P. (1999). Auction Theory: A Guide to Literature. Journal of Economic Surveys, Volume 13, No. 3, 227-286, p. 232.
346 In the literature, asymmetric information is the most crucial element of the auction problem, because, in the case of perfect information, the auction problem is easily solved.
347 Goeree, J. K. and Offerman, T. (2003). Competitive Bidding in Auctions with Private and Common Values. The Economic Journal, Vol. 113, No. 489, 598-613, p. 598.
348 Bulow, J., & Klemperer, P. (2002). Prices and the Winner's Curse. The RAND Journal of Economics, 33(1), 1-21, p. 1.
349 Hong, H., & Shum, M. (2002). Increasing Competition and the Winner's Curse: Evidence from Procurement. The Review of Economic Studies, 69(4), 871-898, p. 872.
350 McAfee, R. P. and McMillan, J. (1987). Auctions and Bidding. Journal of Economic Literature, Vol. 25, No. 2, 699-738, p. 704.
351 Hong, H., & Shum, M. (2002). Increasing Competition and the Winner's Curse: Evidence from Procurement. The Review of Economic Studies, 69(4), 871-898, p. 873.

by the bidders of the item for sale. As a result, the bargaining ability is affected by the presence of asymmetry of information and the ability of the seller to extract surplus is more limited.

Consequently, despite the assumption in auction theory that contracting authorities should be considered monopolist, the contracting authorities cannot exploit the competition among the economic operators to lower the prices because of the asymmetry of information. Furthermore, as described in connection with price competition, the economic operators will be presumed not to set prices equal to the competitive price due to capacity constraints, also called the 'Edgeworth paradox'.

5.2 Effects of Bidding Consortia

5.2.1 Anti-Competitive Effects of Bidding Consortia

The traditional objection to joint bidding is that it may suppress competition by reducing the total number of bids tendered.[352] An increase in competition will generally lead to more aggressive bidding, as each bidder will attempt to maintain their chances of winning against more rivals.[353] In other words, the reduction in the number of independent bidders, and thus the number of independent bids, may have the potential consequences of reduced competition and increased prices. In auction theory, this effect is referred to as the *competition effect*.[354]

The competition effect was articulated by Markham, who described the effects of joint bidding in the study of the auction market for offshore petroleum tracts:

> *"(…) [W]here joint bids are simply substituted for independent solo bids, they reduce the total number of bids. That is, if all the participating firms bid individually on a given tract in any event, joint bids would simply be substituted for a larger number of independent solo bids. If the resulting reduction in total bids is substantial, competition may be adversely affected."*[355]

Hence, when economic operators form a bidding consortium and make a joint bid on a public contract, the competition that could have occurred between these parties might be eliminated for the

[352] Smith. J. L. (1983). Joint Bidding, Collusion, and Bid Clustering in Competitive Auctions. Southern Economic Journal, Vol. 50, No. 2, 355-368, p. 355.
[353] Hong, H., & Shum, M. (2002). Increasing Competition and the Winner's Curse: Evidence from Procurement. The Review of Economic Studies, 69(4), 871-898, p. 871.
[354] Mares, V. and Shor, M. (2003). Joint Bidding in Common Value Auctions: Theory and Evidence. Available at https://econwpa.ub.uni-muenchen.de/econ-wp/game/papers/0305/0305001.pdf, p. 4.
[355] Markham, J. W. and Papanek, G. F. (1970). "The Competitive Effects of Joint Bidding by Oil Companies for Offshore Oil Leases," in Industrial Organization and Economic Development. Houghton Mifflin Company, p. 119.

contract in question. Therefore, the competition effect may lead to a lower number of competitors, higher market power for the economic operators that are members of the consortium and thus higher prices for the contracting authority. Although Markham stated that the reduction in the number of individual bids resulting from consortium formation must be substantial before there is a negative effect on competition,[356] Markham did not specify the extent to which such a reduction may be considered substantial. Accordingly, it must be assumed that there must be a substantial reduction in total bids before the competition effect will be present in public tenders. In recent research, it has also been found that, when a member of a consortium also could have bid solo, the arrangement decreases the number of bidders for the tender and can be anti-competitive.[357]

However, some empirical studies claim that, in specific markets, joint bidding is not necessarily associated with a reduction in the total number of bids, which is a necessary measure for the competition effect to apply.[358] One example of this is a study on firms' bidding behaviour in auctions for development initiatives in Hong Kong, which suggests that joint bidding, in this oligopolistic market, enhances competition by allowing large firms to act strategically by pooling their resources and thus act aggressively in the competition with their top competitors.[359] The findings in these studies suggest that there factors that are favourable for positive effects of bidding consortia, which will be analysed in section 5.2.2 in this chapter.

The impact of competition on prices in public procurement has also been the subject of empirical studies. It has been found that the number of bids in a tender plays a significant role in the context of the overall efficiency of a project.[360] Furthermore, the number of bidders influences the relative difference between the expected price and the award price. Moreover, there is a need for a sufficient number of applicants to participate in the tender procedure in order to achieve competitive prices.[361]

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[356] Markham, J. W. and Papanek, G. F. (1970). "The Competitive Effects of Joint Bidding by Oil Companies for Offshore Oil Leases," in Industrial Organization and Economic Development. Houghton Mifflin Company, p. 119; Levin, D. (2004). The Competitiveness of Joint Bidding in Multi-Unit Uniform-Price Auctions. The RAND Journal of Economics, 35(2), 373-385, p. 373.
[357] Bouckaert, J. M. C., & Van Moer, G. (2021). Joint bidding and horizontal subcontracting. International Journal of Industrial Organization 76(2):102727, p. 27.
[358] Levin, D. (2004). The Competitiveness of Joint Bidding in Multi-Unit Uniform-Price Auctions. The RAND Journal of Economics, 35(2), 373-385, pp. 373-374.
[359] See Shen, J., Pretorius, F, and Li, X. (2019). Does Joint Bidding Reduce Competition? Evidence from Hong Kong Land Auctions. The Journal of Real Estate Finance and Economics volume 58, 111–132.
[360] Hanák, T. and Muchová, P. (2015). Impact of competition on prices in public sector procurement. Procedia Computer Science 64, 729 – 735, p. 734.
[361] Ibid, p. 729.

Keeping these valid points in mind, this study supports that there is a correlation between the number of applicants to participate in the tender procedure and the prices in public tenders.

Another identified negative effect of bidding consortia is coordinated effects. Coordinated effects can arise, as consortia may either facilitate the operation of an existing cartel or favour the emergence of a new one. Joint bidding may entail a lower than average number of competitors submitting bids on the public contract, advocates the possibility of collusion, so colluding bidders with first-price sealed bidding can be expected to arrange for ring members who are not chosen as the winning bidders to submit their complementary bids to disguise the presence of the cartel.[362] Also, the higher the number of collusive firms, the smaller is the share of the profit they will receive or put another way, the profit per firm resulting from collusion decreases as the number of firms increases.[363] Hence, the gains from deviating from a collusive agreement increase as the number of competitors increase, and an economic operator could thus steal profit by undercutting the collusive price.[364] The higher the number of competitors in a market, the more difficult it becomes for economic operators to coordinate and reach an agreement on the market shares, and prices also become more complex as the number of firms increases.[365]

Joint bidding for public contracts favours the exchange of information between the economic operators and the scope of information provided can also extend beyond the minimum amount necessary to establish the collaboration within a consortium.[366] This has also been highlighted by Thomas stating:

> *"The undertakings will, at the very least, obtain an indication of the prices charged by each other, likely including detailed price components; they will learn about the bidding strategies of the other party; and they will get to know the personalities of the business managers with whom they will be expected to compete in subsequent contracts. Depending on the facts, preparing the joint bid may also involve the*

[362] Kovacic, W., Marshall, R., Marx, L., & Raiff, M. (2006). Bidding rings and the design of anti-collusive measures for auctions and procurements. In N. Dimitri, G. Piga, & G. Spagnolo (Eds.), Handbook of Procurement (pp. 381-411). Cambridge: Cambridge University Press, p. 399.
[363] Dolbear, F. T., L. B. Lave, G. Bowman, A. Lieberman, E. Prescott, F. Rueter, and R. Sherman (1968). Collusion in Oligopoly: An Experiment on the Effect of Numbers and Information. The Quarterly Journal of Economics 82, number 2, p. 243.
[364] Albano, G., Buccirossi, P., Spagnolo, G., & Zanza, M. (2006). Preventing collusion in procurement. In N. Dimitri, G. Piga, & G. Spagnolo (Eds.), Handbook of Procurement (pp. 347-380). Cambridge: Cambridge University Press, p. 350.
[365] Albano, G., Buccirossi, P., Spagnolo, G., & Zanza, M. (2006). Preventing collusion in procurement. In N. Dimitri, G. Piga, & G. Spagnolo (Eds.), Handbook of Procurement (pp. 347-380). Cambridge: Cambridge University Press, p. 350.
[366] Kuzma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 138

> *exchange of non-public information about each party's costs, profit requirements, technological capabilities, or other elements affecting the competitive content of their tendering activities. Thus, the joint bid will not only remove competition between the undertakings for the contract in question, but will also undermine competition between them in their other activities throughout the relevant market.*[367]

Accordingly, it is emphasized that joint bidding may not exclusively remove the competition between the undertakings competing for the contract in question. The exchange of information that could arise as a result of joint bidding may extend beyond the tender in question and affect the competition on the relevant market. Furthermore, it should be highlighted that public procurement markets have specific characteristics, which make them more vulnerable to collusion compared to other markets.[368] Some have even argued that public procurement markets facilitate collusion.[369] Hence, public procurement markets usually have relatively stable tender patterns with frequently repeated award procedures, similar quantities, and standard product or service specifications that do not undergo major changes as compared to previous procedures. Further, this predictability of demand may facilitate illicit market sharing among economic operators.[370] There, it can be discussed whether the risk of collusion in public procurement markets is intensified by the collaboration between economic operators regarding joint bidding.

5.2.2 Beneficial Effects of Bidding Consortia

As stated above, joint bidding will not always be associated with a reduction in the total number of bids. Joint bidding may also give rise to the same number of bids occurring or perhaps even more bids than when no joint bid was submitted. As an example, this can happen when two or more economic operators decide to pool their capitals and resources in order to break down the barriers to entry that may have prevented them from submitting bids individually. There may be risks and financial burdens associated with the fulfilment of the tendered public contract that prevent the economic operators from attempting to carry out the public contract on their own.[371] Hence, joint

[367] Thomas, C. (2015). Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law. Journal of European Competition Law & Practice, 2015, Vol. 6, No. 9, p. 634.
[368] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, C(2021) 1631 final, para 1.2.
[369] Albano, G., Buccirossi, P., Spagnolo, G., & Zanza, M. (2006). Preventing collusion in procurement. In N. Dimitri, G. Piga, & G. Spagnolo (Eds.), Handbook of Procurement (pp. 347-380). Cambridge: Cambridge University Press, p. 348.
[370] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, C(2021) 1631 final, para 1.2.
[371] Smith, James L. (1983). Joint Bidding, Collusion, and Bid Clustering in Competitive Auctions. Southern Economic Journal 50, no. 2, 355-68, p. 356.

bidding can encourage entry in the sense that more economic operators are able to bid, which also allows smaller firms access to enter.[372] Levin exemplifies this below:

> *"Consider two firms that participate in a simultaneous auction of two identical items. Perhaps each firm would bid individually on only one of the two items-with individual selections determined by random choice. Bidding separately, each firm would then bear a 50 percent chance of meeting the other in competition. Alternatively, the firms could form a consortium and bid jointly on both items, thereby circumventing all competition. In either case the total number of bids is two.*"[373]

Accordingly, since joint bidding can either raise or lower the number of bids in public tenders, there should not be an exclusive focus on the risk that joint bids will make a reduction in the total number of bids. This view has also become more prominent in more recent economics research.

It has been found that there are also pro-competitive arguments for joint bidding. Bidding consortia may enhance competition if firms can exploit synergies from combining the resources of individual firms in the consortium, and then member of the bidding consortia will be able to tender more aggressively. In auction theory, this effect is referred to as the *information-pooling-effect*.[374] A bidding consortium allows economic operators to pool the resources that are crucial for formulating a valid bid. They may share information about the likely value of the contract, jointly bear fixed costs, and even combine production facilities.[375] Hence, the effects of bidding consortia may have the practical consequence of enabling economic operators to exploit synergies by combining the resources of individual firms in a consortium, which will allow those members to be able to tender more aggressively.

Since the winner of an auction likely has the most optimistic estimate, outbidding fewer competitors implies that there is a lower chance that one's estimate is overly optimistic, which decreases the likelihood of one overbidding and thus end up receiving *the winner's curse*.[376] The winner's curse arises when the winner tends to be the bidder with the most overly optimistic information concerning the

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372 Moody, C., & Kruvant, W. (1988). Joint Bidding, Entry, and the Price of OCS Leases. The RAND Journal of Economics, 19(2), 276-284, p. 277.
373 Levin, D. (2004). The Competitiveness of Joint Bidding in Multi-Unit Uniform-Price Auctions. The RAND Journal of Economics, 35(2), 373-385, pp. 355-356.
374 Mares, V., & Shor, M. (2008). Industry Concentration in Common Value Auctions: Theory and Evidence. Economic Theory, 35(1), 37-56., pp. 39 & 41.
375 Albano, G. L., Spagnolo, G., and Zanza, M. (2009). Regulating Joint Bidding in Public Procurement. Journal of Competition Law & Economics, Volume 5, Issue 2, June 2009, 335–360, p. 17.
376 Mares, V. and Shor, M. (2003). Joint Bidding in Common Value Auctions: Theory and Evidence. Available at https://econwpa.ub.uni-muenchen.de/econ-wp/game/papers/0305/0305001.pdf, p. 1.

object's value.[377] In a private values auction, the bidders will follow the same strategy regardless of the number of bidders, and they will bid up to their true value.[378] However, in common values auctions, bidders will bid more aggressively when there are fewer of them.[379] Hence, the winner's curse is a judgmental failure that may occur in common values auctions.[380] As stated above, the public tender situation may have both private value and common value elements. Therefore, a consideration for the winner's curse will be relevant in certain public tender situation. The phenomenon of the winner's curse may occur in public tenders, and the economic operators may suffer a loss after being awarded the public contract in the public tender, which is what happens when the awarded price is smaller than the actual costs of carrying out the contract, including the bearing of risks that may be entailed by the contract. The winner´s curse becomes more serious as the number of potential bidder increases in which rational bidders will bid less aggressively, which is also referred to as the winner's curse effect.[381] Hence, the economic operators must bid more conservatively depending on the number of other bidders, while winning implies a greater winner's curse. Hence, the reduction in the number of bidders mitigates the effects of the winner's curse.[382]

Joint bidding may also cause certain benefits from economies of scale and scope, which can be beneficial for both economic operators and contracting authorities. Furthermore, joint bidding also facilitates a diversification of risk in the bidding consortium. A bidding consortium can facilitate that economic operators can pool the individual risks linked to unforeseeable events and thus make it more feasible that the public contract is going to be carried out successfully.[383] This may also lead to a moderation of the financial obstacles to bidding for economic operators that do not have the sufficient capital to bid individually.[384]

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377 Kagel, J., & Levin, D. (1986). The Winner's Curse and Public Information in Common Value Auctions. The American Economic Review, 76(5), 894-920, p. 894.

378 The winner's curse is a tendency for the winning bid in an auction to exceed the true worth of the object's value. Therefore, the winner's curse not arise in private values auctions.

379 Hong, H., & Shum, M. (2002). Increasing Competition and the Winner's Curse: Evidence from Procurement. The Review of Economic Studies, 69(4), 871-898, pp. 871-872.

380 Kagel, J., & Levin, D. (1986). The Winner's Curse and Public Information in Common Value Auctions. The American Economic Review, 76(5), 894-920, p. 894.

381 Hong, H., & Shum, M. (2002). Increasing Competition and the Winner's Curse: Evidence from Procurement. The Review of Economic Studies, 69(4), 871-898, p. 872.

382 See, Pinkse, J., & Tan, G. (2005). The Affiliation Effect in First-Price Auctions. Econometrica, 73(1), 263-277; Bulow, J., & Klemperer, P. (2002). Prices and the Winner's Curse. The RAND Journal of Economics, 33(1), 1-21.

383 Albano, G. L., Spagnolo, G., and Zanza, M. (2009). Regulating Joint Bidding in Public Procurement. Journal of Competition Law & Economics, Volume 5, Issue 2, June 2009, 335–360, p. 352.

384Smith, J. (1983). Joint Bidding, Collusion, and Bid Clustering in Competitive Auctions. Southern Economic Journal, 50(2), 355-368, p. 356; Gaver, K., & Zimmerman, J. (1977). An Analysis of Competitive Bidding on BART Contracts. The Journal of Business, 50 (3), 279-295, p. 291.

5.3 Summary of Findings

In conclusion, it should be emphasised that the traditional objection to joint bidding is that it may suppress competition by reducing the total number of bids tendered. However, there must be a substantial reduction in total bids before the competition effect will be present in public tenders. Furthermore, empirical studies have found a correlation between the number of applicants to participate in the tender procedure and the bid prices in public tenders. Hence, there is a need for a sufficient number of applicants to participate in the tender procedure to achieve competitive prices. Another negative effect of bidding consortia is the coordinated effect, which facilitates the operation of an existing cartel or favours the emergence of a new one. Joint bidding may also favours the exchange of information between the economic operators and the scope of information provided can also extend beyond the minimum amount necessary to establish the collaboration within a consortium.

However, it has been highlighted that there also may be positive effects associated with bidding consortia. Joint bidding may also entail bidding procedures with the same or even a higher amount of bids than those bidding procedures with no joint bidding. Furthermore, bidding consortia may also enhance the competition if the firms can exploit the synergies from combining the resources of individual firms in the consortium to which it then becomes possible to tender more aggressively. Another positive effect of bidding consortia is that the reduction in the number of total bidders mitigates the effects of the winner's curse. Additionally, joint bidding may also cause certain benefits from economies of scale and scope, which can be beneficial for both economic operators and contracting authorities. Furthermore, joint bidding also facilitates a diversification of risk in the bidding consortium, and therefore can bidding consortium facilitate that economic operators can pool the individual risks linked to unforeseeable events and thus make it more feasible that the public contract is going to be carried out successfully.

5.4 Effects of Subcontracting

5.4.1 Anti-Competitive Effects of Subcontracting

Subcontracting can lead to some of the same anti-competitive effects as seen with bidding consortia. When the economic operator enters into a subcontracting agreement with a subcontractor and makes a bid on a public contract, the competition that could have occurred between these parties might have been eliminated for the contract in question. This will be the case if the subcontractor is able to bid on the public contract individually. Therefore, the competition effect may lead to a lower number of

competitors as well as higher market power for the economic operators that are members of the subcontracting agreement, and thus higher prices for the contracting authority, see section 5.2.1 in this chapter. Furthermore, subcontracting can also favour the exchange of information between the economic operator and the subcontractor where the scope of information provided can extend beyond the minimum amount necessary to establish the subcontracting agreement, see section 5.2.1 of this chapter.

Another negative anti-competitive effect of subcontracting can be problems with foreclosure of other supplies or other buyers in a supply chain and, hence, the raising of barriers to entry and expansion.[385] In public tenders, there may be situations in which the tender requirements entail the need to make use of certain subcontractors. Therefore, the exclusive contracts between the economic operator and the subcontractor may lead to a foreclosure of other economic operators for the public contract and, hence, cause anti-competitive effects.

5.4.2 Beneficial Effects of Subcontracting

It is widely discussed in the economics literature what positive effects that can be expected from subcontracting. Subcontracting has been found to improve efficiency by decreasing the procurement costs, stimulating participation and technological capacity.[386] Vertical subcontracting can be employed to decrease transaction costs of the parties and reduce the *double marginalization problem.*[387] The perception behind double marginalization is that if both producers and distributors add mark-ups,[388] this will result in a double mark-up and, hence, to excessive prices. The double marginalization problem will typically be considered a problem if both producers and distributors have market power.

[385] Hughes, M., Foss, C and Ross, K. (2010). The Economic Assessment of Vertical restraints under UK and EC Competition law. European Competition Law Review, 424—433.
[386] Spiegel, Y. (1993). Horizontal subcontracting. Rand Journal of Economics, 24(4), 570–590; Gale, L., Hausch, D. B., & Stegeman, M. (2000). Sequential procurement with subcontracting. International Economic Review, 41(4), 989–1020; Atamtürk, A., & Hochbaum, S. (2001). Capacity acquisition, subcontracting, and lot sizing source. Management Science, 47(8), 1081–1100; De Silva, D. G., Kosmopouloub, G., & Lamarcheb, C. (2012). Survival of contractors with previous subcontracting experience. Economics Letters, 117, 7–9; Gil, R. (2009). Revenue sharing distortions and vertical integration in the movie industry. The Journal of Law, Economics, & Organization, 25(2), 579–610; Moretti, L., & Valbonesi, P. (2015). Firms' qualifications and subcontracting in public procurement: An empirical investigation. The Journal of Law, Economics, and Organization, 31(3), 568–598; Bouckaert, J. M. C., & Van Moer, G. (2017). Horizontal subcontracting and investment in idle dispatchable power plants. International Journal of Industrial Organization, 52, 307–332.
[387] See for example Gaudet, G. and Long, V. N. (1996). Vertical Integration, Foreclosure, and profits in the Presence of Double Marginalization. Journal of Economics & Management Strategy, Wiley Blackwell, vol. 5(3), 409—432, p. 427.
[388] Markup is the difference between the selling price and the cost of the product/service.

Hence, vertical subcontracting between the economic operator and the subcontractor can benefit from being in the same supply chain, which ultimately can help them bring down the bidding price.[389]

Furthermore, vertical subcontracting can also solve the *hold-up problem*. The hold-up problem or commitment problem is central to the theory of incomplete contracts.[390] The hold-up problem arises when one party makes a sunk, relationship-specific investment and then engages in bargaining with an economic trading partner.[391] Williamson distinguishes between credible threats and credible commitments. These share common characteristics in that they occur in connection with the irreversible costs that arise as a result of asset-specific investments.[392] However, they differ in that credible commitments are made to support a particular transaction and to ensure the exchange of services, while credible threats occur due to conflicts and rivalry.[393] A credible threat can consist of a convincing presumption that an economic operator will carry out a hold-up. A credible commitment can be a subcontracting agreement between the economic operator and the subcontractor.

5.4.3 Ex-Ante Subcontracting and Ex-Post Subcontracting

The effects of subcontracting on competition depend on the timing of the subcontracting. There may appear ex-ante subcontracting and ex-post subcontracting in public tenders. This analysis will use the following definition of these subcontract-timing concepts. In the case of ex-ante subcontracting, the economic operator signs a subcontracting agreement with a subcontractor *before bidding on the public contract*, whereas ex-post subcontracting is present when the economic operators, *after the award of the tendered contract* with the contracting, set a subcontracting agreement with a subcontractor.

The competitive effects of contracts are often studied in the modelling approach of two-stage models in which contracts are agreed upon in the first stage and competition takes place in the second.[394] This sequential approach may be suitable to assess subcontracting if economic operators set the terms

[389] Hamilton, J. L., & Mqasqas, I. (1996). Double Marginalization and Vertical Integration: New Lessons from Extensions of the Classic Case. Southern Economic Journal, 62(3), 567–584, p. 567.
[390] The hold-up problem as first described by Williamson see Williamson, O. (1983). Credible Commitments: Using Hostages to Support Exchange. The American Economic Review, 73(4), 519-540.
[391] Hermalin, B. E., & Katz, M. L. (2009). Information and the Hold-Up Problem. The RAND Journal of Economics, 40(3), 405–423, p. 405.
[392] Williamson, O. (1985). The Economic Institutions of Capitalism, p. 167.
[393] Williamson, O. (1983). Credible Commitments: Using Hostages to Support Exchange. The American Economic Review, 73(4), 519-540, p. 519.
[394] Spiegel, Y. (1993). Horizontal Subcontracting. The RAND Journal of Economics, 24(4), 570-590, p. 571. This approach has been seen in e.g. Brander, J., & Lewis, T. (1986). Oligopoly and Financial Structure: The Limited Liability Effect. The American Economic Review, 76(5), 956-970; Katz, M., & Shapiro, C. (1992). Product Introduction with Network Externalities. The Journal of Industrial Economics, 40(1), 55-83; Bouckaert, J. M. C., & Van Moer, G. (2021). Joint bidding and horizontal subcontracting. International Journal of Industrial Organization 76(2):102727.

for the subcontracting agreement before they compete for the public contract, which will be the case in ex-ante subcontracting.

However, the approach may not always be suitable. For example, when there is a considerable amount of uncertainty about the public contract, the economic operators may prefer to postpone their decisions about subcontracts until they actually win the public tender, which will be the case in ex-post subcontracting. Hence, the modelling approach of two-stage models will only apply to the subcontract timing of ex-ante subcontracting.

In the economics literature, it is emphasized that the buyer (the contracting authority) will be better off with bidders' ex-post subcontracting and, hence, worse off with their ex-ante subcontracting.[395] It has been found that the timing of subcontracting has a fundamental impact on the bid price. According to Deng and Xu, a situation with ex-ante subcontracting will increase the bid price, while ex-post subcontracting will decrease the bid price. The main reason for these differences are that:

> *"(...) the ex ante subcontracting only raises two bidders' reservation profits and softens the bidding competition; the ex post subcontracting, however, also lowers bidders' fulfillment costs and intensifies the bidding competition between two bidders. This is contrary to our traditional view that cooperation would reduce the competition intensity and hence increase bidders' profits."*[396]

Hence, ex-ante subcontracting softens the bidding competition, while the ex-post subcontracting intensifies the bidding competition.[397] This will entail that the effects of subcontracting depend on the timing of subcontracting, and it will thus be in the interest of the contracting authority that there is ex-post subcontracting in place.

5.4.4 Summary of Findings

In conclusion, both positive and negative effect of subcontracting can be identified. On the one hand, subcontracting can lead to some of the same anti-competitive effects as seen with bidding consortia. Hence, subcontracting in public tenders may lead to a lower number of competitors as well as higher market power for the economic operators that are members of the subcontracting agreement, and thus higher prices for the contracting authority. Furthermore, subcontracting can also favour the

[395] Deng, S. and Xu, J. (2020). Ex ante and Ex post Subcontracting between Two Competing Bidders. Asia-Pacific Journal of Operational Research, Vol. 37, No. 01, 1950035, p. 3
[396] Ibid, p. 20.
[397] The overall same conclusion is seen in Gale, I. L., Hausch, D. B. and Stegeman, M. (2000). Sequential procurement with subcontracting. International Economic Review 41 (4), 989–1020.

exchange of information between the economic operator and the subcontractor in situations where the scope of information provided can extend beyond the minimum amount necessary to establish the subcontracting agreement. On the other hand, subcontracting can improve efficiency by decreasing the procurement costs, stimulating participation and increasing the technological capacity. Furthermore, vertical subcontracting can be employed to decrease the transaction costs of the parties and reduce the double marginalization problem and the hold-up problem.

The effects of subcontracting on competition can be affected by the timing of the subcontracting. It is found that ex-ante subcontracting softens the bidding competition, while the ex-post subcontracting intensifies the bidding competition. This will entail that the effects of subcontracting depend on the timing of subcontracting, and it is thus in the interest of the contracting authority that there is ex-post subcontracting in place.

6 Concluding Remarks

This chapter examined what effects collaboration between economic operators in the competition for public contracts can have on competition in the internal market. The first thing that should be highlighted in this context is that there are different views on competition. The static view of competition focus on the structural situation of multiple firms competing in a market, where the presence of competition affects both the quantity produced as well as the price of the products and services. Hence, the static view of competition emphasizes the importance of competition between the economic operators because competition affects the prices of the goods and services paid by the contracting authorities. Furthermore, individual actions of economic operators concerning price and output is likely to influence reactions from competitors and economic operators knowing their own current and past actions will be treated by rivals as signals of their costs and intentions. The price competition among economic operators may therefore be used as a strategic tool to either eliminate other economic operators from the competition for the public tender or to signal a lack of interest in the public contract in question. Thus, the offered prices by the economic operators to the contracting authorities in public tenders will not always be a reflection of the degree of competition, but the prices can also be used as tools to influence competition between the economic operators in public tenders.

In addition, there is also the dynamic view of competition that considers competition as a result of a dynamic process. The analysis of dynamic competition shows that competition may also be of importance for innovation, because economic operators who are under competitive pressure will have

more of an incentive to innovate and thereby gain market share from competitors. Hence, the presence of competition in public tenders can ensure innovation for the benefit of both the economic operators and the contracting authorities.

Bidding consortia in public tenders can lead to both positive and negative effects on competition. The traditional objection to joint bidding is that it may suppress competition by reducing the total number of bids tendered. A correlation has been found between the number of applicants to participate in the tender procedure and the bid prices in public tenders, and therefore there will be a need for a sufficient number of applicants to participate in the tender procedure to achieve competitive prices for the contracting authority. Another negative effect of bidding consortia is the coordinated effect, which facilitates the operation of an existing cartel or favours the emergence of a new one. Hence, the presence of cartels can restrict competition and thus increase the prices paid by contracting authorities.

Furthermore, bidding consortia can also lead to positive effects on competition. Bidding consortia may entail tender procedures with the same or even a higher amount of bids than those bidding procedures with no bidding consortia. Thus, this can result in bids with better quality or lower prices than the situation with no bidding consortia participating in public tenders. Also, bidding consortia may also enhance the competition if the firms can exploit the synergies from combining the resources of individual economic operators in the consortium to which it then becomes possible to tender more aggressively. Another positive effect of bidding consortia is that the reduction in the number of total bidders mitigates the effects of the winner's curse.

Subcontracting in public tenders can lead to both positive and negative effects on competition. The use of subcontracting can lead to some of the same anti-competitive effects as seen with bidding consortia. Hence, subcontracting in public tenders may lead to a lower number of competitors and higher market power for the members of the subcontracting agreement and thus leading to higher prices paid by the contracting authority. Furthermore, subcontracting can also favour the exchange of information between the economic operator and the subcontractor where the scope of information provided can extend beyond the minimum amount necessary to establish the subcontracting agreement. Moreover, subcontracting can also improve efficiency by decreasing the procurement costs and stimulating participation and technological capacity. Vertical subcontracting may entail a

decrease in transactions costs of the parties and reduce the double marginalization problem and the hold-up problem.

Finally, the effects of subcontracting on competition can also be affected by the timing of the subcontracting. It is found that ex ante subcontracting softens the bidding competition, while the ex post subcontracting intensifies the bidding competition. This will entail that the effects of subcontracting depends on the timing of subcontracting and it will be in interest of contracting authority that there is ex post subcontracting.

In conclusion, various effects of competition have been identified in this chapter. The collaborations between economic operators can both entail anti-competitive and pro-competitive effects on competition. The public procurement market constitutes a significant proportion of the economy in the EU and hence can be an important instrument to ensure the competition in the internal market. Therefore, collaborations between economic operators in the competition for public tenders can play a central role when it comes to ensuring competition on the internal market.

CHAPTER 4

Objectives, Means and Scope of the Rules

1 Introduction

This chapter will serve as the foundation for the legal analysis regarding the legal framework for collaborations between economic operators in the competition for public contracts. In a situation where economic operators decide to collaborate when tendering for a public contract, the public procurement rules and the competition rules can both provide the legal basis for an assessment of whether the collaboration can be considered legal or not. Therefore, the chapter will focus on the public procurement rules and the competition rules.

As described in Chapter 1, the ECJ interprets the wording of the EU provisions in order to clarify the legal situation and it often involves the legal context of the provisions. The ECJ applies the method of teleological interpretation in which the text of the provisions this is being interpreted according to its purpose of the EU law and the purposes of the EU Treaties. Therefore, it is considered particularly important to have some knowledge of the legal context and objectives of the public procurement rules as well as the competition rules in order to interpret these rules and apply the case law of the ECJ. Additionally, this chapter will also consider the subject matter and scope of the rules, as it is essential to know whom the rules are addressed to.

1.1 Outline

In the following, there will be a presentation of the legal context of the rules, which will be followed up by an analysis of their objectives. Focus will first be on the competition rules and subsequently the public procurement rules. This analysis will be structured so that there will be a focus on the same objectives of the rules, namely the internal market objective, which is followed up by a discussion of whether effective competition should be seen as an objective of the rules. Furthermore, this analysis will also include a discussion of the concept of effective competition. In the analysis of the public procurement rules, there will also be an analysis of whether there is a competition principle in the Public Sector Directive.

The chapter concludes with an analysis of the scope of the Public Sector Directive, which will be followed up by an analysis of the scope of application of the competition rules. In this part of the chapter, focus will be on the most important concepts when it comes to clarifying the subject matter and scope of the rules.

2 The Objectives of the Competition Rules

This section will investigate the objective of the competition rules, which is important for the interpretation of the rules. In this respect, the objectives of the rules must be clarified. Here the TFEU does not provide any specific objectives with regard to the competition law provisions,[398] and when it comes to determining the purpose of the rules, there exists a disagreement on what the rules in fact seek to achieve.[399]

2.1 The Legal Context of the Competition Rules

As stated above, the legal basis of the competition rules is to be found in Article 101 to 109 of the TFEU.

However, this is not the only place where 'competition' is addressed in the TFEU, as it also mentioned in the preamble of the TFEU:

> "*RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and* ***fair competition*** *(…).*"[400]

Furthermore, the objectives of the EU also highlight the importance of competition. Article 3(3) TFEU declares the objectives or activities of the EU, which is worded as follows:

> *"The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability****, a highly competitive social market economy****, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".*[401]

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398 See also Lianos, I., Korah, V., & Siciliani, P. (2019). Competition Law, Analysis, Cases, & Materials (first ed.). Oxford University Press, p. 86.

399 Jones, A., & Sufrin, B. (2019). EU competition law: Text, cases, and materials (seven ed.). Oxford University Press, P. 28. See also Parret, L. (2010). Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy, European Competition Journal, 6:2, pp. 339-376.

400 Emphasis added.

401 Emphasis added.

Accordingly, the EU shall create an internal market and work for sustainable development based on a balanced economic growth and price stability, a highly competitive social market economy, full employment and social progress, and with the euro as a single currency for the EU as an economic and monetary union. The achievement of an internal market is a central objective of the EU.[402] Furthermore, the efforts for a sustainable development in Europe is based on a highly competitive social market economy.

Article 119(1) TFEU also refers to competition, which is worded as follows:

> *For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with* ***the principle of an open market economy with free competition****.*[403]

The principle of an open market economy with free competition is repeated in Article 120 TFEU, and pursuant to this, the Member States shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, in compliance with the principles set out in Article 119 TFEU. Hence, Article 120 TFEU reiterated the principle of an open market economy with free competition and added a reference to the efficient allocation of resources.

Furthermore, the Protocol No. 27 on the Internal Market and Competition has been attached to the EU Treaties and is worded as follows: "(…) *[T]he internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted".* This statement has previously been found in Article 3(g) of the EC Treaty (Maastricht), and according to this, the activities of the EU shall include "*a system ensuring that competition in the internal market is not distorted*". Hence, the Lisbon Treaty has led to "*a system ensuring that competition in the internal market is not distorted"* that was embedded in the fundamental provisions of the EC Treaty to a Protocol annexed to the EU Treaties. According Article 51 TFEU, the Protocols and Annexes to the Treaties shall form an integral part thereof. Therefore, the Protocols have legally binding effects, yet legal scholars have discussed the legal effects of the replacement of Article 3(1)(g) EC, in substance, by a Protocol. Riley is one of scholars who

[402] The internal market is defined in Article 26(2) TFEU: The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.
[403] Emphasis added.

has taken part in the debate by presenting the view that this is far from being merely a minor technical adjustment and that this change most likely has a number of damaging consequences for competition law.[404] In this regard, Riley has made the following statement:

> *"No mere protocol can achieve the same interpretative status as the preamble and the first few articles. Any close examination of the case law demonstrates the fundamental nature of Article 3(1)(g) in making competition an objective of the Community legal order, most notably in Continental Can where the Court ruled that 'If Article 3(f) [now Article 3(1)(g)] provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires a fortiori that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless".*[405]

Accordingly, Riley points out that the consequence of this change could be that in the future, the ECJ may not take into consideration that the policy of ensuring that competition is not distorted, because it does not form a part of the provisions of the TFEU. However, the ECJ confirmed that the movement of Article 3(1)(g) EC, in substance, to Protocol No. 27 had no legal effect. In *Konkurrensverket v TeliaSonera*, the ECJ found that:

> *(…) Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon (…) is to include a system ensuring that competition is not distorted.*[406]

Hence, the ECJ reads the content of the Protocol together with the objective of establishing an internal market. Thus, the ECJ established that the Protocol forms a constitutive part of Article 3(3) TFEU. Protocol No. 27 on the Internal Market and Competition states that undistorted competition is part of the internal market. Thus, through the reference to the internal in Article 3(3) TFEU, competition policy is indirectly still present as a part of the objective of the EU.[407] As stated above, there are several references to competition made in the preamble and in the provisions of the TFEU. Pursuant to Article 3(3) TFEU, Article 119(1) TFEU, Article 120 TFEU, and Protocol 27, the EU's

[404] Riley, A. (2017). The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law. CEPS Policy Brief, No. 142, September 2007, p. 1.
[405] Ibid, p. 2.
[406] Case C-52/09, Konkurrensverket v TeliaSonera Sverige AB, EU:C:2011:83, para 20.
[407] Parret, L. (2010). Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy, European Competition Journal, 6:2, pp. 339-376, p. 344.

central task of establishing an internal market may be seen as a fundamental objective of competition law.

2.2 The Internal Market Objective

As stated in above, it is clear from the wording of Protocol 27 on the Internal Market and Competition that the function of EU competition law is to ensure that competition in the internal market is not distorted. The promotion of the internal market is a key objective for EU law in general and was obviously the focus of competition law from the start.[408]

The Parliament has also highlighted the internal market as a fundamental objective of the competition rules:[409]

> *"The fundamental objective of EU competition rules is* ***to ensure the proper functioning of the internal market****. Effective competition enables businesses to compete on equal terms across Member States, while putting them under pressure to strive continuously to offer the best possible products at the best possible prices for consumers. This, in turn, drives innovation and long-term economic growth.*
>
> ***Competition policy is, thus, a key instrument for achieving a free and dynamic internal market*** *and promoting general economic welfare. EU competition policy also applies to non-EU businesses that operate in the internal market (…)"*[410]

Furthermore, the Commission have repeatedly stressed that particular and fundamental nature of the competition rules in achieving the internal market. Back in 2015, Commissioner Vestager stated the following about the internal market and competition policy:[411]

> *"One of the pillars of the union is the Single Market. When our founding fathers were laying the foundations of a united Europe, they saw the need to protect consumers and honest businesses from the anti-competitive practices of rivals. This is where EU competition law plays a central role (…).*
>
> ***Competition policy is very much at the core of the process of European integration****. Our work is based on Treaty articles that have not changed since 1958. The founding*

[408] Ibid, p. 346.
[409] Communication from the Parliament, Competition Policy. Fact Sheets on the European Union – 2021. https://www.europarl.europa.eu/factsheets/en/home, pp. 1-2.
[410] Emphasis added.
[411] Vestager, M. (2015). The values of competition policy. Speech held 13 October 2015 and is available here: https://ec.europa.eu/competition/speeches/index_2015.html.

> *fathers of Europe understood that there would be no genuine integration without a Single Market – and* ***no functioning Single Market without a strong competition policy*** *enforced by a central competition authority. Six decades later, here we are. The Single Market has been – and still is – a powerful engine of European integration in the economic sphere and beyond. And this will continue into the future."*[412]

Thus, Vestager emphasizes the role of competition policy as the core of European integration and as an instrument to achieve the internal market. Additionally, the ECJ has also underscored, in several of its ruling, that promotion of the internal market is an objective of the competition rules.[413] In addition to the internal market as an objective, the competition rules may have multiple goals.[414] In the following, one of the proposed purposes will be examined, which is effective competition, as this is relevant to the analyses in the thesis.[415]

2.3 Competition as an Objective or Means

As stated above, competition appears from the competition rules in Article 101 to 109 of the TFEU and is addressed several other times throughout the TFEU. Thus, the question is whether competition can be regarded as an objective of the competition rules or as a means of attain the objective(s).

As mentioned in connection with the legal context of the competition rules, the Lisbon Treaty has modified the goals of the EU. Hence, undistorted competition is no longer listed as an objective and a way to achieve the higher goals through the establishment of the internal market - as it was in Article 3(g) EC Treaty. However, according to Protocol No. 27 on the Internal Market and Competition, the

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412 Emphasis added.

413 Case 22/78, Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities, EU:C:1979:138, para 17; Case C-475/99, Firma Ambulanz Glöckner mod Landkreis Südwestpfalz, EU:C:2001:577, para 47; Joined cases C-295/04 to C-298/04, Manfredi and Others, EU:C:2006:461, para 41; Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios, EU:C:2006:734, para 33; Case C-407/04 P, Dalmine SpA v Commission of the European Communities, EU:C:2007:53, para 89; Joined cases C-468/06 to C-478/06, Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE, EU:C:2008:504, para 66; Case C-52/09, Konkurrensverket v TeliaSonera Sverige AB, EU:C:2011:83, para 21.

414 According to Parret, EU competition law have multiple goals, namely market integration, economic freedom, economic efficiency, industrial policy, protection of small and medium-sized enterprises, justice, fairness, and non-discrimination, and protecting the interests of consumers. See Parret, L. (2010). Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy, European Competition Journal, 6:2, 339-376. See also Lianos, I., Korah, V., & Siciliani, P. (2019). Competition Law, Analysis, Cases, & Materials (first ed.). Oxford University Press, p. 120.

415 For a review of different objectives and views, see Parret, L. (2010). Shouldn't We Know What We Are Protecting? Yes We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy, European Competition Journal, 6:2, 339-376; and among Stylianou, K. and Iacovides, M. (2020). The Goals of EU Competition Law - A Comprehensive Empirical Investigation. Available at SSRN: https://ssrn.com/abstract=3735795.

function of competition law is to ensure that competition in the internal market is not distorted. Hence, EU's central task of establishing an internal market that includes a system ensuring that competition is not distorted may be seen as a fundamental objective of competition law indirectly, through the reference in Protocol No. 27 to the internal market in Article 3 TFEU.

This is also highlighted by the ECJ. In *Continental Can*, the ECJ held that "*Articles 85 and 86 seek to achieve the same aim on different levels, viz. the maintenance of effective competition within the Common Market*."[416] Hence, the ECJ found that the competition provisions, Articles 101 and 102 TFEU seek to achieve the same aim of retaining effective competition within the internal market. Therefore, the question is how effective competition should be understood and whether this should be considered as a purpose of the competition rules.

The ECJ has defined the concept of competition by reference to the objectives of the Treaty. In *Metro*, the ECJ held that:

> *"(…) competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market."*[417]

Hence, the ECJ found that workable competition is the level of competition necessary to attain the objectives of the Treaty. In *Metro,* the ECJ also found that the degree of competition may vary depending on the product and economic structure of the relevant market in question.[418] However, this definition is far from being clear. A similar wording has been repeated by the General Court in *GlaxoSmithKline*, where it has been emphasized that *"(…) it should be noted at the outset that the competition referred to in Article 3(1)(g) EC and Article 81 EC is taken to mean effective competition, that is to say, the degree of competition necessary to ensure the attainment of the objectives of the Treaty*."[419]

Thus, the General Court found that competition referred to in Article 3(1)(g) EC (now the substance are found in Protocol No. 27 and Article 101 TFEU) should be taken to mean effective competition.

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[416] Case 6-72, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities, EU:C:1973:22, para 25.
[417] C-26/76, Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities, EU:C:1977:167, para 20.
[418] Ibid, para 20.
[419] Case T-168/01, GlaxoSmithKline Services Unlimited v Commission of the European Communities, T:2006:265, para 109.

In above, both the concept of *workable competition* and *effective competition* are used, yet this is done interchangeably.[420] The ECJ and General Court does not mention only an effective competitive structure but also an impact on competition, thus indicating that effective competition might be interpreted as the appropriate degree of competition for the realization of the objective of the competition rules.[421] Hence, effective competition can be considered the means to an objective and not the objective itself.[422]

The competition rules seek to protect a market structure that is built around an effective competitive process and they seem to prioritize the competition process rather than the outcome of the competition. This has also been stressed by the ECJ who in *T-Mobile Netherlands* stated that the "*competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such."*[423] Thus, the ECJ highlighted the importance of preserving the process of competition or more generally to protect the competitive structure of the market and thus competition as such. Recent case law has confirmed that the objective of competition law is protection of the structure of market, and, in so doing, competition as such.[424]

It can therefore be deduced that effective competition should be considered the means to an objective and not the objective itself. The objective of competition rules is to protect the competition process rather than a certain outcome. The Ordoliberal School of thought also advocates for the protection of the process of competition but it wishes to protect the process of competition to achieve individual economic freedom.[425] As a result, the notion of effective competition from a competition law perspective will be examined in the following.

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[420] Baskoy, T (2003) Effective Competition and EU Competition Law. Review of European and Russian Affairs vol. 1 no. 1 December 2005, p. 3.
[421] See Lianos, I., Korah, V., & Siciliani, P. (2019). Competition Law, Analysis, Cases, & Materials (first ed.). Oxford University Press, p. 118.
[422] Bishop, S. & Walker, M. (2010). The Economics of EC Competition Law (third ed.). Sweet & Maxwell, p. 20.
[423] Case C-8/08, T-Mobile Netherlands and Others, EU:C:2009:343, para 38.
[424] See e.g. Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v Commission of the European Communities, EU:C:2009:610, para 63; Case C-8/08, T-Mobile Netherlands and Others, EU:C:2009:343, para 38; Case T-201/04, Microsoft Corp. v Commission of the European Communities, EU:T:2007:289, para 664.
[425] Akman, P. (2009). Searching for the Long-Lost Soul of Article 82 EC. Oxford Journal of Legal Studies, 29(2), 267-303, p. 268.

2.4 The Concept of Effective Competition from a Competition Law Perspective

The concept of effective competition is a key concept in competition law.[426] The importance of this concept can also be emphasized with the purpose of Article 102 TFEU as a dominant position is defined as involving an undertaking's power to prevent effective competition from being maintained on the relevant market.[427]

Although it is an important concept, the EU institutions are not clear about what effective competition means. As mentioned, the ECJ defined workable competition as "*the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty*".[428]

Hence, this definition of effective competition is not clear.[429] The uncertainty regarding the concept has also been highlighted in the literature by Veljanovski who state that "*it is rare to find in EC antitrust texts, or in statements by the Commission, a clear expression of the nature of effective competition*".[430]

Through its case law, the ECJ has developed a concept of effective competition in connection with treaty's objective of establishing a system of undistorted competition. It was found in the above that the concept of effective competition might be interpreted as the appropriate degree of competition for the realization of the objective of the competition rules and that the objective of competition law is protection of the structure of market, and, in so doing, competition as such. The ECJ therefore implies with its terminology that effective competition is to bring focus on the process of competition or more generally to protect the competitive structure of the market.

Hence, the concept of effective competition from a competition law perspective is in line with the dynamic view of competition, where competition must be considered as a result of a dynamic process.[431] The fact that here is a coherence between the concept of effective competition applied by

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426 Baskoy, T. (2005). Effective Competition and EU Competition Law. Review of European and Russian Affairs vol. 1 no. 1 December 2005, p. 1.

427 Case 27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities, EU:C:1978:22, para 65; Case 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities, EU:C:1979:36, para 38.

428 Case C-26/76, Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities, EU:C:1977:167, p. 20; Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services Unlimited v Commission of the European Communities, EU:C:2009:610, para 63; Case C-8/08, T-Mobile Netherlands and Others, EU:C:2009:343, para 38; Case T-201/04, Microsoft Corp. v Commission of the European Communities, EU:T:2007:289, para 664.

429 As stated above, the concept of workable and effective competition are used interchangeably

430 See Veljanovski, C. (2004). EC Merger Policy after GE/Honeywell and Airtours. Antitrust Bulletin, Vol. 49, No. 1/2 2004, pp. 153-193.

431 See Chapter 3, section 4.2.

the ECJ and the dynamic view of competition including the theories of effective competition, is also highlighted in economic literature.[432]

3 The Objectives of the Public Procurement Directives

This section will investigate the objectives of the Public Procurement Directives. In this regard, there has been uncertainty concerning the objectives as well as confusion over the means with which the directives seek to achieve its objectives.[433] In addition, an understanding of objectives is important for interpreting the provisions in the Public Procurement Directives, and, in this respect, the objectives of the Public Procurement Directives must be clarified.

3.1 The Legal Context of the Public Procurement Directives

The legal context of the Public Procurement Directives is a necessary tool to clarify the objective of the directives. The provisions must be placed in its context and interpreted in the light of the provisions of EU law as a whole[434].

The EU and its Member States are, pursuant to Articles 3(3) TEU, 3(1) (b) TFEU and Protocol 27, required to refrain from any measure that could risk the achievement of EU's goals, in particular the principle of an open market economy with free competition and the objective of building up a system which ensures that competition in the market is not distorted.

Among its constitutional objectives, the EU aims to achieve a highly competitive social market economy. The achievement of an internal market is a central aim of the European Union. Article 3(3) TEU is worded as follows:

> ***"The Union shall establish an internal market****. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high*

[432] See Baskoy, T. (2005). Effective Competition and EU Competition Law. Review of European and Russian Affairs vol. 1 no. 1 December 2005, p. 9.
[433] See Sue Arrowsmith S. (2012). The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies. Cambridge Yearbook of European Legal Studies, Volume 14, 2; Ølykke, G. S., & Nielsen, R. (2017). EU's udbudsregler – i dansk kontekst (second ed.). DJØF Publishing, p. 39.
[434] Case C-283/81, Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, EU:C:1982:335, para 20.

level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

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

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

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."[435]

According to Article 3(3) TEU, the EU shall establish an internal market that has to work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, along with a high level of protection and improvement of the quality of the environment.

Furthermore, it appears from Article 26(1) TFEU that "*The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties".*

The internal market must be understood in accordance with Article 26(2) TFEU which states that: "*The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."*

Thus, the EU shall adopt measures with the aim of establishing or ensuring the functioning of the internal market. The Public Procurement Directives were all adopted under the EU's internal market provisions, and in particular, the provisions found in Article 53(1), Article 62 and Article 114 TFEU[436]. Therefore, the Public Procurement Directives must be seen in the light of this fact.

The first citation of the Public Procurement Directives is placing the legal context and the legal basis is worded as follows: *"Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Articles 62 and 114 thereof (…)."*[437] This implies that that the provisions of the Public Procurement Directives must be interpreted in accordance with the TFEU and the legal context of the rules which is the internal market.

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435 Emphasis added.
436 At that time, Article 47(2) EC, Article 55 EC, and Article 95 EC. See Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third edition). Sweet & Maxwell, p. 164.
437 This wording is the same for all Public Procurement Directives.

As stated above, the legal basis of the Public Procurement Directives are EU's internal market provisions in the TFEU. It can be argued that this establish that the objective of the Public Procurement Directives as promoting the internal market.[438] Below it will take a closer look at the objectives in the Public Procurement Directives.

3.2 The Objectives in the Public Procurement Directives

The starting point in the analysis of the objectives is that the Public Procurement Directives all share the same objective. This has been established in case law by the ECJ.

In *Concordia Bus,*[439]*,* the ECJ took a position on the possibilities for contracting authorities to meet the needs of the public concerned, including the environmental and/or social area. In this connection, the ECJ also ruled on an interpretation on the provisions with a substantially similar wording in all the different public procurement directives. The ECJ stated *"(…) those directives taken as a whole constitute the core of Community law on public contracts and are intended to attain similar objectives in their respective fields".*[440] Accordingly, the ECJ found that the directives were intended to attain similar objectives.

Hereafter, the ECJ held that *"[i]n those circumstances, there is no reason to give a different interpretation to two provisions which fall within the same field of Community law and have substantially the same wording".*[441] Hence, the ECJ found that if two provisions, which fall within the same field of EU law (in this case the public procurement rules), have substantially the same wording, then there is no reason to provide an alternative interpretation. Also, in subsequent case law, it has been seen that the ECJ makes general statements on the objectives of Public Procurement Directives.[442] Consequently, no distinction will be made between the Public Procurement Directives once the purpose is analyzed. Furthermore, the same interpretation will form the basis of analysis in the case of Public Sector Directive with substantially similar wording.

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438 See Sue Arrowsmith S. (2012). The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies. Cambridge Yearbook of European Legal Studies, Volume 14, p. 2.

439 Case C-513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne. EU:C:2002:495.

440 Ibid para 90. The statement by the ECJ to "those directives" is a reference to Directive 92/50/EEC; Directive 93/36/EEC; Directive 93/37/EEC; and Directive 93/38/EEC.

441 Ibid para 91.

442 See e.g., Case C-26/03, Stadt Halle and RPL Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, EU:C:2005:5, para 44; Case C-340/04, Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA. EU:C:2006:308, para 58; and C-220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado, EU:C:2007:815, para 40.

The Public Procurement Directives do not directly state their objective of the directives. However, the first radical in the preamble of the Public Sector Directive is worded as follows:[443]

> *"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.* ***However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.***"[444]

This radical can be considered an indication of the objective of the rules.[445] However, the wording may give rise to problems of interpretations.[446] Overall, this provision can be read as such that its objective is to complete the internal market through procurement procedures which ensure that public procurement is opened up to competition. However, based on the Public Sector Directive alone, it cannot be deduced what the objective of the rules is. As previously mentioned, it can be argued that the objective of the Public Procurement Directives is to promote the internal market. This is explored further in the following.

3.3 The Internal Market Objective

The ECJ has ruled on the purpose of the public procurement rules in a number of cases and the objective of achieving an internal market has also been emphasised by the ECJ in several cases.

In *Beentjes,*[447] the ECJ ruled on the objective of Directive 71/304/EEC. The ECJ found that *"(…) the aim of the directive, which is to ensure the effective attainment of freedom of establishment and freedom to provide services in respect of public works contracts (....)".*[448]

Furthermore, the ECJ stated: "*Finally, in order to meet the directive's aim of ensuring development of effective competition in the award of public works contracts, the criteria and conditions which govern each contract must be given*

[443] Recital 1 of Directive 2014/24/EU. A substantially same wording can be found in Recital 2 of Directive 2014/25/EU.
[444] Emphasis added.
[445] There is a similar wording in Directive 2004/18/EU, which however, mentions effective competition.
[446] Ølykke, G. S., & Nielsen, R. (2017). EU's udbudsregler – i dansk kontekst (second ed.). DJØF Publishing, p. 40.
[447] Case 31/87, Gebroeders Beentjes BV v State of the Netherlands, EU:C:1988:422.
[448] Ibid., para 11.

sufficient publicity by the authorities awarding contracts."[449] Hence, it appears from this judgement that the objective is to complete the internal market by ensuring the freedom of establishment and the freedom to provide services. In addition, the ECJ established that Directive 71/304/EEC had the aim of ensuring the development of effective competition in the award of public works contracts.

Although new directives on public procurement have emerged, the case law of the ECJ has repeated that the objective of the rules is to promote the internal market by ensuring the effective attainment of the rules on free movement.

In *Commission v Ireland,*[450] the ECJ observed the purpose of Directive 77/62/EEC. The ECJ emphasized that "*[i]t must be borne in mind that the purpose of coordinating at Community level the procedures for the award of public supply contracts is to eliminate barriers to the free movement of goods*"[451]. Thus, the ECJ held that the objective was to eliminate the barriers of the free movement of goods.

In *Impresa Lombardini,*[452] the ECJ commented on the objective of Directive 93/37/EEC. The ECJ found that: *"The Directive nevertheless aims, as is clear from its preamble and second and tenth recitals, to abolish restrictions on the freedom of establishment and on the freedom to provide services in respect of public works contracts in order to open up such contracts to genuine competition between entrepreneurs in the Member States".*[453] Hereafter, the ECJ highlighted that *"[t]he primary aim of the Directive is thus to open up public works contracts to competition. It is exposure to Community competition in accordance with the procedures provided for by the Directive which avoids the risk of the public authorities indulging in favouritism".*[454]

Hence, the ECJ stated that the aim was to eliminate the restrictions on the freedom of establishment and on the freedom to provide services with respect to public works contracts. Moreover, this was done in order to open up so that such contracts could enter genuine competition between entrepreneurs in the Member States. Furthermore, the ECJ pointed out that the primary aim was to open up public works contracts to competition. In this judgement, the ECJ mentioned competition in connection to the promotion of the internal market but also in relation to the aim of opening up public works contracts to competition.

[449] Ibid., para 21.
[450] Case C-353/96, Commission of the European Communities v Ireland, EU:C:1998:611.
[451] Ibid, para 35.
[452] Joined cases C-285/99 and C-286/99, Lombardini and Mantovani, EU:C:2001:640.
[453] Ibid, para 34.
[454] Ibid, para 35.

Another case in which the ECJ ruled on the purpose of Directive 93/37/EEC was in *Commission v. French.*[455] Here, the ECJ found that:

> *"As far as the purpose of the Directive is concerned, moreover, the Court has held that the purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State."*[456]

Accordingly, the ECJ had once again found that the objective was to eliminate the barriers to the freedom of providing goods and services and to promote the internal market. However, competition was not mentioned by the ECJ.[457] As stated above, the ECJ has consistently held that, in general, the Public Procurement Directives have the objective to promote the internal market over time. Furthermore, competition had been mentioned when the ECJ formulated the objective of the Public Procurement Directives.[458] As a consequence, the question is whether competition must be considered as an objective and or as a mean of the Public Procurement Directives. This is examined further in the sections below.

3.4 Competition as an Objective or a Mean

As stated above, competition had been mentioned when the ECJ formulate the objective of the public procurement rules.

In *Fracasso and Leitschutz,*[459] the ECJ analysed the purpose of Directive 93/37/EEC. It highlighted that *"(…) it should be observed that, according to the 10th recital in the preamble to Directive 93/37, the aim of that directive is to ensure the development of effective competition in the award of public works contracts".*[460] Hence, the ECJ stated that the objective of the Directive 93/37/EEC was to ensure the development of effective competition in the award of public works contracts.[461] The ECJ has also repeatedly stressed that the

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455 Case C-237/99, Commission of the European Communities v French Republic, EU:C:2001:70.

456 Ibid, para 41.

457 There might be several reasons for this. Even though both judgements mention the objective of Directive 93/37/EEC which was handed down in 2001, there were several different judges and advocate generals assigned to the cases.

458 More cases will be highlighted in the sections below.

459 Case C-27/98, Metalmeccanica Fracasso SpA and Leitschutz Handels- und Montage GmbH v Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten. EU:C:1999:420.

460 Ibid 26.

461 The argumentation of the ECJ was based on the 10th recital in the preamble to Directive 93/37. The radical in the preamble of the Directive 93/37/EEC is worded as follows: "Whereas, to ensure development of effective competition

objective of the directives on public procurement is to develop effective competition in the field of public contracts.[462]

In *Varec,*[463] the ECJ ruled on the objective of the public procurement rules. The ECJ stated that *"[t]he principal objective of the Community rules in that field is the opening-up of public procurement to undistorted competition in all the Member States".*[464] Thus, the ECJ found that the objective was the opening-up of public procurement to undistorted competition in all the Member States. The ECJ did not use the notion effective competition in this case, but referred to the notion of "undistorted competition".

The ECJ ruled about the relation between the internal market objective and the objective of undistorted competition in *Pressetext.*[465] In the judgement, it held that:

> *"It is clear from the case-law that the principal objective of the Community rules in the field of public procurement is to ensure the free movement of services and the opening-up to undistorted competition in all the Member States (…). That two-fold objective is expressly set out in the second, sixth and twentieth recitals in the preamble to Directive 92/50."*[466]

Hereafter, the ECJ stated: *"In order to pursue that two-fold objective, Community law applies inter alia the principle of non-discrimination on grounds of nationality, the principle of equal treatment of tenderers and the obligation of transparency resulting therefrom".*[467] Thus, the ECJ found that the objective of the Directive 92/50 must be seen as a two-fold objective. Accordingly, the objective is to both to ensure the free movement (the internal market objective) and the opening-up to undistorted competition. Again, the CJUE used the notion undistorted competition, which similarly can be seen in other judgements[468]. In a more

in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community (…)".

462 See Joined Cases C-285/99 and C-286/99, Lombardini and Mantovani, EU:C:2001:640, par 34; Case C-470/99 Universale-Bau and Others, EU:C:2002:746, para 89; Case C-247/02 Sintesi, EU:C:2004:593 para 35; and C-138/08, Hochtief and Linde-Kca-Dresden, EU:C:2009:627, para. 47.

463 Case C-450/06, Varec SA v Belgian State, EU:C:2008:91.

464 Ibid 34.

465 C-454/06, Pressetext Nachrichtenagentur GmbH v Republik Österreich, EU:C:2008:351.

466 Ibid para 31.

467 Ibid para 32.

468 See e.g. Se e.g. Case C-26/03, Stadt Halle and RPL Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna, EU:C:2005:5, para 44; and C-340/04, Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA, EU:C:2006:308, para 58.

recent case, *Strong Segurança,*[469] the ECJ ruled about the objective of the Directive 2004/18. The ECJ stated:

> *"With regard to the Commission's contention that the general principle of 'effective competition' specific to Directive 2004/18 could lead to such an obligation, it must be noted that, whereas effective competition constitutes the essential objective of that directive, that objective, as important as it is, cannot lead to an interpretation that is contrary to the clear terms of the directive (…)".*[470]

Hence, the ECJ found that effective competition constituted an essential objective of Directive 2004/18. In this judgment, the ECJ used the notion of effective competition, and it seems that it aligned undistorted competition with effective competition and thereby used the concepts interchangeably.

This analysis of case law indicates that the ECJ consider effective competition/ undistorted competition as an objective and not as a mean to achieve the internal market objective. However, as previously stated, there has been uncertainty regarding the objective as well as confusion over the means with which the Public Procurement Directives seek to achieve it.

Academic scholars have contributed to the debate on the objective of the Public Procurement Directives. The core of the debate seems to be whether there is only one objective of the Public Procurement Directives, namely the internal market objective, or whether competition is an objective in itself. Below, different understandings and arguments for the objective are taken into consideration.

It could be argued that the internal market objective is the main objective of the Public Procurement Directives. Arrowsmith has expressed this approach and states that "*the directives main objective is to promote the internal market*".[471] Arrowsmith also argues that the objective is to prevent barriers to the internal market and not to create competition as an end/objective in itself by stating that there are

> *"(…) two key principles for implementing procurement objectives, namely transparency and competition. These are sometimes referred to as objectives or goals of a public procurement system.*

469 C-95/10, Strong Segurança SA v Município de Sintra and Securitas-Serviços e Tecnologia de Segurança, EU:C:2011:161.
470 Ibid para 37.
471 Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third edition). Sweet & Maxwell, p. 164.

However, (…) they are in fact a means used to achieve one or more of the objectives mentioned above, rather than objectives in their own right."[472]

Hereby, it appears that competition is seen as a mean used to achieve the internal market objective. However, there are other views on the objective of the Public Procurement Directives.

Sánchez-Graells has the opposite opinion than Arrowsmith by claiming that competition is to be seen as an independent objective of the Public Procurement Directives and that the primary purpose of the procurement rules is to compete effectively for public contracts. Sánchez-Graells states that:

"(…) competition is predominant external goal of public procurement – inasmuch as it should be considered not only an internal objective in reinforcing legitimacy (by avoiding favouritism, which is more properly the objective of transparency goals), or an internal instrument to reinforce the efficiency of the purchasing activities (by obtaining best value for money, although that is one of its paramount effects), or to guarantee non-discrimination between participants in a given tender; but also as the main constraint in the public buyer's market behavior. Indeed, competition goals of the public procurement system shall also be interpreted as rules oriented to curbing the public buyer's market behavior that could have a substantial negative impact on the competitive dynamics of those markets where the activities of the public purchaser are relatively more important."[473]

Ølykke also disuses whether effective competition is a mean or objective of the public procurement rules. Ølykke highlights the following arguments for and against competition as an objective of the Public Procurement Directives:

"On the one hand, it could be argued that there is only one objective of the public procurement directives, namely the internal market objective. (…) However, it is also essential for obtaining the internal market objective that competition for the contract is effective. In this way, "effective competition" could be understood as a mean for achievement of the internal market objective.[474]

On the other hand, it could be argued that the development of effective competition, according to the wording of Recital 36 and Recital 46 (…), signals that the achievement of effective competition is an objective in itself."[475]

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[472] Arrowsmith, S. (2012), "Understanding the purpose of the EU's procurement directives: the limited role of the EU regime and some proposals for reform" in The Cost of Different Goals of Public Procurement (first ed.), Book published by the Swedish Competition Authority, Konkurrensverket, p. 60.
[473] Graells, A. S. (2015), Public Procurement and EU competition rules (second ed.). Hart Publishing, p. 104.
[474] Ølykke, G. S. (2010). Abnormally low tenders with an emphasis on public tenders. DJØF Publishing Copenhagen (first ed.), p. 68.
[475] Ibid p. 69.

Based on an analysis of this, Ølykke deduces the following conclusion: "*There seems to be no doubt that the ECJ perceives development of effective competition/undistorted competition as an objective of the public procurement Directives and not ´merely´ a mean to achieve the Internal Market objective."*[476] Hence, it is hereby emphasized that Ølykke considers the development of effective competition/ undistorted competition as an objective of the Public Procurement Directives.

In literature, there are diverging views on whether competition should be considered as an objective or as a mean to achieve the internal market objective. This discussion shows that something which should be very simple in practice is in fact not.

The different views of the objective of the public procurement rules indicate that the rules can be viewed in many ways. However, the objective of the procurement rules must be seen in light of the legal context of the rules, which is to promote the internal market. In the event of teleological interpretation of a provision in the Public Procurement Directives, the internal market must be given importance.

In sum, it remains uncertain whether undistorted competition/ effective competition should also be considered an objective of the Public Procurement Directives. However, many factors speak in favor for effective competition to be seen as an objective, as has repeatedly been confirmed in case law by the ECJ. Consequently, the starting point of this thesis will be that effective competition must be regarded as an objective of Public Procurement Directives and not just as a mean for the achievement of the internal market objective.

3.5 The Concept of Effective Competition from a Public Procurement Perspective

Even though effective competition may be regarded as an objective of Public Procurement Directives, the directives does not contain an indication of how the concept of effective competition should be understood.

The ECJ has repeatedly mentioned the role of competition in procurement rules and how the concept of which should be defined. In *Assitur,* the ECJ emphasized the importance of effective competition in public procurement.[477] This was a case concerning Italian law prohibiting affiliates from the same group to submit separate bids in a tender procedure. The ECJ held:

[476] Ibid p. 70.
[477] C-538/07, Assitur Srl v Camera di Commercio, Industria, Artigianato e Agricoltura di Milano, EU:C:2009:317.

> *"It should be recalled, in this connection, that the Community rules on public procurement were adopted in pursuance of the establishment of the internal market, in which freedom of movement is ensured and restrictions on competition are eliminated (...)"*[478]

> *"In this context of a single internal market and effective competition it is the concern of Community law to ensure the widest possible participation by tenderers in a call for tenders."*[479]

Accordingly, the ECJ found that effective competition must be understood as to ensure the widest possible participation by tenderers in a call for tenders. This has been repeated by the ECJ in subsequent case law.[480]

In *CoNISMa,*[481] the ECJ had to conclude whether national legislation that excluded a consortium of an inter-university group from participating in a tender procedure, on the grounds that the inter-university group constituted a public body, and thus did not fall under the definition of an economic operator. The ECJ found that such an exclusion was in breach of the procurement directives, and it held in this connection that that one of the primary objectives of public procurement is to attain the widest possible opening-up to competition and law to ensure the widest possible participation by tenderers in a call for tenders.[482] Furthermore, the ECJ stated that the widest possible opening-up to competition is contemplated not only from the point of view of the EU's interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which thus will have greater choice to select the most advantageous tender. [483]

In this case, it was again stated that one of the primary objectives of public procurement is to achieve the widest possible opening-up to competition and to ensure the widest possible participation by tenderers in a call for tenders. Hence, the widest possible opening up to competition entails a greater possibility for the contracting authority to choose the tenderer who is most suitable for the needs of the contracting authority.

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478 Ibid, para 25
479 Ibid, para 26.
480 See, to that effect, C 376/08, Serrantoni and Consorzio stabile edili, EU:C:2009:808, para 40; and C 425/14, Impresa Edilux and SICEF, EU:C:2015:721, para 36.
481 C-305/08, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche, EU:C:2009:807.
482 Ibid, para 37.
483 Emphasis added.

In recent case law, the ECJ has stated award criteria must "*(…) ensure compliance with the principles of transparency, non-discrimination and equal treatment, so as to guarantee an objective comparison of the relative merits of the tenders and, accordingly, effective competition.*[484] This indicates that the ECJ has the view that compliance with principles of transparency, non-discrimination and equal treatment helps to ensure effective competition. After this, it is stated by the ECJ that the contracting authorities ensure effective competition and it must be stated assessed from

> *"(…) the outset that even if, following the technical evaluation, there is only one tender left for the contracting authority to consider, that authority is in no way required to accept that tender (…).*
>
> *In such circumstances, if the contracting authority considers that the procurement procedure is, in view of the specificities and the subject matter of the contract concerned, characterised by a lack of effective competition, it is open to that authority to terminate that procedure and, if necessary, to launch a new procedure with different award criteria."*[485]

Again, the ECJ rules that effective competition is assessed based on participation by tenderers in a call for tenders. Furthermore, the contracting authority is not required to accept a tender if there is only one tender.[486] It is also emphasized that effective competition can be facilitated by compliance with principles of transparency, non-discrimination and equal treatment.

Hence, it is clear from case law that effective competition from a public procurement perspective should be understood as ensuring the widest possible participation by tenders and that it is assessed on the basis of the number tenders.[487] This is also reflected in the Public Sector Directive. According to Article 67, the number of candidates invited, in restricted procedures, shall be sufficient to ensure genuine competition, which in practice entails that the contracting authorities shall invite five candidates.[488] Nevertheless, where the number of candidates meets the selection criteria and where the minimum levels of ability is below five, the contracting authority may continue the procedure by inviting the candidates with the required capabilities.[489]

Effective competition from a public procurement perspective can be considered in line with the static view of competition, where competition is used to refer to the structural situation of many firms

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484 C-546/16, Montte SL v Musikene, EU:C:2018:752, para 31.
485 Ibid, para 41.
486 See also C-27/98 paras 32 and 34.
487 Ølykke, G. S. (2011). How does the Court of Justice of the European Union Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), 179-192, p. 189.
488 Article 65(2)(2) of Directive 2014/24/EU.
489 Article 65(2)(3) of Directive 2014/24/EU.

competing in a market and where competition is highly centered on the number of sellers.[490] Furthermore, the center of assessment of effective competition is the competition in a specific public tender and not the competition in a specific or relevant market.

To summarize, the development of effective competition can be seen as an objective of the Public Procurement Directives and not merely as a means to achieve the internal market. The notion of effective competition should be understood as a way to ensure the widest possible participation by tenderers in a call for tenders. Furthermore, the effective competition can be facilitated by observing general principles of the treaty, such as the principles of transparency, non-discrimination and equal treatment.

There is also an ongoing discussion on whether there is a principle of competition in the public procurement rules. The proposed competition principle will be examined more in below.

3.6 Competition as an Independent Procurement Law Principle

The procurement law principles of transparency, equal treatment and proportionality have long been considered as part of the fundamental procurement law principles.[491] The legal basis for the suggested principle of competition is found in Article 18(1) of the Public Sector Directive under the title *Principles of procurement.* Article 18(1) reads as follow:[492]

> *"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*
>
> *The design of the procurement shall not be made with the* ***intention of excluding it from the scope of this Directive or of artificially narrowing competition.*** *Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."*[493]

Accordingly, the last sentence of Article 18(1) provides that the design of the procurement shall not be made with the intention of artificially narrowing competition, which is to be understood as the

[490] See Chapter 3, section 3.4.
[491] The existence of these three principles were consolidated in Article 2 of Directive 2004/18, according to which contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way.
[492] A similar provision can be found in Article 36 (1), last sentence of Directive 2014/23/EU. However, no similar provisions can be found in the Concessions Directive 2014/23/EU or the Defence and Security Directive 2009/81/EU
[493] Emphasis added.

intention of unduly favoring or disadvantaging certain economic operators when the design of the procurement is made. In simple terms, this means that contracting authorities have created a competition for the contract with fewer economic operators.[494] Furthermore, the background for including a reference to competition here is that:

> *"Practice has shown that tailor-made procurement design (e.g., an extremely narrow description of the subject-matter or very specific selection criteria which are not justified by the object of the procurement) is a common method of discriminating between economic operators. The second sentence of Article [18] has been added to give a clear signal that these malpractices are unacceptable and to facilitate the fight against them."*[495]

Thus, competition is mentioned by placing emphasis on the importance of ensuring that tenderers are given equal opportunities to pursue a public contract. Therefore, artificially narrowing the competition is fundamentally a question of whether there is discrimination and if there is a significant overlap between this part of the provision and the principle of equal treatment.[496]

Additionally, the formulation of Article 18(1) provides an intentional element of artificially narrowing the competition. This intentional element of restriction of competition is common to different language versions of the Public Sector Directive. Below are examples of wording of the provision in different language versions.

Language	**Wording of Article 18(1) in the Public Sector Directive**
Danish	*De ordregivende myndigheder behandler økonomiske aktører ens og uden forskelsbehandling og handler på en gennemsigtig og forholdsmæssig måde.* *Udbuddet udformes ikke med det formål at udelukke dette fra direktivets anvendelsesområde eller kunstigt indskrænke konkurrencen. Konkurrencen betragtes som kunstigt indskrænket, hvis udbuddet er udformet med den* ***hensigt*** *uretmæssigt at favorisere visse økonomiske aktører eller stille dem mindre gunstigt.*

[494] Hamer, C. R. & Andhov, M. (2020). Article 18 Public Procurement Principles. In Caranta, R. & Sanchez-Graells, A. (eds.). European Public Procurement. Commentary of Directive 2014/24/EU. Edward Elgar, p. 196.
[495] Cluster 8, Sound procedures, Council Document 11266/12.
[496] Steinicke. M., & Vesterdorf. P. L. (2018). Brussels Commentary on EU Public Procurement Law (first ed.). C.H. Beck-Hart-Nomos, p. 329.

German	*Die öffentlichen Auftraggeber behandeln alle Wirtschaftsteilnehmer in gleicher und nichtdiskriminierender Weise und handeln transparent und verhältnismäßig.* *Das Vergabeverfahren darf nicht mit der Absicht konzipiert werden, es vom Anwendungsbereich dieser Richtlinie auszunehmen oder den Wettbewerb künstlich einzuschränken. Eine künstliche Einschränkung des Wettbewerbs gilt als gegeben, wenn das Vergabeverfahren mit der* ***Absicht*** *konzipiert wurde, bestimmte Wirtschaftsteilnehmer auf unzulässige Weise zu bevorzugen oder zu benachteiligen.*
French	*Les pouvoirs adjudicateurs traitent les opérateurs économiques sur un pied d'égalité et sans discrimination et agissent d'une manière transparente et proportionnée.* *Un marché ne peut être conçu dans l'intention de le soustraire au champ d'application de la présente directive ou de limiter artificiellement la concurrence. La concurrence est considérée comme artificiellement limitée lorsqu'un marché est conçu dans l'****intention*** *de favoriser ou de défavoriser indûment certains opérateurs économiques.*

On that basis, it cannot be considered as justified as an error in the translation or in the wording of the provision. Thus, it must be assumed that this wording has been carefully selected and used by the legislature. The intentional element of restriction of competition is emphasized. Therefore, the intention of the contracting authority must be assessed when the entity design the procurement. However, it may be difficult to assess the exact intention of a contracting authority for any given action. In the Public Sector Directive, there are no indications as to how the interpretation of the intention must be conducted.[497] Furthermore, the recitals of the Public Sector Directive do not provide any clarification of the intentional element of Article 18(1).

Thus, it is unclear how an intentional element of artificially narrowing the competition should be understood. Article 18(1) can therefore open the door to complex problems of identification and attribution of intentional elements in the field of public procurement.[498] The article is addressed to the contracting authorities and it is uncertain what obligations this provision imposes on contracting authorities when they design the procurement, as Article 18(1) is worded unclearly.

[497] Steinicke. M., & Vesterdorf. P. L. (2018). *Brussels Commentary on EU Public Procurement Law* (first ed.). C.H. Beck-Hart-Nomos, p. 329.
[498] Graells, A. S. (2015), Public Procurement and EU competition rules (second ed.). Hart Publishing, p. 210.

Principles are an essential aid in interpreting and explaining a specific provision in the Public Procurement Directives.[499] It can therefore be argued that the presence of a principle of competition can have an impact on the interpretation of the provisions of the Public Procurement Directive. Many general principles of EU law are unwritten and created by the ECJ, even though many have been codified in the treaties over time.[500] The ECJ has not confirmed the existence of a principle of competition as a general principle of EU law or a general principle of public procurement consolidated in the Public Sector Directive.[501]

However, the Advocates General have mentioned the principle of competition in their opinions.[502] The most elaborated construction of the principle of competition in the procurement setting so far has been developed by Advocate General Stix-Hackl in the opinion in *Sintesi*.[503] Here, Advocate General Stix-Hackl stated the following:[504]

> *"The principle of competition is therefore one of the fundamental principles of Community law on the award of public contracts (…)*[505]
>
> *The principle of competition is expressed in the actual provisions of the directives on the award of public contracts, which include, first, the provisions on the permissible forms of procedure for the award of contracts and the conduct thereof, in particular the time-limits to be complied with in the various phases of the procedure, and the prohibition on renegotiation (…)"*[506]
>
> *Concrete expressions of the principle of competition also include, second, the provisions on contract documents, primarily technical specifications, the provisions on the selection of undertakings, and the provisions on the criteria for the award of contracts to which this case relates (…)*[507]

Hence, Advocate General Stix-Hackl highlights the principle of competition as a fundamental principle of the public procurement rules. Furthermore, the legal basis of the principle of competition

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499 Sune Troels Poulsen, Peter Stig Jakobsen, Simon Evers Kalsmose-Hjelmborg, EU Public Procurement Law – The Public Sector Directive, The Utilities Directive (2nd edn, DJØF 2012), p. 51.
500 Cuyvers, A. (2017). General Principles of EU Law. In Cuyvers A., Ugirashebuja E., Ruhangisa J., & Ottervanger T. (Eds.), East African Community Law: Institutional, Substantive and Comparative EU Aspects, 217-228, p. 218.
501 Hamer, C. R. & Andhov, M. (2020). Article 18 Public Procurement Principles. In Caranta, R. & Sanchez-Graells, A. (eds.). European Public Procurement. Commentary of Directive 2014/24/EU. Edward Elgar, p. 197.
502 Opinion of Advocate General Stix-Hackl in Sintesi, C-247/02, EU:C:2004:399, paras 33–40 and Opinion of Advocate General Colomer in SECAP SpA v Comune di Torino, Joined Cases C-147/06 and C-148/06, EU:C:2007:711, para 47.
503 See Sanchez-Graells, A. (2016). Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies? European Public Law 22, no. 2, 377–394, p. 381.
504 Opinion of AG Stix-Hackl in Sintesi, C-247/02, EU:C:2004:399. For the principle of competition see paras 33–40.
505 Ibid, para 33.
506 Ibid, para 37.
507 Ibid, para 38.

is stated to be found in the actual provisions of the Public Procurement Directives. Advocate General Stix-Hackl explained that the principle of competition is underlying all the procedural provisions in the Public Procurement Directives.

In *Sintesi,* the ECJ did not mention the principle of competition.[508] However, it mentioned the importance of competition and maintained the application of the terminology from earlier case law and stated that: *"According to the 10th recital thereto, the purpose of the Directive is to develop effective competition in the field of public contracts."*[509] The ECJ therefore emphasizes that effective competition is an objective of the directive, which is also discussed in section 3.4 of this thesis. Although the Advocate Generals are mentioning the principle of competition, the ECJ neither repeats the wording from the options nor uses the term 'principle of competition' in its judgements. As a consequence, the principle cannot be considered valid law.[510]

The literature has also discussed whether a principle of competition exits, and here multiple views are evident.[511] Arrowsmith argues that Article 18(1) "*appears to be simply a manifestation of the more general equal treatment principle, as designing any aspect of the procurement for this reason rather than based on other needs and preferences in the project would clearly infringe that principle.*"[512] Hence, Arrowsmith considers the provision manifestation of the more general equal treatment principle and not as an independent procurement principle.

This position is not shared by Sanchez-Graells who advocates for the principle of competition. In the view of Sanchez-Graells, the promotion of effective competition is one of the fundamental goals of the public procurement rules and the pursuit of this primary objectives has resulted in "*the emergence of a competition principle. (…) Such a principle has now been consolidated in Article 18(1) of Directive 2014/24, which in my view constitutes a mere incremental step in the development of the EU system of procurement rules (…)"*[513]

[508] C-247/02, Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici, EU:C:2004:593.
[509] Ibid, para 35.
[510] The assessment of valid law has been made on the basis of the definition and description in Chapter 2.
[511] For an overview on various positions regarding the principle of competition, see Moldén. R. (2020). The New Competition Principle in the New EU Public Procurement Directives. Europarättslig Tidskrift number 1 2020. Moldén also provides own point of view on the principle of competition on pp. 77-78.
[512] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol 1 (third edition), Sweet & Maxwell, p. 631.
[513] Graells, A. S. (2015), Public Procurement and EU competition rules (second ed.). Hart Publishing, pp. 198–199. See also Sanchez-Graells, A. (2015), A Deformed Principle of Competition? – The Subjective Drafting of Article 18(1) of Directive 2014/24 in Ølykke, G. S. & Sanchez-Graells, A. (eds), Reformation or Deformation of the EU Public Procurement Rules in 2014. Cheltenham, Edward Elgar Publishing, p. 80.

Ølykke shares the view of Sanchez-Graells when it comes to whether effective competition should be considered as an objective of the Public Procurement Directives. However, Ølykke is critical of the existence of a principle of competition. Ølykke states that:

> *"Proposing a ´principle of competition´ is apparently another approach than the one I have chosen in the previous Sections of this Chapter, where I have argued that "development of effective competition" (undistorted competition) is an objective of the public procurement Directives. Maybe it is only a question of terminology whether the wording "objectives" or "principle" is used to emphasis the importance of specific aspects. (…) It is, in my opinion, therefore not necessary to develop a ´principle of competition´ in the public procurement regime: development of effective competition, i.e. preventing that the rules on competition are violated by tenderers, is an objective, not a means."*[514]

Thus, Ølykke emphasizes whether it is merely a question of terminology or if the wording objectives or principle have been used to highlight the importance of effective competition for public contracts. Hereafter, it is emphasized that it is not necessary to develop a principle of competition in the public procurement regime. The view that there is no need for a competition principle is shared by Balshøj.

Balshøj also emphasizes that competition plays a major part in procurement and states that *"the principles of equal treatment and competition are so closely connected that they make up two sides of the same coin, for which reason there is no need – or room for – a principle of competition."*[515] In addition, Balshøj contributes to the discussion by stating that "*calling it a principle may be a stretch – among others because when mentioning the principles in the recitals of Directive 2014/24/EU (e.g. Recital 1), there is no mention of competition (…)".*[516] In addition, Balshøj mentions that Recital 1 of the Public Procurement Directive, which mentions the principles of procurement law, do not mention competition.

It appears from the above, that there are different views in literature on the proposed principle of competition. As previously highlighted, Article 18(1) is placed under the title Principles of procurement, which would advocate that its first paragraph is a procurement principle.[517] However,

[514] Ølykke, G. S. (2010). Abnormally low tenders with an emphasis on public tenders. DJØF Publishing (first ed.), p. 76.
[515] Balshøj. D. K. (2018). Public Procurement and Framework Agreements – the application of competition law to contracting authorities in a procurement context (PhD thesis), p. 67.
[516] Ibid, p. 67.
[517] There is a similar discussion as to whether Article 18(2) can be considered as procurement principle (referred to as a principle of sustainability). See Andrecka, M. (2014). Public-Private Partnerships in the EU Public Procurement Regime (first ed.). Globe Edit. In this PhD thesis, it is considered whether in the future sustainable development could be considered a procurement principle.

whether Article 18(1) can be regarded as a general principle of public procurement is not clear from the wording of the provision. Furthermore, the competition principle is not mentioned among the other principles in the recitals of the Public Sector Directive.

As Balshøj emphasizes in the discussion of the competition principle, recital 1 of the Public Sector Directive does not mention competition. Even though the recitals are not legally binding themselves in the same way as the actual provisions, the recitals of the preamble state the reasons for which they are based, as required by Article 296 TFEU. Hence, the recitals can be used in the interpretation of directives, especially in cases with provisions with unclear wording. According to recital 1 of the Public Sector Directive, the award of public contract has to comply with the principles of TFEU and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as their derived principles, such as equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. Thus, there is no indication of the presence of a principle of competition in the Public Sector Directive.

Article 18(1) is worded unclear. As a result, the content of the principle of competition is far from clear and it is difficult to define exactly what such principle should involve.[518] In particular, there may be interpretation issues with regards to the intentional element. The ECJ has in case law stressed the importance of ensuring effective competition. However, it remains to be seen if the ECJ would apply competition as independent procurement principle that can be relied upon without the other principles.[519]

According to the general principle of public procurement, the contracting authority may not discriminate and should ensure equal treatment of tenders, which will require that these have equal access, that the procurement process is transparent and that requirements are proportional. It can therefore be argued whether the general principle of public procurement is used to ensure development of undistorted/effective competition, thereby elevating competition to an aim or an objective of the rules, rather than a principle.[520]

[518] See Steinicke. M., & Vesterdorf. P. L. (2018). Brussels Commentary on EU Public Procurement Law (first ed.). C.H. Beck-Hart-Nomos, p. 329–330.
[519] Hamer, C. R. & Andhov, M. (2020). Article 18 Public Procurement Principles. In Caranta, R. & Sanchez-Graells, A. (eds.). European Public Procurement. Commentary of Directive 2014/24/EU. Edward Elgar, p. 197.
[520] Ibid, p. 197.

This is also in line with the choice of wording by the ECJ in *Manova*.[521] In this case, the ECJ stated that:

> *"One of the principal objectives of the public procurement rules under EU law is to ensure the free movement of services and the opening up of undistorted competition in all the Member States. In order to pursue that twofold objective, EU law applies, inter alia, the principle of the equal treatment of tenderers and the corollary obligation of transparency."*[522]

Hence, the principles of equal treatment and transparency can be seen as means to achieve the objective of development of undistorted/effective competition. As highlighted by Ølykke and Balshøj, the necessity of an independent procurement principle of competition can be questioned because the objective of the public procurement rules is both to achieve the internal market and to ensure development of undistorted/effective competition.

In sum, this thesis will be based on the finding that there is no competition principle in the Public Procurement Directive. However, elevating competition to a principle does not seem to have legal consequences because the two-folded objective of the public procurement rules is both to achieve the internal market and to ensure development of undistorted/effective competition. As previously stated, artificially narrowing the competition is fundamentally a question of whether there is discrimination and if there is a significant overlap between Article 18(1) and the principle of equal treatment.

However, according to a teleological interpretation of Article 18(1), the provision can still be considered an important tool to strengthen the use of pro-competitive arguments in public procurement. The contracting authorities must refrain from conducting any procurement practices that prevent, restrict or distort competition. Furthermore, the intention of the contracting authority must be assessed when the entity design the procurement. However, it may be difficult to assess what exactly the intention of a contracting authority is for any given action. If the contracting authorities design the procurement with the intention of unduly favouring or disadvantaging certain economic operators and hence artificially narrowing competition, the contracting authority would clearly infringe Article 18(1) of the Public Sector Directive. In addition, this would also be in conflict with the purpose of the public procurement rules.

[521] C-336/12, Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S, EU:C:2013:647.
[522] Ibid, para 28.

4 Scope of the Public Procurement Rules

4.1 Parties to the Public Contracts

Article 1 of the Public Sector Directive determines the subject matter and scope of the directive, worded as follows:

> *"This Directive establishes rules on the procedures for* ***procurement by contracting authorities*** *with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4."*[523]

Thus, the concept of contracting authorities defines the personal scope of the Public Sector Directive, which is also referred to as *ratione personae*.[524] This concept is a decisive element of the public procurement legal framework, because it determines the applicability of the rules.[525] Furthermore, it appears from Article 1(2) what is meant by procurement within the meaning of the Public Sector Directive. Article 1(2) is worded as follows:

> *"Procurement within the meaning of this Directive is the* ***acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators*** *chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose."*[526]

Accordingly, procurement is an acquisition by means of a public contract of works, supplies, or services that are provided by one or more contracting authorities from economic operators chosen by those contracting authorities. Furthermore, what is meant by public contracts is clarified in subsection 5 of Article 2(1) in the Public Sector Directive: "*Public contracts' means contracts for pecuniary interest concluded in writing* ***between one or more economic operators and one or more contracting authorities*** *and having as their object the execution of works, the supply of products or the provision of services (…)".*[527]

Hereby, the parties to the public contract are contracting authorities and economic operators. Entities covered by the notion of economic operators may participate in the tender procedure as candidates[528]

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523 Emphasis added.
524 Preamble 10 of the Public Sector Directive.
525 Bovis, C. (2015), The Law of EU Public Procurement (second ed.), Oxford University Press, p. 310.
526 Emphasis added.
527 Emphasis added.
528 Candidate means an economic operator that has sought an invitation or has been invited to take part in either a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation. See Article 2(1) subsection 12 of the Public Sector Directive.

and tenderers[529] and obtain rights under the Public Procurement Directive. The concept of economic operators is analysed in section 4.4. To summarize, the parties to the public contract are contracting authorities and economic operators. The concepts of contracting authorities are explored in the section below.

4.2 The Concept of a Contracting Authority

The concept of contracting authorities is crucial in order to verify whether the Public Sector Directives cover the entity in question. In the literature, this definition has been highlighted as probably the most important element of the public procurement legal framework.[530] In subsection 1-4 of Article 2(1) in the Public Sector Directive, the definition of contracting authorities is worded as follows:

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

[529] Tenderer means an economic operator that has submitted a tender. See Article 2(1) subsection 12 of the Public Sector Directive.
[530] Bovis, C. (2015), The Law of EU Public Procurement (second ed.), Oxford University Press, p. 309.

The concept of contracting authorities in subsections 1-4 of Article 2(1) in the Public Sector Directive continues the previously applicable rules in Article 1(9) of 2004 Public Procurement Directive, and they do not make any substantive changes to the definition of contracting authorities.[531] Article 1(9) of 2004 Public Sector Directive is worded as follows:

> *"Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law. A 'body governed by public law' means any body:*
> *(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*
> *(b) having legal personality; and*
> *(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law."*

The definition of central government authorities and sub-central contracting authorities have been added. Furthermore, the definition of *bodies governed by public law* remains essentially unchanged with a clarification in subsection 4(a) of Article 2(1)[532].

The clarifications that have been made in connection with the concept of contracting authorities have been mentioned and justified in preamble 10 in the Public Sector Directive. Preamble 10 is worded as follows:

> *"The notion of 'contracting authorities' and* ***in particular that of 'bodies governed by public law' have been examined repeatedly in the case-law of the Court of Justice of the European Union****. To clarify that the scope of this Directive ratione personae should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case-law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case-law. For that purpose,* ***it should be clarified that a body which***

[531] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol 1 (third edition), Sweet & Maxwell, p. 381.
[532] Reflect the approach developed by ECJ in Case C-18/01, Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy and Rakennuttajatoimisto Vilho Tervomaa v Varkauden Taitotalo Oy, EU:C:2003:300, para 51.

operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a 'body governed by public law' since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character."[533]

Thus, the EU legislator states that they intend the scope of the directive's *ratione personae* to remain unaltered but that clarifications were needed. Among other things, this means that, to a certain extent, the case law of the ECJ has been codified, without the intention of altering the understanding of the concepts as elaborated by the case law. Furthermore, the Public Sector Directive no longer includes an illustrative list in its annexes that shows which bodies that are considered to be governed by public law, as was found in Annex III of the 2004 Public Procurement Directive.

4.3 Categories of Contracting Authorities

As stated above, the public-sector bodies covered by the Public Sector Directive are referred to as contracting authorities. According to subsection 1 of the Public Sector Directive, the concept of contracting authorities covers the following four categories:

1) The State
2) Regional or local authorities
3) Bodies governed by public law
4) Associations formed by one or more such authorities or one or more such bodies governed by public law

When assessing which entities that are contract authorities, it must be taken into account whether an entity is at risk of giving preferential treatment to a national industry when they purchase.[534] Additionally, it is important to remember that the notion of contracting authorities has been held to be a concept of EU law and the scope does not depend on the definition in national law in the Member States[535]. This entails that the definition of contracting authorities must be interpreted the

[533] Emphasis added.
[534] This has been established by the ECJ in case law in C-44/96, Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH, EU:C:1998:4, para 33. See also Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol 1 (third edition), Sweet & Maxwell, p. 340.
[535] C-323/96, Commission of the European Communities v Kingdom of Belgium, EU:C:1998:411, para 41; C-214/00, Commission of the European Communities v Kingdom of Spain, EU:C:2003:276, para 55.

same way for the whole of EU. Furthermore, according to the settled case law of the ECJ, the concept of contracting authorities must be interpreted in accordance in functional terms and with the purpose of the Public Procurement Directives.[536]

In the following, the different categories of contracting authorities as well as the legal conditions that apply to each of these categories, are being treated.

3.1.1. The State

As mentioned, the definition of contracting authorities in the directive covers the *state*, yet the definition of which is not further elaborated. In *Beentjes,*[537] the ECJ found that the term *state* must be interpreted in functional terms.[538] Hereafter, the ECJ stated that the aim of the Directive *"(…) would be jeopardized if the provisions of the directive were to be held to be inapplicable solely because a public works contract is awarded by a body which, although it was set up to carry out tasks entrusted to it by legislation, is not formally a part of the State administration."*[539]

Consequently, a local land consolidation committee which was not an independent legal entity was regarded as falling within the notion of the *state* in the directive even though it was not part of the state administration in formal terms.[540]

In *Commission v Belgium,*[541] the ECJ held that the concept of the *state*: *"(…) encompasses all the bodies which exercise legislative, executive and judicial powers. The same is true of the bodies which, in a federal state, exercise those powers at federal level."*[542] Thus, the concept of the State encompasses all of the bodies that exercise legislative, executive and judicial powers.

The concept of the *state* refers to the central level of government.[543] According to subsection 2 of Article 2(1) of the Public Sector Directive, the definition of central government authorities are "*(…) the contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national*

536 In this direction see Case 31/87, Gebroeders Beentjes BV and State of the Netherlands, EU:C:1988:422. para 11; Case C-353/96, Commission of the European Communities v Ireland, EU:C:1998:611, para 36; and C-526/11, IVD GmbH & Co. KG v Ärztekammer Westfalen-Lippe, EU:C:2013:543, para 21. See also Ølykke, G. S., & Nielsen, R. (2017). EU's udbudsregler – i dansk kontekst (second ed.). Jurist- og Økonomforbundets Forlag, p. 137.
537 Case 31/87, Gebroeders Beentjes BV v State of the Netherlands. EU:C:1988:422.
538 Ibid, para 11.
539 Ibid, para 11.
540 Ibid, para 12.
541 Case C-323/96, Commission of the European Communities v Kingdom of Belgium, EU:C:1998:411.
542 Ibid, para 27.
543 Arrowsmith S. (2014). The Law of Public and Utilities Procurement Regulation in the EU and UK, vol 1 (third edition). Sweet & Maxwell, p. 342.

level, their successor entities (…)". Accordingly, central government authorities can only be those contracting authorities that are listed in Annex I of the directive.

Lower threshold values apply to central government authorities than what applies to sub-central contracting authorities.[544] Sub-central contracting authorities are all the contracting authorities that are not central government authorities. Therefore, Annex I of the directive contains a list of contracting authorities that are considered central government authorities in each Member State.

3.1.2. Regional or Local Authorities

Regional and local authorities are sub-central contracting authorities.[545] The definition of regional and local authorities is elaborated as follows in Article 2(2) of the Directive as follows:

> *"For the purpose of this Article 'regional authorities' includes authorities listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council (1), while 'local authorities' includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003."*

As stated in Article 2(2), regional and local authorities are listed in Regulation (EC) No 1059/2003 on the establishment of a common classification of territorial units for statistics (NUTS).[546]

Regional authorities are listed in NUTS 1 and NUTS 2, whereas local authorities, including all authorities of the administrative units, fall under NUTS 3.

3.1.3. Bodies Governed by Public Law

As previously stated, bodies governed by public law have all of the following characteristics:

> *"(…) (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*
>
> *(b) they have legal personality; and*
>
> *(c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or*

[544] Article 4(c) of the Public Procurement Directive.
[545] Article 4(c) of the Directive.
[546] Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS). The Nomenclature of territorial units for statistics, shortened NUTS is a geographical nomenclature subdividing the economic territory of the EU into regions at three different levels.

have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law."[547]

The concept of bodies governed by public law does not have a simple definition and it depends on whether the body has certain characteristics, which need to be met so that the body in question may be considered as a body governed by public law. The wording of the provision indicates that there are three characteristics are cumulative. Furthermore, this has been confirmed in the case law of the ECJ.[548]

3.1.4. Associations formed by one or more such authorities or one or more such bodies governed by public law

The fourth category of entity covered as a contracting authority under the Public Sector Directive is an associations formed by one or more of such authorities or one or more of such bodies governed by public law. This category is not further elaborated in the Public Sector Directive. In the assessment of the public sector bodies, it is necessary to consider whether the public entity in question involves other contracting authorities acting together as a body governed by public law.

Arrowsmith takes the view that:

"Since most entities that are composted of authorities that act together and that have a separate legal personality are bodies governed by public law, the provision is relevant mainly for entities without legal personality. An example might be a purchasing consortium composed of representatives of different contracting authorities."[549]

4.4 The Concept of Economic Operators

As well as applying to contracting authorities, the Public Sector Directive also impose some obligations on other bodies. As stated above, the parties to the public contract are contracting authorities and economic operators. Economic operators participating in tenders are subject to the application of rules in the Public Sector Directive by contracting authorities. According to subsection 10 of Article 2(1) of the directive, the concept of economic operators is defined as:

[547] Public Procurement Directive, Article 2(1), subsection 1-4.
[548] That the three conditions set out in that provision are cumulative, see Case C-44/96, Mannesmann Anglagenbau Austria and Others, EU:C:1998:4, para 21; and C-223/99, Agorà Srl and Excelsior Snc di Pedrotti Bruna & C. v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc. coop. arl, EU:C:2001:259, para 26.
[549] Arrowsmith S. (2014). The Law of Public and Utilities Procurement Regulation in the EU and UK, vol 1 (third edition). Sweet & Maxwell, p. 367.

> *"(…) any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market (…)".*

This provision is an addition in the directive since the 2004 Public Sector Directive did not contain a definition of an economic operator. The concept of economic operator covers the tenderer and candidate. Subsection 11 of Article 2(1) of the Directive defines a tenderer as *"an economic operator that has submitted a tender".*

Additionally, subsection 12 of Article 2(1) of the Public Sector Directive defines a candidate as:

> *"(…) an economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership."*

Pursuant to recital 14 in the preamble to the directive, the concept should be interpreted in a broad sense. Radical 14 of the Public Sector Directive is worded as follows:

> *"It should be clarified that* ***the notion of 'economic operators' should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate.*** *Thus, firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are 'legal persons' in all circumstances."*[550]

As stated above, the legal form of an entity is irrelevant to its classification as an economic operator. The important question is whether there is execution of works, the supply of products or the provision of services on the market. Public entities may therefore constitute an economic operator for the purpose of the directive.

Additionally, the legal form of economic operators is treated in Article 19(1) in the directive:

> *"Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the*

[550] Emphasis added.

Member State in which the contract is awarded, they would be required to be either natural or legal persons".

Thus, the contracting authority cannot reject economic operators on the grounds that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons. Furthermore, this provision means that the contracting authority cannot exclude economic operators solely on the grounds that their legal form does not correspond to a specific category of legal persons, as they are entitled to carry out the relevant service activity from a tendering procedure in accordance with the law of the Member State concerned. This has been established in the case law of the ECJ.[551]

4.5 Economic Operators as Undertakings

In this section, it will examine whether economic operators will fall under the concept of an undertaking and thus under the scope of the competition rules. The concept of an economic operator and the concept of an undertaking can defined in the following ways:

The concept of an economic operator depends on whether there is an execution of works, a supply of products or a provision of services on the market. Hence, the decisive element for the concept of economic operator is the offer of goods or services on the market. Furthermore, the legal form of an entity is irrelevant to its classification as an economic operator.

The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Furthermore, the concept of an undertaking relies upon whether an economic activity is performed by offering goods and services on the market. This concept will be analysed and discussed in section 5.1 of this chapter.

The definitions of the concepts of economic operator and an undertaking share many similarities. First, the legal form is irrelevant in order to be classified as an economic operator or an undertaking. Second, the concepts rely on whether goods and services are offered on the market. However, what differentiates the definition of an economic operator from an undertaking is that the definition of economic operator does not state whether the way in which it is financed has an impact on the qualification.

[551] See C-357/06, Frigerio Luigi & C. Snc v Comune di Triuggio, EU:C:2007:818, para 21. In this judgement, Article 4(1) of the 2004 Public Procurement, was interpreted. Article 4(1) of the 2004 Public Procurement is almost identical to Article 19(1) of the Directive. Candidates or tenderers are replaced with economic operator in the Directive.

In *Ordine,*[552] the ECJ commented on the concept of economic operator and made the following statement:[553]

> *(…) where one of the authorities concerned can be regarded as an economic operator, a classification which* ***encompasses any public body proposing services on the market, regardless of whether it has a primarily profit-making objective****, whether it is structured as an undertaking or whether it has a continuous presence on the market (…)".*[554]

Thus, the ECJ found that classification as an economic operator encompasses any public body proposing service in the market, regardless of whether it has a primarily profit-making objective. In recent case, the ECJ has again commented on the concept of an undertaking. In *Parsec Fondazione,*[555] the ECJ emphasises that radical 14 to the preamble of the Public Sector Directive states explicitly that the concept of an economic operator needs to be interpreted *in a broad manner.*[556]

Hereafter, the ECJ stated that the concept of an economic operator includes *"(…) any persons or entities active on the market 'irrespective of the legal form under which they have chosen to operate".*[557] Thus, this terminology is very close to that used for the purposes of defining an undertaking under the competition rules.[558]

However, it should be noted that participation in public procurement requires offering goods and services on the market to the contracting authorities. Hence, this will entail that all economic operators are undertakings, even though not all undertakings are economic operators.[559]

5 The Scope of Application of the Competition Rules

The competition rules apply to undertakings and decisions by associations of undertakings.[560] Hence, the concept of an undertaking is central to the analysis of the scope of application of the competition

552 C-159/11, Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others, EU:C:2012:817.
553 Ibid, para 20.
554 Emphasised added.
555 Case C-219/19, Parsec Fondazione Parco delle Scienze e della Cultura v Ministero delle Infrastrutture e dei Trasporti, EU:C:2020:470.
556 Ibid, para 22.
557 Ibid, para 22.
558 The same conclusion can be found in Sanchez-Graells (2021). Article 2 Definitions in Caranta, R. and Sanchez-Graells (eds.). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 30.
559 An exception are in-house providers or other entities involved in public-public cooperation. See Sanchez-Graells, A. (2016). EU Competition Law and State Aid Issues in Public Procurement. In Risvig Hamer (ed.). Grundlæggende udbudsret (first ed.) DJØF Publishing, p.696.
560 In the treaty, the competition rules can be found under the section "Rules applying to undertakings".

rules.[561] An undertaking has the same meaning for the purposes of both Article 101 and Article 102 TFEU.[562]

The TFEU does not contain a definition of an undertaking, thereby leaving it up to the European Courts to interpret and establish the extent of the concept. It may seem simple to establish what an undertaking is, yet perhaps not in practice. In order to determine whether the EU competition rules are applicable to actions by contracting authorities, case law by the European courts regarding the concept of undertaking is reviewed.

5.1 The Concept of an Undertaking

According to settled case law, an undertaking encompasses every entity engaged in economic activities of an industrial or commercial nature by offering goods and services on the market. This was established in *Commission v. Italy,*[563] where the ECJ held that *"(…) the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market (…)."*[564] Thus, the ECJ found that an undertaking encompasses every entity engaged in economic activities of an industrial or commercial nature by offering goods and services on the market. The same wording is repeated in subsequent case law.[565]

Furthermore, the concept of an undertaking is understood regardless of the legal status of the entity and the way in which it is financed. In *Höfner,*[566] the ECJ was asked to decide whether a public employment agency could be classified as an undertaking that is subject to the EU competition rules in the Treaty. The ECJ held:

> *"(…) in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity."*[567]

[561] C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, EU:C:1999:430, para 206.
[562] See Joined cases T-68/89, T-77/89 and T-78/89, Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v Commission of the European Communities, EU:T:1992:38, PARA 358. See also Jones, A., & Sufrin, B. (2019). EU competition law: Text, cases, and materials (7.th ed.). Oxford University Press, p. 141.
[563] Case 118/85, Commission of the European Communities v Italian Republic, EU:C:1987:283.
[564] Ibid para 7.
[565] Among others, the same wording are repeated in C-35/96, Commission of the European Communities v Italian Republic, EU:C:1998:303, para 36; Joined cases C-180/98 to C-184/98, Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, EU:C:2000:428, para 75, and Case C-49/07, Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, EU:C:2008:376, para 22.
[566] C-41/90, Klaus Höfner and Fritz Elser v Macrotron GmbH., EU:C:1991:161.
[567] Ibid para 21.

Hereby, the ECJ stated that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.[568]. The concept of an undertaking relies upon whether an economic activity is performed by offering goods and services on the market.

Furthermore, the fact that the entity offers goods or services without a profit motive does not preclude the entity who carries out those operations on the market from being considered an undertaking. In *MOTOE*[569], the ECJ held:

> "(…) *the fact that the offer of goods or services is made without profit motive does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit.*"[570]

Thus, non-profit activity does not change the fact that it may be economic activity.

5.2 A Functional Approach for Identifying an Undertaking

As stated above, the legal form of an entity is irrelevant to its classification as an undertaking. The functional approach followed by the ECJ focuses on the activity rather than the entity.[571] The decisive factor for the concept of undertaking under competition law is whether the entity conducts economic activity.

The wide definition of an undertaking covers every entity regardless of the legal status of the entity. This leads to the EU competition rules possibly applying not only to legal persons but also to individuals, state bodies and other public bodies.[572]

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[568] The same wording are repeated in subsequent case law see e.g. Joined Cases C-180/98 to C-184/98, Pavlov and Others v Stichting Pensioenfonds Medische Specialisten, EU:C:2000:428, para 74; Case C-475/99, Firma Ambulanz Glöckner v Landkreis Südwestpfalz, EU:C:2001:577, para 19; and C-218/00, Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), EU:C:2002:36, para 22.

[569] Case C-49/07, Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, EU:C:2008:376.

[570] Ibid, para 27.

[571] See Lianos, I., Korah, V., & Siciliani, P. (2019). Competition Law, Analysis, Cases, & Materials (first ed.). Oxford University Press, p. 280

[572] More about individuals considered as undertakings, see Jacobsen Cesko, K. S. (2020). Blurring the Boundaries Between Being an Employee and Self-employed - An EU Competition Law Analysis of the Employment Status of Wolt Couriers. Copenhagen Business School, CBS LAW Research Paper No. 20-32, Available at SSRN: https://ssrn.com/abstract=3705203.

Furthermore, the functional approach may result in an entity being considered an undertaking when it engages in some activities, but not when it engages in others.[573] The classification of a particular entity as an undertaking depends on the economic or non-economic nature of its activities. Again, the TFEU does not contain a definition for an economic activity, leaving it up to the European Courts to interpret and establish the extent of the concept. The following will therefore examine what is meant by economic activity.

5.3 The Concept of Economic Activity

As the concept of economic activities has no exhaustive definition, it is not possible to define a conclusive list of activities that are considered to be economic activities. The ECJ has elaborated on activities that constitute economic activities and non-economic activities.

For the purpose of this thesis, the most relevant non-economic activity is the exercise of public powers. When an entity is exercising public powers, be it on its own or in the capacity of public authorities, the competition rules do not apply.[574] However, public entities will fall within the concept of an undertaking when they carry out an economic activity.

This exception to the application of competition rules has been established in case law by the ECJ. The court has repeated that activities falling within the exercise of public powers are not of an economic nature, thereby justifying the application of the competition rules in the treaty.[575] From this point on, the exception in question is referred to as the *public sector exception*, which it has also been referred to in legal literature[576].

5.4 The Public Sector Exception

As stated above, activities that fall within the exercise of public powers are omitted from the scope of the competition rules. Public entities may act by either exercising public powers or carrying out

[573] See Option of Advocate General Jacobs in C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie, EU:C:1999:28, para 207.
[574] See Winterstein, A: Nailing the Jellyfish: Social Security and Competition Law (1999) ECLR at 324-333, p. 5.
[575] See to that effect, Commission of the European Communities v Federal Republic of Germany, Case 107/84, EU:C:1985:332, paras 14 and 15; SAT Fluggesellschaft v Eurocontrol, C-364/92, EU:C:1994:7, para 30; Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, Case 107/84, EU:C:1985:332 and Selex Sistemi Integrati v Commission, C-113/07 P, EU:C:2008:376, para 70.
[576] Faull, J. and Nikpay, A. (2014). The EU Law of Competition (third ed.). Oxford University Press, p. 194.

economic activities of an industrial or commercial nature by offering goods and services on the market.[577]

In essence, a critical factor in determining whether the public sector exception applies is the nature of the activity carried out by the relevant entity.[578] A distinction must therefore be drawn between a situation where the public entities act as the exerciser of official authority and a situation where the public entities perform economic activities of an industrial or commercial nature by offering goods or services on the market.

For the purpose of assessing whether an activity is economic or non-economic, it is necessary to determine if the given activity is connected with the exercise of public powers. In a number of case law examples, the ECJ has dealt with the distinction between public entities acting with the capacity of public powers or by performing economic activities. Such cases are dealt with below.

5.4.1 Distinction between Acting in the Capacity of Public Powers and Performing Economic Activity

The distinction between acting in the capacity of public powers and performing economic activities was explored in *Höfner and Elser*.[579] In this judgment, the ECJ found that a public employment agency which was in the business of employment procurement might be classified as an undertaking for the purpose of applying the competition rules. The ECJ held that:

> *"(…) employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment."*[580]

Thus, the ECJ focused on the activities of the public employment agency, thereby holding that employment procurement activities could, at least in principle be carried out by a private undertaking, which may be offered in competition with other operators.

The ECJ found that employment procurement activities were economic in nature, since they had not always been and are not necessarily carried out by public entities. However, the public employment agency had a legal monopoly concerning higher staff and their services were without charge. Consequently, an entity like a public employment agency engaged in the business of employment

[577] Case 118/85, Commission of the European Communities v Italian Republic, EU:C:1987:283, para 7. See also Lianos, I., Korah, V., & Siciliani, P. (2019). Competition Law, Analysis, Cases, & Materials (first ed.). Oxford University Press, p. 290.
[578] Faull, J. and Nikpay, A. (2014). The EU Law of Competition (third ed.). Oxford University Press, p. 194.
[579] Case C-41/90, Klaus Höfner and Fritz Elser v Macrotron GmbH., EU:C:1991:161.
[580] Case C-41/90, Klaus Höfner and Fritz Elser v Macrotron GmbH., EU:C:1991:161, para 22.

procurement may be classified as an undertaking for the purpose of applying the competition rules.[581] Hence, the ECJ focused on whether the activities had always been carried by public entities, which previously has been referred to as the *comparative criterion*.[582]

Another judgment that addresses the issue of exercise of public powers is *Eurocontrol*[583] In this case, the ECJ assessed the separability between the exercise of public powers and the performance of economic activities. The case concerned the European Organization for the Safety of Air Navigation (hereinafter Eurocontrol), which a regionally oriented international organization that was founded via a multinational agreement between several Member States[584]. The case laid before the ECJ arose as a request for a preliminary ruling referred by a Belgian court. The dispute before the national Belgian court concerned the refusal of the air navigation company SAT Fluggesellschaft mbH (hereinafter SAT) to pay Eurocontrol the route charges for flights that had taken place between September 1981 and December 1985.[585] The SAT claimed, among other things, that the procedure followed by Eurocontrol in fixing charges at different rates for equivalent services of an amount varying in particular from state to state and from year to year constituted an abuse of a dominant position and pleaded that Eurocontrol had infringed Articles 86 and 90 of the treaty (now Article 102 and 106 TFEU). [586]

The ECJ held that in order to determine whether Eurocontrol's activities are those of an undertaking within the meaning of the treaty, it is necessary to establish the nature of those activities[587]. The ECJ considered the public character of Eurocontrol's activities and stated that Eurocontrol on the behalf of the Member States carried out tasks in the public interest aimed at contributing to the maintenance and improvement of air navigation safety[588]. Therefore, the ECJ took a closer look at the nature of the Eurocontrol's activities. The ECJ stated that Eurocontrol's collection of route charges *"(…) cannot be separated from the organization's other activities. Those charges are merely the consideration, payable by users, for the obligatory and exclusive use of air navigation control facilities and services. (…) Eurocontrol must, in collecting the charges, be regarded as a public authority acting in the exercise of its powers[589]".*

581 Ibid, para 23.
582 See the Option in FENIN by Poiares Maduro, C-205/03 P, FENIN v Commission of the European Communities, EU:C:2005:666, para 11-13.
583 Case C-364/92, SAT Fluggesellschaft v Eurocontrol, EU:C:1994:7.
584 Ibid, para 3.
585 Ibid, para 5.
586 Ibid, para 6.
587 Ibid, para 19.
588 Ibid, para 27.
589 Ibid, para 28.

Hereafter, the ECJ expressed the following view that "*Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition."*[590] Hereby, the EJC emphasized that Eurocontrol's activities by their nature, aim, and the rules to which they are subject are connected with the exercise of powers relating to the control and supervision of air space which is typically considered the powers of a public authority. The fact that a public entity offers goods and services in return for remuneration is not necessary for the activity to be classified as economic activity. Thus, in the assessment of the exercise of public powers, it must be verified whether the activities by the public entities by their nature, aim, and the rules to which they are subject are connected with the exercise of public powers or whether they have an economic character that justifies the application of the competition rules. Based on the facts of the case, Eurocontrol was not considered to constitute an undertaking subject to the provision of the treaty.[591] It was held by the ECJ that Eurocontrol's collection of route charges was inseparable from Eurocontrol's other activities, thus making its operation as a whole one that is connected with the exercise of public powers.[592]

In essence, it follows from case law that a distinction must be drawn between a situation where public entities act in the exercise of official authorities and one where they carry out economic activities of an industrial or commercial nature by offering goods or services on the market.

The outcome of *Eurocontrol*[593] has subsequently been applied in *Diego Calì*[594]. In this case, the ECJ was dealing with the interpretation of Article 86 of the EC Treaty (now Article 102 TFEU) including whether SEPG could qualify as an undertaking. The case concerned anti-pollution surveillance and intervention entrusted by a public body to a private limited company, Servizi Ecologici Porto di Genova SpA (hereinafter "SEPG"), in the oil port of Genoa. The tariffs applied by SEPG had been approved by the public authorities[595].

The ECJ stated that it is necessary to consider the nature of the activities carried out by a public undertaking or body for which a state has conferred special or exclusive rights[596]. The ECJ held that "*The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest*

590 Ibid, para 30.
591 Ibid, para 31.
592 See, to that effect C-343/95, Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG) EU:C: 1997:160, paras 16, 18 and 23,
593 Case C-364/92, SAT Fluggesellschaft v Eurocontrol, EU:C:1994:7
594 Case C-343/95, Diego Calì & Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG), EU:C:1997:160.
595 Ibid, para 8 and 24.
596 Ibid, para 18.

which forms part of the essential functions of the State as regards protection of the environment in maritime areas[597]". Thus, the ECJ found that anti-pollution surveillance was a task in the public interest. Consequently, the SEPG carried out services relating to the protection of the environment that were essential functions of the state.

Hereafter, the ECJ referred to *Eurocontrol*[598] and held that "*Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature SEPG justifying the application of the Treaty rules on competition*[599]". Hence, the ECJ found that the SEPG was not an undertaking since it carried out services of a non-economic nature. Furthermore, it highlighted that the charge by SEPG for preventive anti-pollution surveillance is an integral part of its surveillance activity in the maritime area of the port and therefore cannot affect the legal status of that activity[600]. Accordingly, the assessment of the activities by the ECJ was based on the nature of the activity and the rules to which the activity is subject.

In *Eurocontrol*[601] and *Diego Cali*[602], the ECJ assessed the activities with a focus on the public nature of the performed activities. The ECJ also found that services or goods supplied by a public entity or on behalf of a public body in return for remuneration is not sufficient for the activity to be classified as economic.

The public nature of the activities performed was also addressed in *Ambulanz Glöckner.*[603] In this case, the ECJ assessed whether medical aid organizations entrusted under the relevant legislation with the task of providing ambulance services were undertakings according to the competition rules. The legislation distinguishes between two types of ambulance services: emergency transport and patient transport. The ECJ repeated previous case law and established that an undertaking, in the context of competition law, covers any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Furthermore, any activity related to offering goods and services on a given market is an economic activity[604]. Again, the ECJ focused on the activities and stated that the medical aid organizations provide services for remuneration from users on the market

[597] Ibid, para 22.
[598] Case C-364/92, SAT Fluggesellschaft v Eurocontrol, EU:C:1994:7
[599] Case C-343/95, Diego Calì & Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG), EU:C:1997:160, para 23
[600] Ibid, para 24.
[601] Case C-364/92, SAT Fluggesellschaft v Eurocontrol, EU:C:1994:7
[602] Case C-343/95, Diego Calì & Figli Srl v Servizi Ecologici Porto di Genova SpA (SEPG), EU:C:1997:160
[603] Case C-475/99, Firma Ambulanz Glöckner v Landkreis Südwestpfalz, EU:C:2001:577.
[604] Ibid, para 19

for emergency transport services and patient transport services[605]. Hereafter, the ECJ emphasized that the activities of the medical aid organizations have not always been, and are not necessarily, carried on by such organizations or by public authorities[606].

The ECJ then took the view that "*public service obligations may, of course, render the services provided by a given medical aid organisation less competitive than comparable services rendered by other operators not bound by such obligations, but that fact cannot prevent the activities in question from being regarded as economic activities*[607]. Hereby, the ECJ emphasized that even though the activities of the medical aid organizations were subject to public service obligations not imposed on private sector competitor, the activities of the medical aid organizations can be considered economic activities. Thus, the ECJ found that the provision of ambulance services constituted an economic activity and that the medical aid organizations must be treated as undertakings within the meaning of the competition rules.[608] In sum, the fact that an activity has a public interest dimension and that the entity carrying on the activity may be subject of public service obligations does not mean that the competition rules cannot apply.

Furthermore, the question of whether the competition rules apply to the actions of contracting authorities when they conduct public tenders has been the subject of multiple judgements by the EU Courts and the General Court.

FENIN marked the beginning of case law regarding whether public entities can be engaged in an economic activity when they act within the capacity as a purchaser.[609] In *FENIN,*[610] the ECJ was asked to decide whether the contracting authority performed economic activities for the purpose of Article 102 TFEU, and, thereby, whether the contracting authority could fall under the scope of the competition rules. The case came to the ECJ in the form of an appeal brought by the Federación Española de Empresas de Tecnología Sanitaria (hereinafter FENIN) to set aside a judgment by the General Court.[611] The ECJ endorsed the argument of the General Court and set out that "(…) *there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to*

[605] Ibid, para 20
[606] Ibid, para 20.
[607] Ibid, para 21.
[608] Ibid, para 22.
[609] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third edition). Sweet & Maxwell, p. 326.
[610] Case C-205/03 P, Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission, EU:C:2006:453.
[611] T-319/99, Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission of the European Communities, EU:T:2003:50.

whether or not the subsequent use of the purchased goods amounts to an economic activity."[612] Thus, purchasing activities are not considered economic in nature, unless the subsequent use amounts to an economic activity.

In *SELEX,*[613] the position set out in FENIN was upheld by the EJC, and the EJC clarified that "*(…) it would be incorrect, when determining whether or not a given activity is economic, to dissociate the activity of purchasing goods from the subsequent use to which they are put, and that the nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity.*"[614] Hence, the approach by the ECJ of taking the context of the activities into account and not looking separately at the activities in question is also seen in *FENIN*.

Furthermore, in *SELEX*, the ECJ stated that activities are inseparable if an activity is connected with activities which constitute an exercise of public power. Consequently, the ECJ found that it is not a requirement that the activity is essential or indispensable for the exercise of public power in order for it to be inseparable.[615]

In *Compass-Datenbank,*[616] the ECJ has confirmed the approach taken in *FENIN* and *SELEX*. The ECJ developed a test for when the two activities must be treated together and when they ought to be treated separately. The ECJ held that "*in so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers.*"[617] Accordingly, the EJC found that, in the situation that an economic activity cannot be separated from the exercise of public power, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers. Thus, inseparable activities are treated together either as an economic activity or non-economic activity. Separable activities, on the other hand, are treated separately as economic or as non-economic activities.

From above it can be deduced, that purchasing activities are not, in themselves, economic activities under the competition rules. The assessment of the nature of the procurement activities depends on whether the subsequent use can be considered an economic activity. According to settled case law,

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612 Case C-205/03 P, Federación Española de Empresas de Tecnología Sanitaria (FENIN) v Commission, EU:C:2006:453, para 26.

613 Case T-155/04, SELEX Sistemi Integrati SpA v Commission of the European Communities, EU:T:2006:387.

614 Ibid, para 65.

615 Ibid, para 79.

616 Case C-138/11, Compass-Datenbank GmbH v Republik Österreich, EU:C:2012:449.

617 Ibid, para 38.

an entity may carry out several activities, and the nature of each activity must be assessed individually.[618] When a public entity carries out both economic and non-economic activities, the ECJ has developed a test to determine whether the activities must be assessed individually or together as one integrated activity. In literature, this is called the *inseparability test.*[619]

In *TenderNed,* [620] the EJC took the opportunity to make a distinction between situations where the contracting authorities act as an undertaking and situations where they act as public authorities. The EJC stated the following about the inseparability test:

> *(…) [I]n so far as a public entity carries on an economic activity, since that activity is not connected to the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that same economic activity cannot, however, be separated from other activities connected with the exercise of public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers.*[621]

Thus, the ECJ found that, if the different activities carried out by a public entity cannot be separated, they are exempted from competition law as a whole, since the public entity cannot be considered an undertaking. Hereafter, the ECJ stated that:

> *The 'separation' criterion put forward by the appellants, is in fact referred to by the Court, in paragraph 38, only in the particular situation where certain activities of a public entity do not, as such, form part of the exercise of public powers and must be considered, in isolation, to be economic activities.*[622]

Hence, according to the EJC, the inseparability test is only applicable to activities that do not, as such, form part of the exercise of public powers and can thus be considered to be economic activities in isolation. It is difficult to understand what is meant by this and the question is whether this should

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618 See, for example, Case C-49/07, Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, EU:C:2008:376, para 25: C-138/11, Compass-Datenbank GmbH v Republik Österreich, EU:C:2012:449, para 37; and C-147/16, Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers, EU:C:2018:320, paras 56-57.

619 See Holdgaard, R., Ølykke, G. S., & Nielsen, R. G. (2019). Public Authority or Economic Activity in the Context of Public Infrastructures: An Assessment of the European Commission's Policy After Leipzig-Halle. European State Aid Law Quarterly, 18(3), 274–292, p. 289.

620 C-687/17 P, Aanbestedingskalender BV and Others v European Commission, EU:C:2019:932.

621 Ibid, para 18.

622 Ibid, para 19.

be seen as a further development of the inseparability test. Hence, it is not clear from case law which activity that will prevail under the inseparability test.[623]

6.1.1. Summary of Findings

The analysis of case law indicates that it is not easy to draw a line between public entities acting in the capacity of public powers or performing economic activities. In search for clarity, the ECJ have been asked to rule on whether the activities are considered as economic activity. As previously stated, it is settled in case law that the essential feature of economic activity is the offering of goods and services on the market. The assessment of the activities is typically based on the nature of the relevant activity, the purpose of the relevant activity and the rules to which the activity is subject. Furthermore, the fact that the service supplied by a public entity is provided in return for remuneration is not sufficient for the activity to be classified as economic.

Furthermore, the competition rules can, in some situations, apply to the actions of the contracting authorities when they conduct public tenders. Whether the competition rules apply will depend on a case-by-case assessment of the activities of the contracting authorities. Hence, there is uncertainty when it comes to the assessment of whether purchasing activities by contracting authorities constitutes economic activities and thereby the applicability of the competition rules to contracting authorities.

6 Concluding remarks

As stated in the introduction, this chapter serve as the foundation for the legal analysis regarding the legal framework for collaborations between economic operators in the competition for public contracts. In a situation where economic operators decide to collaborate when tendering for a public contract, the public procurement rules and the competition rules can both provide the legal basis for an assessment of whether the collaboration can be considered legal or not. Therefore, the chapter will focus on the public procurement rules and as well as the competition rules.

The competition rules has multiple objectives and one of the objectives is the promotion of the internal market. Furthermore, it is found that the objective of the competition rules is to protect the

[623] See Holdgaard, R., Ølykke, G. S., & Nielsen, R. G. (2019). Public Authority or Economic Activity in the Context of Public Infrastructures: An Assessment of the European Commission's Policy After Leipzig-Halle. European State Aid Law Quarterly, 18(3), 274–292, p. 289.

competition process rather than an outcome of the process and, in doing so, competition as such. Thus, effective competition should be considered the means to an objective, not the objective itself.

The Public Sector Directive has also the objective to promote the internal market. Furthermore, it is uncertain whether effective competition should also be considered an objective of the public procurement rules. However, many factors speak in favor of effective competition to be seen as an objective and therefore in the present thesis, the starting point will be that effective competition must be regarded as an objective of public procurement rules and not just as a mean to achieve the internal market objective. The notion of effective competition should be understood as to ensure the widest possible participation by tenderers in a call for tenders. Furthermore, the effective competition can be facilitated by observing general principles of the TFEU, such as the principles of transparency, non-discrimination and equal treatment. Furthermore, there are also an ongoing discussion whether a principle of competition can be found in the Public Sector Directive. This thesis will be based on the finding that there is no competition principle in the Public Sector Directive. It is found that elevating competition to a principle does not seem to have legal effects because the two-folded objective of the public procurement rules is both to achieve the internal market objective and to ensure development of effective competition.

The personal scope of the Public Sector Directive are the contracting authorities, whereas the competition rules are addressed to undertakings and decisions by associations of undertakings. The starting point is that activities that fall within the exercise of public powers are omitted from the scope of the competition rules. However, contracting authorities may act either by exercising public powers or by carrying out economic activities of an industrial or commercial nature by offering goods and services on the market and therefore, in some cases, they will be bound by the competition rules. The assessment of whether the competition rules will apply to the actions of the contracting authorities will depend on the distinguishing between exercise of public powers and economic activity. There is, however, uncertainty when it comes to the assessment of whether purchasing activities constitutes economic activities and thereby the applicability of the competition rules to the actions of contracting authorities.

PART III

LEGAL FRAMEWORK FOR COLLABORATION

CHAPTER 5

Collaboration between Economic Operators from a Public Procurement Law Perspective

1 Introduction

This chapter focuses on the legal framework set by the Public Sector Directive in situations of collaboration between economic operators participating in public tenders. The Public Sector Directive allows for economic operators to collaborate and have relations in a variety of ways. Collaboration between economic operators in the competition for public contracts has long been allowed in certain forms, such as participating in public tenders as a bidding consortia.[624]

In the Public Sector Directive, the general principle is that a contracting authority must respect the right of an economic operators to jointly submit a tender.[625] Furthermore, a contracting authority cannot require a group of candidates or tenderers to have a specific legal form for taking part in their public tender.[626] However, in some situations, a contracting authority can require that a group of candidates or tenderers should have some specific legal form in order for a group to be awarded the contract.[627] Thus, collaboration between economic operators are generally recognised as legitimate under the Public Sector Directive and they are not subject to any official scrutiny under those rules. Prior to the adoption of the Public Sector Directive, collusive practices in public procurement were primarily dealt with at EU level from the perspective of competition law.[628] One of the most important changes in this regard has been the introduction of the discretionary exclusion ground in Article 57(4)(d) of the Public Sector Directive.[629] The collusion-related exclusion ground of Article 57(4)(d) provides that a contracting authority may exclude, or that it may be required by a member state, to exclude an economic operator from a tender procedure if the contracting authority has a

[624] See Article 21 of Directive 71/305/EEC that states: "Tenders may be submitted by groups of contractors. These groups may not be required to assume a specific legal form in order to submit the tender; however, the group selected may be required to do so when it has been awarded the contract."
[625] As acknowledged in Articles 2(1)(10), 19(2) and 63(1) of the Public Sector Directive.
[626] Article 19(2) of the Public Sector Directive.
[627] Article 19(3) of the Public Sector Directive.
[628] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, p. 4, section 1.3.
[629] Kuzma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 2.

sufficient basis of plausible indications to conclude that the economic operator has entered into an agreement with other participating economic operators with the aim of distorting competition.

1.1 Outline

In the following, there will be a presentation of the legal framework for collaborations between economic operators set out by the Public Sector Directive. As presented in section 0 of Chapter 1, this section will focus on the three different types of collaboration can be entered into by economic operators, which are: (1) reliance on other economic operators' capacity; (2) bidding consortia; and (3) subcontracting. These types of collaboration will be treated in this order and will, to a certain extent, be analysed separately from one another.

The presentation of each type of collaboration will follow a similar structure. Each section will begin with a clarification of the notion of the collaboration type according to the Public Sector Directive, which is followed by an analysis of the applicable rules. Subsequently, the chapter takes a closer look at the discretionary exclusion ground in Article 57(4)(d) of the Public Sector Directive. This section will have focus in the application of the collusion-related exclusion ground in relation to collaboration between economic operators when they jointly submit a tender.

2 Reliance on the Capacities of Other Entities in Public Procurement

2.1 The Concept of Reliance on the Capacities of Other Entities

An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of its links to those entities. The notion of reliance on the capacities of other entities includes both reliance relating to economic and financial standing as set out pursuant to Article 58(3) and to criteria relating to technical and professional ability as set out pursuant to Article 58(4) of the Public Sector Directive.[630]

2.2 Rules Applicable to Reliance on the Capacities of Other Entities

The provisions on reliance on the capacities of other entities can primarily be found in Article 63 of the Public Sector Directive. The provisions of Article 63 of the Public Sector Directive consolidate the rules on reliance on the capacities of other entities, which are spread in Articles 47(2), 47(3), 48(3),

[630] Article 63(1) of the Public Sector Directive.

and 48(4) of the 2004 Public Sector Directive.[631] The objective pursued by the provisions on reliance on the capacities of other entities is attaining the widest possible opening-up of public contracts to competition to the benefit of not only of economic operators but also contracting authorities, including the involvement of SMEs in the public procurement market.[632]

The rule that tenderers can rely on the capacity of other entities in order to demonstrate that they have all necessary resources to execute a contract finds its origins from the *Ballast Nedam* case.[633] Since the *Ballast Nedam* case, the ECJ has progressively laid down the possibility for tenderers to rely on other entities' capacities for qualitative selection and the case law of the ECJ seem to allow reliance on third parties' capacities in a very broad sense without strict constraints.[634] The provisions in the Article 63 of the Public Sector Directive elaborates on the possibility to rely on other entities' capacity and it codifies new case law from the ECJ.[635]

The provisions in Article 63 of the Public Sector Directive are formulated more broadly than the provisions in the 2004 Public Sector Directive.[636] However, the provisions under Article 63 of the Public Sector Directive can be considered more extensive than the ones under the 2004 Public Sector Directive and these new and more extensive rules have improved the legal certainty.[637]

The relations between the provisions of Article 63 of the Public Sector Directive and the provisions of Articles 47 and 48 of the 2004 Public Sector Directive have been addressed by the ECJ in *Partner Apelski.*[638] In this judgement, the ECJ took a stand on the possibility for an economic operator to rely on the capacity of third parties when seeking the award of a public contract. In this regard, the ECJ stated following:

> *"Although it is true, as stated, inter alia, by recital 2 of Directive 2014/24, Directive 2014/24 aims to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related*

631 Sanchez-Graells, A. (2014). Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24 in Lichere, F, Caranta, R. and Treumer, S. (eds) Novelties in the 2014 Directive on Public Procurement, vol. 6 European Procurement Law Series. DJØF Publishing, p. 122.
632 C-94/12, Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo, EU:C:2013:646, para 34; C-324/14, Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, EU:C:2016:214, para 34.
633 Case C-389/92, Ballast Nedam Groep NV v Belgian State, EU:C:1994:133.
634 Dor, V. and Y. Musschebroeck, Y. (2021). The possibility to rely on the capacity of other entities. Public Procurement Law Review. 2021, 5, 209-224, p. 224.
635 C-94/12, Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo, EU:C:2013:646; C-324/14, Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, EU:C:2016:214; C-406/14, Wroclaw - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju, EU:C:2016:562.
636 Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 187.
637 Vornicu, R. (2021). Article 63 Reliance on the capacity of other entities in Caranta, R. and Sanchez-Graells (ed). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 675.
638 Case C-324/14, Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, EU:C:2016:214.

> *well-established case-law of the Court of Justice of the European Union, the fact remains that* ***Article 63 of that directive introduces substantial amendments as regards the right of an economic operator to rely on the capacities of other entities in the context of public contracts.***[639]
>
> *Far from preserving the continuity of Article 48(3) of Directive 2004/18, and clarifying its scope, Article 63(1) of* ***Directive 2014/24 introduces new conditions which were not provided for under the previous legislation.***"[640]

According to the ECJ, the provisions of Article 63 of Public Sector Directive include substantial amendments to the right of an economic operator to rely on the capacities of other entities in the context of public contracts. Moreover, the Public Sector Directive also introduces new conditions that were not provided for under the 2004 Public Sector Directive. This has been confirmed by the ECJ in subsequent case law.[641] Since some of the rules on reliance on the capacities of other entities in Article 63 of the Public Sector Directive do not have a counterpart in the provisions in the 2004 Public Sector Directive, these provisions should therefore be interpreted with attention to the fact that some can be considered as new. Hence, this aspect will be emphasized in the analysis of the rules.

The rules under Article 63 of the Public Sector Directive will to some extent differ depending on whether the third party´s capacities relied upon refer to (1) economic and financial standing, (2) technical capacity or (3) educational and professional qualifications.[642] This three-part division will form the framework for the further analysis of the rules in the sections below. Furthermore, it should be highlighted that under the same conditions stipulated under Article 63 of the Public Sector Directive, an economic operator can also rely on the capacity of other companies of its own group of companies.[643] Consequently, there following will also be applied in such a situation.[644]

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639 Ibid para 90. Emphasis added.
640 Ibid para 91. Emphasis added.
641 Case C-223/16, Casertana Costruzioni Srl v Ministero delle Infrastrutture e dei Trasporti - Provveditorato Interregionale per le opere pubbliche della Campania e del Molise and Azienda, EU:C:2017:685, para 27.
642 This difference in how the rules may apply depending on the capacities of the third party involved is mainly caused by the fact that if the third party's educational and professional qualifications are being relied upon, it must be the third party itself that perform the works, as it requires their specific qualifications.
643 Vornicu, R. (2021). Article 63 Reliance on the capacity of other entities in Caranta, R. and Sanchez-Graells (eds.). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 678.
644 See, to this effect Case C-176/98, Holst Italia SpA v Comune di Cagliari, intervener: Ruhrwasser AG International Water Management, EU:C:1999:593, para 15. In this judgement, the ECJ stated that an undertaking may prove that it has the necessary standing by furnishing references in respect of other companies within the same group,

An economic operator's possibility to rely on the capacities of other entities will differentiate from the use of subcontractors pursuant to Article 71 of the Public Sector Directive.[645] This differentiation lies in the fact that a subcontractor always will perform a part of the contract, whereas a third party, on whose capacities a tenderer relied on, might not. However, there is an exception to this when the economic operator rely on third parties' capacities in with regard to their technical and financial capacities and standing, see section 0 of this chapter. The use of subcontractors is analyzed in section 0 of this chapter.

The contracting authority may choose to impose requirements in the tender documents in order to ensure that the economic operator possesses the necessary capacity to perform the tendered contract. In this regard, the contracting authority shall ensure that all imposed requirements are related to and proportionate with the subject matter of the contract.[646] Furthermore, the contracting authority shall indicate the main reasons for choosing such requirements in the procurement documents or the individual report as referred to in Article 84 of the Public Sector Directive.[647]

When the contracting authority impose requirements in the tender documents, it must do it within the limitations set out in Annex XII Part 1 of the Public Sector Directive. Hence, the provisions to some degree limit the information that a contracting authority may require from economic operators. However, they do not prevent the contracting authority from considering information which the contracting authority may not require, but which an economic operator may choose to provide to prove its standing.[648] Pursuant to Article 63(1) of the Public Sector Directive, where appropriate and for a particular contract, an economic operator can rely on the capacities of other entities regardless of the legal nature of its links to those entities. It is therefore not a requirement that the economic operator is in possession of the required capacity imposed by the contracting authority in the tender documents.

Article 63(1) of the Public Sector Directive stipulates that where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority that it will have the necessary resources at its disposal.[649] The economic operators must state this before the expiry of the

[645] However, it should be noted that the economic operator can also rely on the capacities of a subcontractor.
[646] Article 58(1) of the Public Sector Directive.
[647] According to Article 84(1) of the Public Sector Directive, the contracting authority shall for every contract or framework agreement covered by the Directive and for every time a dynamic purchasing system is established draw up a written report.
[648] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol. 1 (third edition), Sweet & Maxwell, p. 1203.
[649] Which has also been emphasised by the ECJ in C-324/14, Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, EU:C:2016:214, paras 37-38.

time limit laid down for submitting applications or tenders for the public tender in question.[650] Moreover, the economic operator must prove that it actually will have the resources of the third party entity at its disposal, as the economic operator itself does not own these resources that are necessary for the performance of the contract.

The economic operator is free to choose the legal nature of the links it intends to establish with other entities on whose capacities it relies in order to perform the particular contract.[651] The economic operator is also free to choose the type of proof that it will use to illuminate the existence of those links. This is indirectly stated in Article 63(1) of the Public Sector Directive, which states that an example of proof can be producing a commitment by the third-party entry.[652]

Furthermore, this is also been highlighted in case of law of the ECJ. In *Ostas celtnieks,*[653] the court found that Articles 47(2) and 48(3) of the 2004 Public Sector Directive need to be interpreted as having the intent of precluding contracting authorities, in the tender documentation, from imposing on a tenderer, who relies on the capacities of other entities, the obligation to conclude a cooperation agreement or the formation of a partnership with third party entities before the contract is awarded. Preliminarily, the ECJ recalled that it is settled case law that:

> *"(…) Articles 47(2) and 48(3) of Directive 2004/18 recognise the right of every economic operator to rely, for a particular contract, upon the capacities of other entities, "regardless of the nature of the links which it has with them", provided that it proves to the contracting authority that it will have at its disposal the resources necessary for the performance of the contract (…)".*[654]

Hereafter, the ECJ highlights that an economic operators is free to choose the legal nature of the links it intends to establish with other entities, on whose capacities it relies in order to perform a particular contract as well as the type of proof that it wants to put forward to document the existence of those links.[655] Hence, the tenderer was free to choose both the legal nature of the links it intended to establish with its subcontractors and the type of proof it intended to put forward to document the existence of those links.

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[650] Case C-387/14, Esaprojekt sp. z o.o. v Województwo Łódzkie, EU:C:2017:338, paras 41-42.
[651] Article 60(1) of the Public Procurement Directive. See also: C-234/14, Ostas celtnieks SIA v Talsu novada pašvaldība and Iepirkumu uzraudzības birojs, EU:C:2016:6, para 28; and C-324/14, Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, EU:C:2016:214, para 52.
[652] Thus this is not an exhaustive list of possibilities for documentation.
[653] C-234/14, Ostas celtnieks SIA v Talsu novada pašvaldība and Iepirkumu uzraudzības birojs, EU:C:2016:6.
[654] Ibid para 23.
[655] Ibid para 28. This has also been cordified in Article 63(1) of the Public Sector Directive.

Although this judgement was been handed down under the provisions in the 2004 Public Sector Directive, it will remain important for the interpretation of the rules in the Public Sector Directive. This shall entail that the Public Sector Directive does not permit that contracting authorities to oblige economic operators that rely on the capacities of other entities to conclude a cooperation agreement or to form a partnership with third party entities before the public contract is awarded. The economic operator is free to choose the type of proof that it will use to illuminate the existence of those links.

Furthermore, where the economic operator relies on the capacities of other entities, the ESPD shall also contain the information in respect of such entities.[656] Thus, it is also a requirement that an ESPD should provide the relevant information in respect of entities on whose capacities an economic operator relies, so that the verification of the information regarding such entities can be carried out together with and on the same conditions as the verification in respect of the main economic operator.[657]

The Public Sector Directive facilitates limitations of the possibility to rely on the capacity of others. Article 63(2) explicitly allows limitations to the economic operators' right to rely on third party capacities by establishing that, in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks will be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators, by a participant in that group. Hence, it is clear from the provision that this also applies in the case of a consortium.

This limitation may be inspired by the case law of ECJ the in *Siemens and ARGE Telekom*.[658] In the present case, the contracting authority had a requirement that a maximum of 30% of the services may be subcontracted, and also that certain parts of the work could not be subcontracted at all.[659] The ECJ held that the use of subcontractors may in some cases, be restricted, and it found that the directive allows the contracting authority to prohibit the use of subcontractors whose capacities could not be verified at the level of examination of tenders and selection of the contractor, for the performance of essential parts of the contract. This case is dealt with in section 0 of this chapter.

[656] Article 59(1) of the Public Sector Directive.
[657] Recital 84 of the preamble to the Public Sector Directive.
[658] C-314/01, Siemens AG Österreich and ARGE Telekom & Partner v Hauptverband der österreichischen, EU:C:2004:159.
[659] Ibid para 16.

Hence, Article 63(2) pf the Public Sector Directive entails that the contracting authority can impose that critical tasks will be performed by the main tenderer.[660] The provision does not clarify what those critical tasks are. Hence, the classification of the critical tasks is a matter for the discretion of the contracting authority. In assessing what can be characterized as a central task, the contracting authority must carry out a substantive task assessment of the specific tasks where it must be assumed that the task in question can be considered critical when the task concerns elements that significantly contribute to the fulfillment of the public contract.

In the case law of the ECJ that emerged after the adoption of the Public Sector Directive, the ECJ has ruled on several matters relevant to the provisions on reliance on the capacities of other entities in the Public Sector Directive. In *Swm Costruzioni 2 SpA*,[661] the ECJ was requested for a preliminary ruling concerning the interpretation of provisions in the 2004 Public Sector Directive. In this case, the ECJ found that the subject of the contract might have special requirements, thus giving rise to a need for a certain capacity that could not be achieved by combining the capacities of multiple economic operators, as they individually, would prove to be inadequate for the purpose. In this regard, the ECJ held that:

> *"(…) there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators, in accordance with the second subparagraph of Article 44(2) of Directive 2004/18, as long as that requirement is related and proportionate to the subject-matter of the contract at issue."*[662]

Accordingly, the ECJ found that a contracting authority may require that a single economic operator meets the minimum requirement for the capacity in question or, where appropriate, that a limited number of economic operators meet this requirement, if such a requirement is related to the subject matter of the contract and is proportionate. This has been confirmed in subsequent case law by the ECJ.[663]

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[660] Steinicke, M. (2018). Comment to Article 63 in Steinicke, M. and Vesterdorf, P. L (eds.), Brussels Commentary on EU Public Procurement Law. Hart/Nomos, p. 622.
[661] C-94/12, Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo, EU:C:2013:646
[662] Ibid para 35.
[663] Case C-387/14, Esaprojekt sp. z o.o. v Województwo Łódzkie, EU:C:2017:338, paras 52-53; C-27/15, Pippo Pizzo v CRGT Srl, EU:C:2016:404, para 28.

Consequently, it must be assumed that when the contracting authority finds that the works has special requirements necessitating a certain capacity, the contracting authority would be justified in requiring limitations regarding the economic operators' right to rely on third party capacities. However, since those circumstances represent an exception, the requirements in question cannot be made general rules under national law in the Member States, and such a requirement must be related and proportionate to the subject matter of the contract at hand.[664]

As stated above, the rules under Article 63 of the Public Sector Directive differ to some extent depending on whether the third party´s capacities that have been relied upon refer to economic and financial standing, technical capacity or educational and professional qualifications. The following section will take a closer look at the framework for economic operator's reliance on third parties' capacities with regard to their economic and financial capacities.

2.2.1 Economic and Financial Capacity

Article 63 of the Public Sector Directive has brought increased certainty as to how economic can rely on third parties' capacities, even in regard to their technical and financial capacities and standing.[665] An economic operator can rely on the capacities of other entities relating to economic and financial standing pursuant to Article 58(3) of the Public Sector Directive.

The contracting authority may choose to impose requirements in the tender documents in order to ensure that the economic operator possesses the necessary economic and financial capacity to perform the tendered contract. For this purpose, contracting authorities can therefore require that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. Furthermore, contracting authorities may require that economic operators provide certain information on their annual accounts, for instance by showing the ratios between their assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance.[666] As previously stated, the economic operators are not obliged to be able to meet all the requirements for economic and financial capacity and thus they can make use of the option to rely on other third parties.

[664] See, to this effect C-27/15, Pippo Pizzo v CRGT Srl, EU:C:2016:404, para 28.
[665] Vornicu, R. (2021). Article 63 Reliance on the capacity of other entities in Caranta, R. and Sanchez-Graells (eds.). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 680.
[666] Article 58(3) of the Public Sector Directive.

According to Article 63(1) of the Public Sector Directive, when an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those third party entities involved are jointly liable for the execution of the contract. The provision refers only to the economic and financial capacity. This optional requirement is introduced in the Public Sector Directive.

The Public Sector Directive does neither specifies how this rule regarding joint liability for the execution of the contract is to be assessed nor in which cases this should be applied. However, as the Public Sector Directive mentions the possibility for contracting entities to require joint liability, it must be assumed that whether joint liability is required or not, it must be a matter for the discretion of the contracting authority. Hence, when the economic operator (i.e. main contractor) and the third party entities are jointly liable for the execution of the contract, it will mean that each party is fully liable for the performance of the contract to the contracting authority. Thus, the contracting authority can make claims against both the main contractor and the third party entity in the event of any breach of contract, notwithstanding which party has performed the work in question.

If the contracting authority impose a requirement of joint liability for the performance of the contract, there may be potential problems for both the contracting authorities, the economic operators and the third parties involved. This has also been highlighted in the literature. Dor and Musschebroeck have pointed out that if a third party accept to be jointly liable for the execution of the contract this can entail following:

> *"(…) very concretely, that the "third party" will be in the same position as if it was a member of a consortium, towards the contracting authority, even if it is only a subcontractor or a mother company of the tenderer for example (which would not even act as a subcontractor). There is in our view therefore a confusion between the tenderer and the third party to which capacities it refers, which is, by definition, a "third party" and not a party to the contract or to the consortium that submits a tender."*[667]

Accordingly, Dor and Musschebroeck finds that a jointly liable requirement can result in the third party entity in this situation ending up in the same position as a member of a consortium and thus cannot be considered a third party to the contract in question. Another potential problem regarding a requirement of joint liability for the performance of the contract has been addressed by Sanchez-Graells and De Koninck. They highlight that this requirement can "*result in complicated structures of letters of indemnity that raise the legal costs of participation*". Hereafter they suggest that "*an even more flexible approach*

[667] Dor, V. and Musschebroeck, Y. (2021). The possibility to rely on the capacity of other entities. Public Procurement Law Review. 2021, 5, 209-224, p. 212.

where a contracting authority should be satisfied with the liability of the main contractor, and if need be, self-protect through requirements for adequate professional risk indemnity insurance".[668] Hence, it is hereby emphasized that the optional requirement of joint liability for the execution of a public contract may result in higher legal costs of participation in the public tender. Instead of this requirement, they suggest requiring an adequate professional risk indemnity insurance.[669]

Furthermore, joint liability may be considered as a barrier to the participation of SMEs in public procurement procedures as the requirement of joint liability may make it more difficult to find third party entities and thus participate in the competition for public contracts. As previously stated, the objective of the rules on reliance on the capacities of other entities is attaining the widest possible opening-up of public contracts to competition to the benefit of not only of economic operators but also contracting authorities, including the involvement of SMEs in the public procurement market.

It can be assumed that the possibility to impose a requirement of joint liability for the execution of the contract is intended to ensure that the contracting authorities have the same security for the performance of the contract when entering into contracts with economic operators who cannot themselves meet the required minimum level of economic and financial capacity, as opposed to concluding contracts with undertakings who comply with the requirements. However, although a third party may only be responsible for the execution of a small part of the given public contract, the liability requirement applies regardless of whether the obligation by the public contract is indivisible or not. The contracting authority must therefore be aware of the optional requirement of joint liability for the execution of the contract as it may give rise to some of the mentioned problems in above.

Hence, the contracting authorities should be aware of the possible alternatives to the requirement of joint liability for the execution of a contract. To ensure equal treatment for economic operators who cannot themselves meet the required minimum level of economic and financial capacity as when concluding contracts with undertakings which comply with the requirements, the contracting authority can require another appropriate form of security for the performance of the contract, such as a bank guarantee or a professional risk indemnity insurance. As a result, the contracting authority must make a careful assessment regarding the requirements to economic and financial standing with the aim of the widest possible opening-up of public contracts to competition pursued by the relevant directives to the benefit not only of economic operators but also of contracting authorities. In

[668] Sanchez-Graells, A. and Koninck, D. C. (2018). Shaping EU Public Procurement Law. A Critical Analysis of the ECJ Case Law, 2015-2017. Kluwer Law International, p. 141.
[669] According to Article 58(3) of the Public Sector Directive, the contracting authorities may require an appropriate level of professional risk indemnity insurance.

addition, this interpretation also facilitates the involvement of SME's in the public procurement market, which is an aim that is also being pursued by Public Sector Directive.[670]

2.2.2 Technical Capacity

Pursuant to Article 63(1) of the Public Sector Directive, an economic operator can rely on the capacities of other entities regardless of the legal nature of its links to those entities with regard to criteria relating to technical capacity. The entity providing its technical capacity to the economic operator to demonstrate that the conditions for participating in the procedure have been satisfied and are not in a contractual relationship with the contracting authority. This entity will therefore not be liable to the contracting authority for the proper performance of the awarded public contract, and hence joint liability cannot be required by the contracting authority.

An exception to this are the applicable rules in a situation of reliance upon economic and financial standing.[671] As stated in section 2.2.1 of this chapter, the contracting authority may require the involved economic operators and third party entities to be jointly liable for the execution of the contract.[672]

Regarding technical ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary technical resources and experience to perform the contract to an appropriate quality standard. In this regard, contracting authorities may, in particular, require that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past. In procurement procedures for supplies requiring siting or installation work, services or works, the professional ability of economic operators to provide the service or to execute the installation or the work may be evaluated with regards to their skills, efficiency, experience and reliability.[673]

As previously stated, the economic operators are not obliged to be able to meet all the requirements for technical capacity and thus they can make use of the opportunity to rely on third party entities. However, it must be demonstrated that the economic operator has the necessary capacity. The

[670] See, to that effect, C-94/12, Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo, EU:C:2013:646, para 34; C-324/14, Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, EU:C:2016:214, para 34.
[671] Kuzma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 188.
[672] Article 63(1) of the Public Sector Directive.
[673] Article 58(4) of the Public Sector Directive.

economic operator may provide a statement of support or other documentation showing that the necessary technical capacity is available.

2.2.3 Educational and Professional Capacity

Economic operators may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of its links to those entities regarding professional abilities pursuant to Article 58(4) of the Public Sector Directive. However, an economic operator can rely on a third party´s capacity for educational and professional qualifications only when the latter will perform the works or services for which these capacities are required.[674] Although this rule is new in the Public Sector Directive, the ECJ found that this legal position also applied under the 2004 Public Sector Directive.[675] Hence, if an economic operator relies on the educational and professional qualifications of a third party entity, the part of the contract that requires such qualifications or experience shall be performed by the third party entity on which the economic operators relies. The contracting authority can ensure that this is done, for example, by writing this as a requirement into the contract. This rule in the Public Sector Directive may in practice entail that the possibility of an economic operator to rely upon the abilities of other entities for educational and professional qualifications can appear as a kind of consortium.[676]

The contracting authority may impose requirements which ensure that the economic operators possess the necessary human resources and experience to perform the contract to an appropriate standard. This entails that the contracting authority can require that the economic operators have a sufficient level of experience, which can be demonstrated by suitable references from contracts performed in the past.[677] As previously stated, the economic operators are not obliged to be able to meet all the requirements for technical capacity and thus they can make use of the opportunity to rely upon third party entities. However, it must be demonstrated that the economic operator has the necessary professional capacity. The economic operator may provide a statement of support or other documentation showing that the necessary technical capacity is available.

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[674] Article 63(1) of the Public Sector Directive. See also Case C-399/05, Commission of the European Communities v Hellenic Republic, EU:C:2007:446.
[675] C-324/14, Partner Apelski Dariusz v Zarząd Oczyszczania Miasta, EU:C:2016:214.
[676] Ølykke, G. S., & Nielsen, R. (2017). EU's udbudsregler – i dansk kontekst (2nd ed.). DJØF Publishing, p. 311.
[677] Article 58(4) of the Public Sector Directive.

Where economic operators rely upon the capacity of other entities, the contracting authority must verify that the entities upon which the economic operators relies can prove that they meet the relevant minimum requirements and that they are not covered by the grounds for exclusion.[678] The third party must, in the same way as the economic operator, document that the requirements imposed by the contracting authority are met. in the below, the thesis will take a closer look at the rules for substitution and exclusion of a third party entity, which may occur as a result of the verification of the contracting authority.

2.3 Substitution and Exclusion of a Third Party Entity

According to Article 63(1) the Public Sector Directive, the contracting authority has an obligation to verify whether the entities whose capacities the economic operator intends to rely on to fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57 of the Public Sector Directive. In order to verify the economic operator and third parties, the economic operator submits the ESPD with the tender.[679]

A third party entity which does not meet a relevant selection criterion, or in respect of which there are grounds for exclusion, may or sometimes shall be excluded and hence cannot be relied upon. Pursuant to Article 63(1) of the Public Sector Directive, the contract authority may or in some cases shall require following:

> *"The contracting authority **shall** require that the economic operator replaces an entity which does not meet a relevant selection criterion, or in respect of which there are **compulsory grounds for exclusion**.*
>
> *The contracting authority **may** require or may be required by the Member State to require that the economic operator substitutes an entity in respect of which there are **non-compulsory grounds** for exclusion."*[680]

Hence, substitution of a third part entity will in some cases be required by the contracting authority. The obligations of the contracting authority depend on whether it is a compulsory grounds for exclusion or non-compulsory grounds for exclusion. In the event of a compulsory grounds for exclusion, the contracting authority is obliged to require the economic operators to substitute a third

[678] Articles 57, 59, 60 and 61 of the Public Sector Directive.
[679] Article 59 of the Public Sector Directive.
[680] Emphasis added.

party entity. Whereas in the case of non-compulsory grounds for exclusion, the Member States can require that the contracting authority may require that the economic operator substitutes a third-party entity.

Article 63(1) the Public Sector Directive does not mention in which situations and on under which procedure this substitution may take place. This part of Article 63(1) does have a counterpart in the 2004 Public Sector Directive and thus these provisions should be interested new provisions.[681] However, it may nonetheless be relevant to include case law in order to clarify the framework of the substitution or exclusion of a third party entity.

In *Casertana Costruzioni,*[682] the ECJ confirmed the lawfulness of an automatic exclusion of an economic operator relying on the capacities of a third party that had lost the required qualifications after the submission of the tender. In the judgement, the ECJ highlighted the following:

> *"(…) the possibility afforded, unpredictably, exclusively to a consortium of undertakings to replace a third-party undertaking which belongs to that consortium and has lost a qualification that is required in order not to be excluded would amount to a substantial change of the tender and the very identity of the consortium. Indeed, such a change of the tender would compel the contracting authority to carry out new checks whilst at the same time granting a competitive advantage to that consortium which might attempt to optimise its tender in order to deal better with its competitors' tenders in the procurement procedure at issue."*[683]

Accordingly, the ECJ found that the possibility for an economic operator taking part in a tendering procedure to replace a third party may lead to a substantial change of the tender and the very identity of the consortium and perhaps granting a competitive advantage to that consortium which might attempt to optimise its tender in order to deal better with its competitors' tenders in the procurement procedure at issue. Furthermore, the ECJ also held that a change might lead to additional work for the contracting authority.

Moreover, the ECJ also stressed that this situation would be in conflict with the principle of equal treatment. The ECJ held that according to the principle of equal treatment, tenderers shall be afforded equality of opportunity when formulating their bids, which implies that the bids of all tenderers must be subject to the same conditions. Accordingly, such conflict would amount to a distortion of healthy

[681] Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 193.
[682] C-223/16, Casertana Costruzioni Srl v Ministero delle Infrastrutture e dei Trasporti, EU:C:2017:685.
[683] Ibid, para 39.

and effective competition between the economic operators participating in the public procurement procedure.[684] This reasoning led to the ECJ ruling that Articles 47(2) and 48(3) of the 2004 Public Sector Directive must be interpreted as not precluding national legislation, which excludes the possibility for an economic operator taking part in a tendering procedure to replace an auxiliary undertaking that has lost required qualifications after the submission of its tender and which results in the automatic exclusion of that operator.[685]

This must entail that Article 61(1) of the Public Sector Directive allows automatic exclusion of an economic operator that had relied on the capacities of a third party, where the latter lost the required qualifications after the submission of the tender. The reasoning of ECJ focused on the substitution of the third party leading to a breach of the principle of equal treatment because one consortium is given the opportunity and other tendered are not, and that the consortium in question can substantially alter the terms of its tender. In the judgement, the ECJ did not require an analysis of the terms of the substitution.

However, the approach of the ECJ can be questioned because the automatic exclusion of an economic operator which had relied on the capacities of a third party, where the latter lost the required qualifications after the submission of the tenderer, will entail that there are fewer tenderers in a call for tenders. As previously stated, the development of effective competition can be seen as an objective of the Public Sector Directive and not merely a means to achieve the internal market. The notion of effective competition should be understood as to ensure the widest possible participation by tenderers in a call for tenders. Furthermore, effective competition can be facilitated by observing general principles of the TFEU, such as the principles of transparency, non-discrimination and equal treatment.

In this case, the ECJ finds that there is no requirement to give the tenderer an opportunity to substitute the third-party undertaking that have lost the required qualifications after the tender has been submitted because that would amount to allowing for a substantial change of the tender. The automatic exclusion of an economic operator was justified by, inter alia, the observation of principle of equal treatment. However, the automatic exclusion can lead to a reduction in participation by tenderers and hence development of effective competition. If the ECJ had enquired an assessment of the substitution before a possibly exclusion, and this assessments finds that the new third party undertakes all the same obligations of the substituted third party under the same conditions this can

[684] Ibid, para 40.
[685] Ibid, para 42.

result in a substitution that does not give a competitive advantage to the tenderer under assessment, and thus this can may facilitate widest possible participation by tenderers in a call for tenders and thus competition. Although the ECJ highlights that a change of the tender would force the contracting authority to carry out new checks and thus lead to additional work for the contracting authority, it can be discussed whether these costs could justify an action that is contrary to the purpose of the Directive.

2.4 Summary of Findings

Overall, the Public Sector Directive facilitates a flexible approach to reliance on third party capacities. As highlighted, the general principle is that the contracting authority must respect the right of the economic operators to jointly submit a tender. However, there are limitations to this due to the provisions in the Public Sector Directive and certain case law from the ECJ.

The starting point is that, where appropriate and for a particular contract an economic operator can rely on the capacities of other entities regardless of the legal nature of its links to those entities. Furthermore, when an economic operator wishes to rely on the capacities of other entities, it shall prove to the contracting authority that it will have the resources necessary at its disposal. The economic operator must state this before the expiry of the time limit laid down for submitting applications or tenders for the public tender concerned. The economic operator shall prove that it will actually have the resources of the other entity at its disposal, which it does not own itself and that they are necessary for the performance of the contract. Moreover, it is free to choose the legal nature of the links that it intends to establish with the other entities, on whose capacities it relies upon in order to perform the particular contract as well as the type of proof it chooses to put forward to showcase the existence of those links. However, there are limitations to the application of reliance on third party capacities. First, when an economic operator relies upon the capacities of other entities with regards to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and the involved third party entities are jointly liable for the execution of the contract. Secondly, the Public Sector Directive explicitly allows for limitations to the economic operators' right to rely on third party capacities. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks are performed directly by the tenderer itself. Thirdly, an economic operator can only rely on a third party´s capacity for educational and professional

qualifications when the latter will be performing the works or services for which these capacities are required.

3 Bidding Consortia in Public Procurement

3.1 The Concept of a Bidding Consortium

The concept of a bidding consortium is not defined by the Public Sector Directive. However, it is generally accepted that this notion applies to agreements entered into by groups of economic operators, including temporary associations, pursuant to Article 19(2).[686] This provision provides economic operators with the possibility to jointly submit tenders regardless of the legal relations binding them and the legal form that they choose. Hence, the notion of a bidding consortium covers associations of two or more individuals, companies or organisations which have the objective of participating in a common activity, such as submitting a joint bid to a tendered public contract by a contracting authority. An economic operator can join or form part of a group with other economic operators in order to tender for a particular public contract or to participate in tenders on various contracts.

3.2 Rules Applicable to Participation through Bidding Consortia in the Public Sector Directive

The provisions that are particularly relevant to bidding consortia are Articles 19(2) and (3), the last sentence of Article 63(1), and Article 63(2) of Public Sector Directive. Consequently, there will be some overlap with the applicable rules to reliance on the capacities of other entities, as described in the above.

According to Article 19(2) of the Public Sector Directive, groups of economic operators shall not be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate. Hence, contracting authorities are explicitly prohibited from rejecting tenders on the ground that they are submitted by consortia composed of more than one legal entity.[687] However, the contracting authority may require groups of economic operators to assume a specific legal form, once they have been awarded the contract, to the extent that such a change is necessary

[686] Kuzma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 122.
[687] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol. 1 (third edition), Sweet & Maxwell, p. 1321.

for the satisfactory performance of the contract. If this requirement is imposed, this must be stated in the tender documents. For instance, where joint and several liability is required, a specific form may be required when a bidding consortium is awarded the contract.[688] A consortium may rely on the capacities of participants in the group or of other entities under the same conditions as stated in Article 63 of the Public Sector Directive.

Furthermore, pursuant to Article 19(1) of the Public Sector Directive, economic operators, which under the law of the Member State in which they are established, are entitled to provide the relevant service shall not be rejected by the contracting authority solely on the grounds that they would be required to be either natural or legal persons under the law of the Member State in which the contract is awarded.[689] Together with the rule that prohibits a contracting authority from requiring groups of economic operators to have a specific legal form in order to submit a tender or a request to participate, this provision ensures that participation by bidding consortia is not limited by rules that require a specific legal form.

The general rules is that a contracting authority cannot impose any conditions that are different from those imposed on individual participants for the performance of a contract when dealing with a group of economic operators. If a contracting authority wants to impose any other conditions for the performance of a contract to a group of economic operators as opposed to an individual participant, this shall be justified by objective reasons and shall be proportionate.[690] In practice, this will entail that contracting authorities cannot set requirements in the tender documents that only apply to, for example, a group of economic operators. Thus, there can be no discrimination between economic operators bidding individually and those participating as a bidding consortium.

Furthermore, a group of economic operators may rely on the capacities of participants in the group or of other entities under the same conditions as described in section 2.2 of this chapter.[691] The Member States have an obligation to adapt conditions for applications for registration submitted by economic operators belonging to a group and claiming resources made available to them by the other companies in the group.[692]

[688] See Radial 15 of the preamble to the Public Sector Directive.
[689] This rule can be found in Article 4(1) of the 2004 Public Sector Directive. See also C-357/06, Frigerio Luigi & C. Snc v Comune di Triuggio, EU:C:2007:818.
[690] Article 19(2) of the Public Sector Directive.
[691] Article 63(1)(4) of the Public Sector Directive.
[692] Article 64(2)(2) of the Public Sector Directive.

In addition, it should be emphasized that the Public Sector Directive gives the contracting authority the possibility of laying down specific rules for participating as a bidding consortium in the procurement procedure. In the procurement documents, the contracting authority may clarify how groups of economic operators are to meet the requirements for economic and financial standing or technical and professional ability as referred to in Article 58 of the Public Sector Directive, provided that this is justified by objective reasons and is proportionate.[693] This possibility is an innovation that came along with the Public Sector Directive.[694] For instance, any requirement, which should be justified by objective reasons and be proportionate, could include the requiring off the appointment of a joint representation or a lead partner for the purpose of the procurement procedure or the requiring off information on their constitution.[695]

3.2.1 Assessment of the Qualification of a Bidding Consortia

The Public Sector Directive does not provide clear instructions for how to assess the qualification of groups of economic operators seeking to participate in a public tender as a bidding consortium. The provisions in the Public Sector Directive are thus dependent on case law of the ECJ, which remains relevant for interpreting these provisions.

In the first *Ballast Nedam* case,[696] the ECJ found that, for the purpose of the assessment of the criteria to be satisfied by a contracting authority when an application for registration by the dominant legal person of a group is being examined, the companies belonging to that group account should be taken into account.[697] Even though an economic operator does not enjoy a dominant position in relation to other the economic operators, the ruling in *Ballast Nedam* is applicable by analogy to this situation.

It should be emphasized that an economic operator cannot be presumed to actually have the necessary resources at its disposal for the performance of the contract. In *Holst Italia*,[698] the ECJ held that the evidence of the economic operators' technical capabilities may be furnished by an indication of the technicians or technical bodies, regardless of them belonging directly to the service provider or not, on which it can call to perform the service.[699]

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693 Article 19(2)(3) of the Public Sector Directive.
694 Ølykke, G. S., & Nielsen, R. (2017). EU's udbudsregler – i dansk kontekst (2nd ed.). DJØF Publishing, p. 311.
695 See Preamble 15 to the Public Sector Directive.
696 Case C-389/92, Ballast Nedam Groep NV v Belgian State, EU:C:1994:133.
697 Ibid para 18.
698 Case C-176/98, Holst Italia SpA v Comune di Cagliari, EU:C:1999:593.
699 Ibid para 25.

Hence, the contracting authority must assess the qualifications of the bidding consortium as a whole.[700] In practice this entails that in the assessment of whether the minimum requirements regarding economic and financial standing and/ or technical and professional ability is met, it is not expected that the individual members of the consortium must meet the minimum requirements but the consortium as a whole does so. An example of which is that in the assessment of whether there is sufficient technical capacity available to carry out the contract, the contracting authority must take into account all the technical resources actually available through the consortium as a whole, and it can thus not require that every group member should hold the relevant capabilities individually.

In this regard, the contracting authority may describe how the bidding consortia participants should behave to the tender dossier and the tender process. There will often be a difference in the information needed for suitability and selection as well as the subsequent offer must be submitted, depending on whether it is an individual company or a bidding consortium. A clear description for consortium reduces the risk of the consortium making formal mistakes by, for example, giving the wrong or too little information about the consortium as a whole or about the individual consortium participants. It may, in the worst case, mean that the contracting authority will be obliged to disregard the consortium's application or offers to the detriment of competition.

As described in section 2.3 of this chapter on the substitution and execution of third party capacity, the contracting authority has an obligation to verify whether the entities upon whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57 of the Public Sector Directive. The Public Sector Directive has not in any way modified the method of assessing whether premises arise for excluding a bidding consortia or members hereof.[701] Hence, during the tender procedure, the contracting authority may exclude a bidding consortium or a member of the consortium if it turns out that the economic operator is, in view of committed acts or omitted either before or during the procedure, in one of the grounds for exclusion.[702] In the assessment of the whether there are grounds for exclusion, every economic operator who is member of the consortium is assessed individually.[703]

[700] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol. 1 (third ed.), Sweet & Maxwell, p. 1322.
[701] Steinicke, M. (2018). Commentary to articles 13-24 of Directive 2014/24/EU on Public Sector Directive. In Steinicke, M. and Vesterdorf, P. L. (eds.). Brussels Commentary on EU Public Procurement Law, Hart/Nomos, pp. 338-339.
[702] Article 57(5) of Public Sector Directive.
[703] Kuzma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p.123.

3.2.2 Composition of Bidding Consortia and Exclusion

The composition of bidding consortia can give rise to some tricky situations that must be considered carefully in order to ensure compliance with the Public Procurement rules. The Public Sector Directive does not lay down any rules that specifically relate to the composition of groups of economic operators, and consequently, the rules that apply on the matter are the ones laid down by the Member States. This has been established by the ECJ in *Makedoniko Metro and Michaniki.*[704] Furthermore, this has also been confirmed by the ECJ in subsequent case law.[705]

The *Makedoniko Metro and Michaniki* case[706] concerned a tender in which a consortium changed its composition multiple times during the procedure, including after having submitted a tender which would have won the tender. However, the contracting authority had laid down a rule saying that participating consortia could not change the composition of the consortium after the tenders had been submitted nor after having been chosen as the contractor.[707] Consequently, the consortium in question could not lawfully change its composition and it was therefore excluded from the procedure for the award of the contract.

As a result of this, the ECJ was requested for a preliminary ruling, where, among other things, questions were asked as to whether a change in the composition of a consortium which occurs after submission of tenders and selection of the group as the provisional contractor must be accepted by the contracting authority.[708]

The ECJ held to this question that the directive does not preclude national rules that prohibit a change, initiated after the submission of tenders, in the composition of a group of contractors taking part in a procedure for the award of a public works contract or a public works concession.[709] Although the ECJ answered this question of the change in the composition of a consortium briefly, it can be deduced that the rules about the composition of bidding consortia are a matter dealt with in the national law of the Member States.

Hence, if there is a case where neither the legislation in the Member State nor the contract notice contains any specific rules on the composition of groups of economic operators, the composition of

[704] Case C-57/01, Makedoniko Metro and Michaniki AE v Elliniko Dimosio, EU:C:2003:47, para 61.
[705] C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347, para 35.
[706] Case C-57/01, Makedoniko Metro and Michaniki AE v Elliniko Dimosio, EU:C:2003:47.
[707] Ibid para 29.
[708] Ibid para 31.
[709] Ibid para 63.

consortia must be assessed with regard to the general principles of EU law, in particular the principle of equal treatment and the duty of transparency.[710]

The same approach as in *Makedoniko Metro and Michaniki* was applied in *MT Højgaard and Züblin.*[711] Here, the ECJ ruled on whether it should be possible for the remaining economic operator of a two-party bidding consortium to continue a tender in their own name when the other economic operator drops out of the consortium. The crucial question that was being asked was whether such a *substitution* could be considered a breach of the principles of equal treatment and transparency.

The case of *MT Højgaard and Züblin* concerns a tender for a public contract for the construction of a new railway line between the cities Copenhagen and Ringsted in Denmark, announced by the Danish railway infrastructure operator Banedanmark. Two companies, Per Aarsleff and E. Pihl & Søn A/S, combined to form a consortium and were pre-selected to take part in the procurement tender. However, the day they signed the consortium agreement, E. Pihl & Søn was declared to be insolvent and Per Aarsleff was allowed to continue in place of the consortium by Banedanmark.[712] The ECJ emphasized the following:

> *"The principle of equal treatment of tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, requires that all tenderers must be afforded equality of opportunity when formulating their tenders, and therefore implies that the tenders of all competitors must be subject to the same conditions."*[713]
>
> *"In the main proceedings, as is apparent from paragraph 10 of this judgment, the contracting entity considered that there should be at least four candidates in order to ensure such competition."*[714]
>
> *"In that regard, a contracting entity is not in breach of that principle where it permits one of two economic operators, who formed part of a group of undertakings that had, as such, been invited to submit tenders by that contracting entity, to take the place of that group following the group's dissolution, and to take part, in its own name, in the negotiated procedure for the award of a public contract, provided that it is established, first, that that economic operator by itself meets the requirements laid*

[710] See, to that effect, Case C-57/01, Makedoniko Metro and Michaniki AE v Elliniko Dimosio, EU:C:2003:47, para 41; and C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347, para 36.
[711] C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347.
[712] For a review of this case, see Brown, A. (2016). If one partner in a two-party bidding consortium drops out, may the remaining party continue as tenderer in its own name? The EU Court of Justice ruling in Case C-396/14 MT Hojgaard and Zublin v Banedenmark. Public Procurement Law Review, 6, NA191-NA195.
[713] C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347, para 38.
[714] Ibid para 42.

down by the contracting entity and, second, that the continuation of its participation in that procedure does not mean that the other tenderers are placed at a competitive disadvantage."[715]

"Last, as regards the fact that, after the dissolution of the Aarsleff and Pihl group, Per Aarsleff took on the contracts of 50 salaried staff of E. Pihl og Søn, including individuals who were key to the implementation of the construction project concerned, it is for the referring court to determine whether Per Aarsleff thereby acquired a competitive advantage at the expense of the other tenderers."[716]

Accordingly, the ECJ stated that the aim of the principle of equal treatment of tenderers is to promote the development of healthy and effective competition between undertakings taking part in public procurement procedures. In this case, it seems that the ECJ focused on the fact that the contracting authority had determined that, for there to be effective competition in that specific tender, it should include at least four candidates. Accordingly, in *MT Højgaard and Züblin,* the effective competition was ensured, as the four candidates still were remaining after Per Aarsleff was allowed to take part in the procedure individually.

In light of the reasoning above, the ECJ held that it would not be a breach of the principle of equal treatment for an economic operator that takes part as a consortium member to take the place of the consortium in the procurement of a public contract, provided that two conditions are met: first, that the remaining economic operator meets the requirements set by the contracting authority on its own, and, second, that the continuation of the economic operator's participation in the procedure does not mean that the other tenderers are placed at a competitive disadvantage.[717] These two conditions may be considered as a way for the contracting authority to ensure compliance with the principle of equal treatment of tenderers. The ECJ leaves the assessment of one of the two conditions open to the Danish Public Procurement Complaints Board. The board needs to conclude whether Per Aarsleff did gain any competitive advantage over the other candidates participating in the tender.[718]

In addition to the two conditions above, which must be presumed to be cumulative, it also appears that the contracting authority must ensure the development of healthy and effective competition between the economic operators taking part in the public procurement procedure. As has been found in section 3.5 of chapter 4, the objective of effective competition is assessed by the ECJ based on the

[715] Ibid para 44.
[716] Ibid para 47.
[717] Ibid para 48.
[718] For more about the Danish follow-up to the MT Højgaard and Züblin judgement, see: Treumer, S. (2018). Consortium changes: the Danish follow-up to Case C-396/14, MT Hojgaard and Zublin v Banedanmark. Public Procurement Law Review, vol. 1, NA25-NA30.

participation of tenderers in a call for tenders. The notion of effective competition should be understood as to ensure the widest possible participation of tenderers in a call for tenders, and effective competition can be facilitated by observing the general principles of the TFEU, such as the principles of transparency and equal treatment.

The judgment in *MT Højgaard and Züblin* provides useful clarification on the assessment of substitution in the composition of a bidding consortium during participation in a procurement procedure for a public contract. The ECJ decided to take the approach of allowing the change in the bidding consortium, as long as the two conditions aimed at ensuring respect for the principle of equal treatment, were being met. The first condition is that the remaining economic operator individually shall meet the requirements set by the contracting authority. This condition can be considered as reasonably easy to assess. However, the second condition that the continuation of the economic operator's participation in the procedure does not mean that other tenderers are placed at a competitive disadvantage can seem more difficult to assess. The ECJ did not give any indication of the circumstances in which a change in consortium membership would be considered to place other bidders at a competitive disadvantage.

In the option in *MT Højgaard and Züblin,*[719] Advocate General Mengozzi deliberated more on the conditions highlighted in the above. Advocate General Mengozzi stated that the decisive question was not whether, Per Aarsleff, in theory, might have been pre-selected on its own, but whether it benefited from the different treatment that gave it a competitive advantage at the point when it was allowed to take part in the procedure on its own.[720] Thus, Advocate General Mengozzi stresses the view that the most important condition is whether there is a competitive advantage. In continuation of this, there is a clarification of how this advantage can be assessed for the case in question. Advocate General Mengozzi held the following:

> *"It must be examined whether the opportunity given to one of those two operators, at a later stage in the procedure when there are fewer uncertainties about the course that the procedure will follow, to amend that commercial decision by allowing it to take part in the procedure on its own, does not give rise to different treatment in respect of the other tenderers and result in a competitive advantage. It must be ascertained whether that subsequent commercial decision was actually taken on the basis of different information from that available to the other tenderers when they made a decision to take part in the*

[719] Opinion of Advocate General Mengozzi in C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2015:774.
[720] Ibid para 80.

procedure in a particular form or composition, without subsequently having the opportunity to change it."[721]

Accordingly, Advocate General Mengozzi stated that the assessment of whether there was a competitive advantage must be based on whether Per Aarsleff made the commercial decision to take part in the procedure on its own, on the basis of having different information from that available to the other tenderers when they made the decision to take part in the procedure in a particular form or composition, without subsequently having the opportunity to change that. Hence, Advocate General Mengozzi suggested that the assessment should be based on the amount of information available at the time when the economic operators decided on whether or not to participate in the tender procedure. Nevertheless, the ECJ did not emphasize the importance of this in the reasoning. However, it is uncertain how the assessment of a competitive advantage should be conducted. The Advocate General, like the ECJ, eventually left it up to the Danish Complaints Board for Public Procurement to determine whether this situation placed other tenderers at a competitive disadvantage.

Hence, *MT Højgaard and Züblin* established that a change in the composition of a bidding consortia does not per se appear to provide any basis for removing the economic operator. Furthermore, it appears that it is possible for a consortium member to replace a whole consortium in a tender. However, it must be borne in mind that this case has its own unique facts and that each situation will need to be considered on its own merits. Therefore, there may be special facts that causes the need for other elements to be included in the assessment of substitutions in the composition of bidding consortia during participating in a tender procedure for a public contract.

However, it must be assumed that the assessment of the condition regarding the competitive disadvantage must include the information of the remaining party, following the change and whether the change has resulted in eliciting more information than the other tenders in the particular public tender. Furthermore, since a change of consortium membership does not per se provide a basis for removing an economic operator, it can be argued that there should be an assessment of the nature of this change. Modification of candidates or tenderers before the tender is submitted or the contract is awarded is not regulated in the Public Sector Directive. The assessment of the nature of the change in the composition of a bidding consortium can presumably be based on an analogy application of

[721] Ibid para 82.

the rules governing the changes to the tender specification, and the procedure during the award procedure.[722]

However, a distinction should be made between changes in the composition of the bidding consortium before and after a contract award. In the event of changes in the members of the bidding consortium during participation in a procurement procedure for a public contract, the contracting authority can accept this change, as seen in *MT Højgaard and Züblin.* However, this replacement must comply with the conditions developed through case law, which are discussed in the above.

In a situation with changes in the members of the bidding consortium after the award of a public contract, the assessment of the change can, presumably, be based on an analogy application of the rules governing the modification of contracts during their term.[723] This approach has been seen in the case law of the ECJ. In *Velox*, the ECJ held that a change in the composition of a consortium could potentially constitute a change in essential elements that were decisive in the adoption of the award decision. Here, the ECJ stated:

> *"[T]he decision authorising the change in composition of the consortium to which the contract had been awarded necessitates an amendment of the award decision which may be regarded as substantial if, in the light of the particular features of the tender award procedure in question, it alters one of the essential elements that were decisive in the adoption of the award decision. In that situation, all relevant measures provided for by national law would have to be taken to remedy that irregularity, which might extend to a new award procedure (…)"*[724]

Accordingly, the ECJ found that a change in the composition of a bidding consortium may be regarded as substantial, in the light of the particular features of the tender award procedure in question, if it alters one of the essential elements that were decisive in the adoption of the award decision. Hence, the assessment of a change in the composition of a bidding consortium must assessed in the light of the particular features of the tender award procedure. Accordingly, the ECJ draws parallels to the rules governing the modification of contracts during their term.

Thus, it can be deduced that after the award of the contract is made, a change in a member of a bidding consortia must be expected to be assessed in the same way, where a new economic operator

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[722] In the same direction, see Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol. 1 (third ed.), Sweet & Maxwell, p. 1322; Ølykke, G. S., & Nielsen, R. (2017). EU's udbudsregler – i dansk kontekst (second ed.). DJØF Publishing, p. 189.

[723] See to this effect Case C-161/13, Idrodinamica Spurgo Velox srl and Others v Acquedotto Pugliese SpA, EU:C:2014:307.

[724] Ibid para 39.

replaces the one to which the contracting authority had initially awarded the contract. The consequence of a not lawful substitution of a consortium member must be expected to result in the contracting authority being required to make a new procurement procedure.[725]

According to Article 72(1) of the Public Sector Directive, contracts may be modified during their term without the requirement of a new procurement procedure. It appears from the Public Sector Directive that when a new contractor replaces the one to which the contracting authority had initially awarded the contract, it is in accordance with the directive when it takes places as a consequence of either (1) an unequivocal review clause or option, (2) a universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application the Public Sector Directive, or (3) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this option is provided for under national legislation.[726] Consequently, whether a replacement of a member of a bidding consortium can be made within the framework of the Public Sector Directive may depend on if one of these three situations is applicable.

In the first situation, replacements are provided for in the contract.[727] However, this provision must be interpreted relatively limited since this does not entail that a change clause can be given to the contracting authority with free access to replace a contract party. Hence, the contracting authority can advantageously list change scenarios in a change clause, whereby changes may be made under the contract and thus not as an actual change to the contract itself.

In the second situation, replacement are made due to corporate restructuring. In order for this provision to be applicable, three requirements have been set. First, the new contracting party must be able to fulfil the criteria for qualitative selection in accordance with the original requirements of the tender. Second, no substantial modifications to the contract must be made in the process. Third, the replacement of a new contractor must not constitute a circumvention of the application the Public Sector Directive. This is also highlighted in the Public Sector Directive, where it is stated that the

[725] See Article 72(5) of the Public Sector Directive.
[726] Article 72(1)(d) of the Public Sector Directive.
[727] This rule was first established in C-496/99 P, Commission of the European Communities v CAS Succhi di Frutta SpA., EU:C:2004:236.

successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, it is subsequently highlighted that:

> *"[T]he successful tenderer performing the contract should be able, in particular where the contract has been awarded to more than one undertaking, to undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, takeovers, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that tenderer."*[728]

Accordingly, the contract should be allowed undergo certain structural changes during the performance of the contract and, in such situations, there will not be required a new procurement procedure. In the above, specifics are mentioned with regards to bidding consortia (i.e. the awarded of contract to more than one undertaking) and here it is stated that it particularly applies in such cases. Hence, it is possible to undergo structural change in participation by bidding consortium, including to make changes to the contracting party.

In the third situation, the contracting authority itself assumes the main contractor's obligations towards its subcontractors, where this possibility is provided for under national legislation. Here, the contracting authority can undertake the obligation of the main contractor and this situation is dedicated to subcontractors.[729] This provision is relevant in relation to Article 71(3) of the Public Sector Directive which allows contracting authorities to pay subcontractors directly. This rule will be further dealt with in section 0 of this chapter.

Furthermore, if there are changes which are not covered by the situations discussed above, the contracting authority must assess where the change entails substantial modifications to the contract. According to the Article 72(4) of Public Sector Directive, a modification of a contract during its term shall be considered substantial, if it renders the contract materially different in character from the one that initially has been concluded.[730] Article 72(4) of the Public Sector Directive offers four criteria for when a modification shall be considered substantial:

> *"(a) the modification* ***introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other***

[728] Recital 110 of the preamble to the Public Sector Directive.
[729] Olivera, R. D. (2015). Modification of Public Contracts: Transposition and Interpretation of the new EU Directives. European Procurement & Public Private Partnership Law Review, 10(1), 35–49, p. 43.
[730] See also Case C-454/06, Pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung, EU:C:2008:351, para 37.

> ***candidates*** *than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;*
>
> *(b) the modification* ***changes the economic balance of the contract or the framework agreement in favour of the contractor*** *in a manner which was not provided for in the initial contract or framework agreement;*
>
> *(c) the modification* ***extends the scope of the contract or framework agreement considerably****;*
>
> *(d) where a new contractor replaces the one to which the contracting authority had initially awarded the contract in other cases than those provided for under point (d) of paragraph 1."*[731]

Thus, the above criteria are an expression of a codification of the case of the ECJ in *Pressetext*,[732] yet it has subsequently had the opportunity to nuance its statements in *Pressetext*. The ECJ has also stated that a change will result in materially different in character from the initially concluded contract if "*those changes are liable to call into question the award of the contract, in the sense that, had such amendments been incorporated in the documents which had governed the original contract award procedure, either another tender would have been accepted or other tenderers might have been admitted to that procedure".*[733] Accordingly, the ECJ found that in its assessment of the change that it should be examined whether the change contributes to another award decision. Hence, the question is how the assessment of a replacement of a member in a bidding consortium should be conducted, and then if the change entails substantial modifications to the contract.

In *Velox*, the ECJ found that an analogy could be drawn to the judgement in *Wall*.[734] Hence, if parallels can be drawn to *Wall*, a change in the composition of a bidding consortium may be regarded as substantial if it introduces conditions that, if they had been part of the original procedure, would have allowed for the admission of tenderers other than those originally admitted, or would have allowed for the acceptance of an offer other than that originally accepted.[735] Furthermore, in *Wall*, the ECJ stated:

> *"A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a concession contract*

[731] Emphasis added.
[732] Case C-454/06, Pressetext Nachrichtenagentur GmbH v Republik Österreich, EU:C:2008:351.
[733] Case C-549/14, Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation, EU:C:2016:634. para 28.
[734] Case C-91/08, Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH, EU:C:2010:182, paras 38, 39, 42 and 43.
[735] See to this effect ibid para 38.

> *where the use of one subcontractor rather than another was, in view of the particular characteristics of the services concerned, a decisive factor in concluding the contract, which is in any event for the referring court to ascertain."*[736]

Accordingly, the ECJ found that a change of a subcontractor provided by the contract (i.e. changes made under the contract) may still constitute an amendment to essential provisions of the contract, which was a decisive factor in concluding the contract. Hence, the change of subcontract could result in an essential element of the contract being altered. These grounds are also in accordance with the Public Sector Directive which states that sufficiently clear review clauses must indicate the scope and nature of possible modifications as well as the conditions of when they are to be used. However, the review clauses cannot justify modifications that would alter the overall nature of the contract. [737]

Thus, it can be deduced that after the award of the contract is made, a change in a member of a bidding consortia must be assessed in the same way where a new economic operator replaces the one to which the contracting authority had initially awarded the contract. This will mean that this assessment should be based on the provisions in Article 72 of the Public Sector Directive. Hence, it should be investigated whether the change can occur as a result of one of the listed stations in Article 72(1)(d) of the Public Sector Directive, and if the changes that are not covered by one of the situations, the contracting authority must then make an assessment of whether the change entails substantial modifications to the contract. In this regard, the contracting authority must look at the nature of the change in the composition of a bidding consortium, even if it is a change made under the contract. According to this assessment, if the contracting authority find that the change in the composition of a bidding consortium may be regarded as substantial because it introduces conditions that, if they had been part of the original procedure, would have allowed for the admission of tenderers other than those originally admitted or would have allowed for the acceptance of an offer other than that originally accepted, the contracting authority should make a new procurement procedure.

Another potential problem to the composition of a bidding consortium is whether an economic operator may participate in more than one consortium in the same public tender. Again, because specific regulation of bidding consortia does not appear in the Public Sector Directive, this is a matter for the Member States. In practice, this means that if neither the Member State legislation nor the contract notice contain any specific rules on composition of a group of economic operators, the

[736] Ibid para 39.
[737] Recital 111 of the preamble to the Public Sector Directive.

composition of a bidding consortium, including whether an economic operator may participate in the same tender, must be assessed with regard to the general principles of EU law, in particular the principle of equal treatment and transparency.

In legal literature, this situation has been highlighted. Arrowsmith identifies the following reasons to not allow economic operators to participate in more than one bidding consortium in the same public tender:[738]

> *"One reason not to allow this is that there is* ***no genuine competition when two tenderers have a similar composition.*** *This is relevant to the procurement directives/regulations to the extent that it affects whether the contracting authority has complied with the requirements governing the minimum number of participants: if two consortia contain significant similar elements, arguably they cannot be treated as distinct tenderers for the purpose of the rules on minimum numbers.*
>
> *A second potential problem is that a consortium member could* ***pass confidential information about one consortium bid in which it is involved to another****. In view if this risk, it is arguable that allowing participation in two consortia might violate the equal treatment principle (especially given the explicit requirements on confidentiality of information)".*[739]

Accordingly, Arrowsmith highlights two reasons for not allowing the above. First, it is pointed out that this can contribute non-genuine competition when two tenderers have a similar composition. Here, it is highlighted that if two bidding consortia contain significant similar elements, they arguably cannot be treated as distinct tenderers for the purpose of the rules on minimum numbers. Second, Arrowsmith states that the consortium member is able to pass confidential information about one consortium bid while being involved in another, which can potentially be in conflict with the principle of equal treatment.

If an economic operator wishes to bid jointly with one or more economic operators, an information exchange will take place between the economic operators that are considering bidding together. However, it is uncertain whether this will be considered problematic for the contracting authorities. The latter situation may be handled internally between the economic operators in the bidding consortium by establishing internal procedures, confidentiality agreements and other initiatives.

[738] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third ed.). Sweet & Maxwell, p. 1323.
[739] Emphasis added.

3.3 Summary of Findings

Bidding consortia cannot be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate in procurement procedure. As a consequence, contracting authorities are expressly prohibited from rejecting tenders on the grounds that they are submitted by a bidding consortia composed of more than one legal entity. However, the contracting authority can only require groups of economic operators to assume a specific legal form, once they have been awarded the contract to the extent that such change is necessary for the satisfactory performance of the contract. Furthermore, the general rules are that a contracting authority cannot impose any conditions that are different from those imposed on individual participants for the performance of a contract when dealing with a group of economic operators.

The Public Sector Directive does not provide clear instructions for how to assess the qualification of groups of economic operators that seek to participate in a public tender as a bidding consortium. However, it can be deduced that the contracting authority must assess the qualifications of the bidding consortium as a whole and that the composition of consortia must be assessed with regard to the general principles of EU law, in particular the principle of equal treatment and the duty of transparency. It would not be a breach of the principle of equal treatment for an economic operator that takes part as a bidding consortium member to take the place of the consortium in the procurement of a public contract, provided that two conditions are met: first, that the remaining economic operator meets the requirements set by the contracting authority on its own, and, second, that the continuation of the economic operator's participation in the procedure does not mean that the other tenderers are placed at a competitive disadvantage. In the assessment of the condition regarding the competitive disadvantage, information of the remaining party must be included following the change and whether the change has resulted in eliciting more information than the other tenders in the particular public tender.

Additionally, there is also a lack of clarity when it comes to a change of consortium membership. A change does not per se provide a basis for removing an economic operator, and it can therefore be argued that there should be an assessment of the nature of this change. Thus, it must be assumed that after the award of the contract is made, a change in a member of a bidding consortia must be assessed in the same way where a new economic operator replaces the one to which the contracting authority had initially awarded the contract. Overall, however, there is some uncertainty regarding the legal framework set out by the Public Sector Directive when it comes to the application of bidding consortia in order to jointly bid on public contracts.

4 Subcontracting in Public Procurement

4.1 The Concept of Subcontractors

The Public Sector Directive does not define the concept of a subcontractor. However, it can be deduced from Article 71 of directive that an economic operator can entrust specific parts of the tendered contract to another entity, which is called a subcontractor. If this is the case, it shall be done without prejudice to the question of the main contractor's liability for the performance of the contract.[740] Hence, the notion of a subcontractor can be understood as referring to an entity that does not have a contractual relationship with the contracting authority. In addition, the role of a subcontractor is limited to the performance of only a part of the contract based on the terms and conditions agreed upon with the main contractor. Fundamentally, the use of subcontracting differentiates from reliance on third parties' capacities as a subcontractor always will execute a part of the awarded contract, whereas the capacities that the tenderer relied upon might not.[741]

Furthermore, in legal literature, it has been stated that the term subcontractor is applied to economic operators that are to be found further down the supply chain.[742] However, in the Public Sector Directive, there is nothing indicating that subcontractors, within the meaning of the directive, cannot include economic operators that are at the same level in the supply chain as the main contractor. In this thesis, the concept of a subcontractor from a public procurement perspective will therefore be considered to include both economic operators at the same level as well as those further down in the supply chain.

4.2 Rules Applicable to Subcontracting in the Public Sector Directive

The provisions that are particularly relevant to subcontracting can be found in Article 71 of the Public Sector Directive. These can be considered an innovative element in the Public Sector Directive, since the 2004 Public Sector Directive only partially addressed the way in which a contracting authority may involve itself with subcontracting during the procurement process.[743] In essence, Article 71 of

[740] Article 71(4) of the Public Sector Directive.
[741] As stated in section 2, when an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those third party entities involved are jointly liable for the execution of the contract
[742] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third ed.). Sweet & Maxwell, p. 576.
[743] Article 25 of the 2004 Public Sector Directive was very short on the matter of subcontracting by only requiring following of the contracting authority: "In the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors. This indication shall be without prejudice to the question of the principal economic operator's liability".

Public Sector Directive reproduces the wording of Article 25 of the 2004 Public Sector Directive and prescribes additional rules related to subcontracting.[744] Only the optional information requirement on subcontractors in Article 71(2) and the related liability rule in Article 71(4) of the Public Sector Directive had a counterpart in Article 25 of the 2004 Public Sector Directive.[745] These provisions are further dealt with later in the chapter.

The rules on subcontracting have several objectives. First, the provisions of the Public Sector Directive aim to provide transparency for the contracting authority so that the contracting authority is not getting exposed to the risk of using subcontractors who, for example, have been excluded on the basis of the rules for exclusion. This is particularly relevant since there are generally no direct contractual relations between a contracting authority and subcontractor, and mostly when the supply chains grow, there is no direct contact between the main contractor and the subcontractors.[746] Furthermore, transparency is also important when it comes to subcontractors' observance of the applicable obligations in the fields of environmental law, social law and labour law.[747] Second, the provisions on subcontracting have the objective of encouraging involvement of SMEs in the public procurement market.[748] The Public Sector Directive may increase SME participation in public procurement by facilitating direct payments to subcontractors.[749]

According to the Public Sector Directive, an appropriate integration of environmental law, social law and labour law requirements in the public procurement procedure is of particular importance.[750] Article 71 of the Public Sector Directive contains rules on the control of subcontractors, including the subcontractors' compliance with environmental law, social law and labour law. Article 71(1) of the Public Sector Directive clarifies that the obligations in Article 18(2) of the Public Sector Directive apply to all subcontractors in the same way as with the main contractor.

In order to eliminate violations of the obligations, as referred to in Article 18(2) of the Public Sector Directive, certain appropriate measures must be taken. According to Article 71(5), there are two indications as to what such appropriate measures may consist of. In a situation where a member state provides for a mechanism of joint liability between the subcontractors and the main contractor, the

[744] Case C-63/18, Vitali SpA v Autostrade per l'Italia SpA, EU:C:2019:787, para 29.
[745] Trybus, M. and Andhov, M. (2017). Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU. European Procurement and Public Private Partnership Law Review, 224-238, p. 238.
[746] Craven, R. (2016). Subcontracting matters: Articles 43 and 71 of the 2014 Directive in Ølykke, S. G. and Sanchez-Graells. A. (2016). Reformation or Deformation of the EU Public Procurement Rules. Edward Elgar Publishing, p. 295.
[747] Recital 105(1) of the preamble in the Public Sector Directive.
[748] Recital 78(3) of the preamble in the Public Sector Directive.
[749] Trybus, M. and Andhov, M. (2017). Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU. European Procurement and Public Private Partnership Law Review, 224-238, p. 224.
[750] See Article 18(2) and Recitals 37, 40 and 101 of the Public Sector Directive.

member state shall ensure that the relevant rules are applied to in compliance with the conditions set out in Article 18(2). However, the wording of the Public Sector Directive vaguely defines what kind of measures that are to be taken by the competent national authorities, meaning that a member state's transposition laws need to fill this gap.

Overall, the contracting authority has two options when it comes to choosing the framework for the economic operators to use of subcontractors. The first option is that the contracting authority does not set up a framework. Thus, the economic operators are free to make decisions regarding the use of subcontractors and do not have any information obligation in this regard. The second option is that the contracting authority establishes certain requirements for the way in which the economic operators can make use of subcontractors. This can include requirements such as the economic operator providing information about which tasks that will be fulfilled by subcontractors or a disclosure of the specific subcontractors that the economic operator intends to use.[751] The following section will take a closer look at the requirements that may be imposed with regards to the disclosure and restriction of subcontractors.

4.2.1 Disclosure of Subcontractors

According to Article 71(2) of the Public Sector Directive, the contracting authority may ask or be required to by a Member State to ask the economic operator to indicate, in its tender, any share of the contract that it may intend to subcontract along with any proposed subcontractors. Thus, the economic operator may be asked to inform the contracting authority about the share of the contract that it may intend to subcontract. Furthermore, the economic operator may be requested to disclose the identity of the intended subcontractors. The contracting authority's request for this information must be included in the procurement documents and consideration must therefore be given to this issue at the planning stage of the public tender.

However, it does not appear from Article 71(2) of the Public Sector Directive whether the information from the economic operator regarding the share of the contract that it may intend to subcontract to subcontractors and the proposed subcontractors is binding. However, since the provision is worded with the phrase *"intend to"*, it must be assumed that this information will not be binding for the economic operator. Consequently, Article 71(2) of the Public Sector Directive provides a certain flexibility to the economic operator as there are no obligations for the economic

[751] Article 71(2) of the Public Sector Directive.

operator to use the proposed subcontractor disclosed to the contracting authority or to subcontract a certain share of the contract.[752]

A disclosure of the identity of the subcontractors and subcontracting arrangements can be useful for the contracting authority to know which entities will be performing the contract in advance. However, there are some uncertainties to this as the economic operators will not be required to follow the information provided by the contracting authority. In reality, the requested information may therefore not be valid when the contracting authority and the main contractor enter into the contract.

Article 71(2) of the Public Sector Directive provides Member States with the possibility to either empower or oblige contracting authorities to require information regarding the involved subcontractors' identity and share of the main contract. In contrast, the provision in Article 71(5) of the Public Sector Directive introduces an obligation to the contracting authority to require the main contractor to provide details of the appointed subcontractor(s) after the award of the contract or when the performance of the contract commences in certain circumstances at the latest. This requirement applies after the award of the contract and is continuous throughout, as the contracting authority must also require the main contractor to give notice about any changes to this information during the term of the contract. Article 71(5)(1) of the Public Sector Directive has the following wording:

> *"In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services."*[753]

Accordingly, Article 71(5) of the Public Sector Directive imposes the obligation to disclose the name, contact details and legal representatives of all subcontractors that provide works or services at a facility under the direct supervision of the contracting authority. However, the request for information will only be applicable if the information is *"known at this point in time"*. Hence, this is an

[752] Stalzer, J. (2021). Article 71 Subcontracting in Caranta, R. and Sanchez-Graells (eds.). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 762
[753] Article 71(5)(1) of the Public Sector Directive.

exception to the obligation that can be used in cases where the economic operator does not have the requested information available about the subcontractors.

In some cases, this exception can be considered problematic, particularly when the main contractor does not have a clear picture of the subcontractors, which also can signal a lack of transparency in the supply chain to the disadvantage of the contracting authority. It is emphasised in the Public Sector Directive that it is necessary to ensure some transparency in the supply chain, as this gives the contracting authority information about who that are present at their building sites on which works are being performed for the contracting authority, or about which undertakings that are providing services and the like.[754]

Furthermore, according to Article 71(5) of the Public Sector Directive, the contracting authority may extend this information duty or be required to do so by the member state. Such an extension can entail that other types of contracts, than those concerning services to be provided at the facilities under the direct supervision of the contracting authority or to suppliers involved in works or service contracts, are being included in the information obligation.[755] Additionally, the contracting authority can also extend the requirement for information to cover sub-subcontractors.

The contracting authority can seek to control the identity of subcontractors through certain clauses in the contract, who can be appointed as subcontractor and on the requirement of approval for subcontractor(s) by the contracting authority. These contract clauses concerning the identity of subcontractors are subject to the rules in the TFEU. Furthermore, if the contracting authority includes a contract clause, whereby it will designate the subcontractor itself, it is probably the Public Sector Directive that must be followed when appointing the subcontractor.[756] Another possible situation is that the contracting authority is forced to substitute and exclude subcontractors. The rules that can be applied for such a situation will be discussed in section 4.2.4 in this chapter.

The above illustrates that Article 71(5) of the Public Sector Directive is formulated in such a way that it provides great flexibility for the economic operator's use of subcontractor(s). Hence, the economic operator has the possibility of presenting a subcontractor after the award of the contract and will thus not be bound to find a subcontractor during the tender phase. In this regard, Member States can provide that subcontractors, who are presented after the award of the contract, shall provide the

[754] Recital 105(2) of the preamble in the Public Sector Directive.
[755] Stalzer, J. (2021). Article 71 Subcontracting in Caranta, R. and Sanchez-Graells (eds.). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 770.
[756] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third ed.). Sweet & Maxwell, p. 576.

certificates and supporting documents instead of the ESPD. The economic operators can, to a large extent, enjoy flexibility when it comes to using subcontractors. However, some limits can be set for subcontracting, which will be addressed later in the chapter.

4.2.2 Direct Payment to Subcontractors

The Public Sector Directive prescribes that subcontractors are given direct payment by the contracting authority. One the one hand, there are rules on the mechanisms of direct payment to subcontractors upon their request in Article 71(3) of the Public Sector Directive. On the other hand, the Public Sector Directive allows Member States to go further, for instance, by providing for direct payments to subcontractors without it being necessary for them to request such direct payment in Article 71(7).

Recital 78 of the preamble to the Public Sector Directive specifies that Member States should also be free to provide mechanisms for direct payment to subcontractors. However, the rules on direct payments to subcontractors in the Public Sector Directive can be considered optional mechanisms and are therefore not directly imposed by the Public Sector Directive. Hence, Member States can provide in their national laws that subcontractors are paid directly by the contracting authority rather than waiting for payments from the main contractor. As stated above, the provisions on subcontracting have the objective to encourage the involvement of SMEs, and one of the measures to do so in public procurement is the optional mechanisms for direct payment to subcontractors.[757]

However, it should be noted that, pursuant to Article 71(3) of the Public Sector Directive, Member States may provide, at the request of the subcontractor and where the nature of the contract allows it, that the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded (i.e. the main contractor). Hence, it is not in all cases that subcontractors can demand direct payment. This assessment must be made by the contracting authority and has to be based on the nature of the contract. However, the Public Sector Directive does not say anything about the assessment of the nature of the contract, nor the criteria that may determine this assessment.

[757] The Explanatory Memorandum to the 2011 Draft leading to the Public Sector Directive identifies this as one of four main measures to promote SME participation in public procurement.

4.2.3 Limits to Subcontracting

The Public Sector Directive provides for the use of subcontractors without imposing any limits on the economic operators in this regard. However, in accordance with Article 71(2) of the Public Sector Directive, if the procurement documents require the economic operators to indicate in their tenders how large of a share of the contract that they may intend to subcontract as well as the proposed subcontractors that they have in mind, the contracting authority is entitled to prohibit the use of subcontractors whose capacities cannot be verified at the time of the selection of the main contractor.[758]

Furthermore, as stated in section 2.2 of this chapter, Article 63(2) of the Public Sector Directive clearly allows that, in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators, by a participant in that group. It will be therefore possible for the contracting authority to limit the use of subcontractors in connection with critical tasks.[759]

However, the contracting authority cannot impose a general prohibition on subcontracting. This principle can be deducted from the case law of the ECJ in *Siemens and ARGE Telekom*.[760] This case concerned the interplay between the composition of a bidding consortium, the possibility of relying on the capacity of other entities, and the opportunity for the contracting authority to limit the use of subcontractors. Here, the contracting authority had required that only a maximum of 30 per cent of the services provided were subcontracted and also that certain parts of the work could not be subcontracted at all.[761] Hence, this requirement had contributed to the fact that three of the four bidding consortia, which had submitted tenders, had included the same subcontractor of a particular component in their consortium rather than purchasing that component from that subcontractor. The ECJ held that the directive does "*not preclude a prohibition or a restriction on the use of subcontracting for the performance of essential parts of the contract precisely in the case where the contracting authority has not been in a position to verify the technical and economic capacities of the subcontractors when examining the tenders and selecting the lowest tenderer.*"[762]

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[758] See Article 56(1) of the Public Procurement Directive and Case C-314/01, Siemens AG Österreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger, EU:C:2004:159, para 46.
[759] As previously emphasised, it must be assumed that the notion of "critical tasks" is meant to be interpreted narrowly.
[760] Case C-314/01, *Siemens AG Österreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger,* EU:C:2004:159.
[761] Ibid para 16.
[762] Ibid para 45.

Hence, the Public Sector Directive allows the contracting authority to prohibit the use of subcontractors, whose capacities cannot be verified at the level of the examination of tenders and selection of the contractor for the performance of essential parts of the contract.

Hereafter, the ECJ ruled that it was unlawful to prohibit recourse to subcontracting.[763] While the *Siemens and ARGE Telekom* judgement was rendered under a previous public procurement directive[764], it is still relevant to the legal position for the use of subcontractors. It will therefore be possible for the contracting authority to limit the use of subcontractors in connection with critical tasks, pursuant to Article 63(2) of the Public Sector Directive. However, the contracting authority must make a case-by-case assessment of the subcontracting agreement in question in each case and not impose a general ban on subcontracting.

Another relevant question is whether the contracting authority can determine the proportion of the contract that may be performed by subcontractors. In *Wroclaw,*[765] the ECJ considered whether a contracting authority can dictate the percentage of works which should be carried out by the main contractor, thus restricting the possibility of subcontracting. The case concerned a public tender for a public contract relating to the partial construction of a bypass. The tender specification included a requirement that the economic operators to the tender were obliged to perform at least 25 per cent of the works covered by the contract using their own resources. The ECJ held that the primary position under the 2004 Public Sector Directive was that the directive enabled the use of subcontractors, without imposing any limits in this regard.[766] However, under specific circumstances, limitations on the use of subcontractors can be justified by a legitimate interest in ensuring that the contract is properly executed. To this, the ECJ stated the following:

> *(…) limitations on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, and that irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned. In all those respects, such a stipulation is incompatible with Directive 2004/18, which is relevant in the context of the main proceedings.*"[767]

[763] Ibid para 48.
[764] Directive 89/665/EØF
[765] C-406/14, Wrocław - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju, EU:C:2016:562.
[766] Ibid para 32. This was also highlighted by the Court in C-94/12, Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo, EU:C:2013:646, para 31.
[767] C-406/14, Wrocław - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju, EU:C:2016:562, para 35.

Accordingly, the ECJ sets out three conditions that must be met by the contracting authority to enable it to validly restrict the use of subcontractors: (1) in the procurement document, the contracting authority must require the tenderers to indicate the share of the contract that they may intend to subcontract as well as the potential subcontractors; (2) the intended performance by the potential subcontractor must be considered to be of an essential character to the tasks,; (3) the potential subcontractor's capacities cannot be verified.

In *Wroclaw*, the requirement in the tender specification demanding that the economic operator is obliged to perform at least 25 per cent of the works covered by the contract using its own resources, did not meet the three criteria in the above. As a consequence, the ECJ found that the restriction of subcontracting was incompatible with the 2004 Public Procurement Directive.[768]

Hence, this case establishes that the contracting authority is not allowed to specify that the main contractor is required to deliver a quantified percentage of the contract itself in the procurement documents. The contracting authority may only limit the proportion of the contract that may be performed by subcontractors where the capacities of those subcontractors cannot be verified for the performance of essential parts of the contract. However, this is conditional on the contracting authority asking the economic operators to indicate any share of the contract in their tenders that they may intend to subcontract to third parties, including information regarding any proposed subcontractors and the essential character of the tasks that it would concern.[769] Since this judgement was rendered under the 2004 Public Sector Directive, the question is whether this principle remains valid. The ECJ has ruled whether this legal position also applies under the rules of the Public Sector Directive.

In *Vitali SpA,*[770] the ECJ considered whether Italian legislation, in which a cap of 30 per cent limits to the share of the contract was permitted to be subcontracted to third parties, was incompatible with the 2004 Public Sector Directive. In contrast to the previously mentioned case, the provisions of the

[768] Ibid para 51.
[769] The ECJ came to the same conclusion in the judgement in Borta, C-298/15, UAB 'Borta' v VĮ Klaipėdos valstybinio jūrų uosto direkcija, EU:C:2017:266. Although the public contract in question was not covered by the scope of the 2004 Public Sector Directive, it had a certain cross-border interest. Therefore, the ECJ found that Articles 49 and 56 TFEU must be interpreted as precluding a provision of national law, which provides that, where subcontractors are relied on for the performance of a public works contract, the tenderer is required to perform the main works itself, as defined by the contracting entity (para 61). In addition, the ECJ stated that "such a restriction may be justified in so far as it pursues a legitimate objective in the public interest, and to the extent that it complies with the principle of proportionality in that it is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it" (para 51).
[770] C-63/18, Vitali SpA v Autostrade per l'Italia SpA, EU:C:2019:787.

Public Sector Directive were considered in this case. In connection with the case, the government of Italy highlighted the fact that the restriction on the use of subcontracting was justified in the light of the particular circumstances prevailing in Italy, where subcontracting always has been one of the mechanisms used for carrying out criminal operations. In addition, the government stated that by limiting the share of the contract that can be subcontracted, the national legislation makes participation in public procurement less attractive to criminal organisations, which can prevent the phenomenon of mafia infiltration in public purchasing and thus protect the public policy.[771]

The ECJ started out by establishing that Article 71 of the Public Sector Directive, in essence, reduces the wording of Article 25 of the 2004 Public Sector Directive.[772] Hereafter, the ECJ recalled that a clause in the tender specifications for a public works contract, which imposes limits on the use of subcontractors for a share of the contract fixed in abstract terms as a certain percentage of that contract, irrespective of the possibility of verifying the capacities of potential subcontractors and without any mention of the essential character of the tasks which would be concerned, is incompatible with the 2004 Public Sector Directive.[773]

The ECJ then ruled that this would be applicable in the context of the proceedings giving rise to that judgment. Hereafter, the ECJ held that "*even if a quantitative limit on the use of subcontracting may be regarded as likely to combat such a phenomenon, a restriction such as that at issue in the main proceedings goes beyond what is necessary to achieve that objective*".[774] The ECJ reached the conclusion that a provision which limited subcontracting to 30 per cent of the public contract was precluded by the Public Sector Directive on the basis that it went beyond what was necessary to achieve its objective in relation to organised crime.[775] Furthermore, the ECJ highlighted that according to the national legislation at issue in the main proceedings prohibits, in general and abstract terms, can make use of subcontracting which exceeds a fixed percentage of the public contract concerned, so that that prohibition applies to whatever the economic sector concerned by the contract at hand, and that it did not allow for any assessment on a case-by-case basis by the contracting authority.[776]

Thus, in line with its ruling in *Wroclaw*, the ECJ found that the Public Sector Directive also precludes national legislation, according to which tenderers may award a maximum of 30 per cent of the contract to subcontractors. In *Vitali SpA,* the ECJ emphasized the point that all public procurements

[771] Ibid para 32.
[772] Ibid para 29.
[773] Ibid para 28.
[774] Ibid para 38.
[775] Ibid para 45.
[776] Ibid para 40.

should be run on their own merits and that they may have distinctive issues that require specific restrictions. Thus, if the tender document or public contract have specific requirements, these should be reviewed on a case-by-case basis to ensure that the requirements comply with the principle of proportionality, making it suitable for securing the attainment of that objective while not going beyond what is necessary in order to attain it.

Following the judgement in *Vitali SpA,* the ECJ addressed the questions on the quantitative limitations of subcontracting again during the case *Tedeschi and Consorzio Stabile Istant Service.*[777] The ECJ once more found that the way in which national legislation was able to set a limit on the use of subcontractors for a share of the value of the contract, fixed in abstract terms as a certain percentage of that contract, was incompatible with the 2004 Public Sector Directive.[778] In this case, the ECJ also emphasised that even less restrictive measures would be capable of achieving the objective pursued by the Italian legislature.[779]

The judgement in *Tedeschi and Consorzio Stabile Istant Service* adds to the long list of case law by the ECJ that addresses the quantitative limitations of subcontracting.[780] These cases illustrate that the ECJ takes a uniform approach on limits to subcontracting. Furthermore, these cases must also indicate that the provisions on subcontracting in both the 2004 Public Sector Directive and the Public Sector Directive are insufficiently comprehensive when it comes to setting a limit for subcontracting.

Overall, it can be deduced from the Public Sector Directive and the case law by the ECJ that the following must apply when it comes to limiting subcontractors:

Firstly, in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, Article 63(2) of the Public Sector Directive clearly allows for contracting authorities to require that certain critical tasks are performed directly by the tenderer itself, or where the tender is submitted by a group of economic operators by a participant in that group. Therefore, it will be possible for the contracting authority to limit the use of subcontractors in connection with critical tasks.

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[777] C-402/18, Tedeschi Srl and Consorzio Stabile Istant Service v C.M. Service Srl and Università degli Studi di Roma La Sapienza, EU:C:2019:1023

[778] Ibid para 38.

[779] Ibid para 49.

[780] Case C-314/01, Siemens AG Österreich and ARGE Telekom & Partner v Hauptverband der österreichischen Sozialversicherungsträger, EU:C:2004:159; C-94/12, Swm Costruzioni 2 SpA and Mannocchi Luigino DI v Provincia di Fermo, EU:C:2013:646; C-406/14, Wrocław - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju, EU:C:2016:562: C-298/15, UAB 'Borta' v VĮ Klaipėdos valstybinio jūrų uosto direkcija, EU:C:2017:266; C-63/18, Vitali SpA v Autostrade per l'Italia SpA, EU:C:2019:787.

Secondly, the contracting authority is allowed to limit the proportion of the contract that may be performed by subcontractors in places where the capacities of those subcontractors cannot be verified for the performance of the essential parts of the contract. However, this is conditional on the fact that the contracting authority can ask the economic operator to indicate any share of the contract in its tender that it may intend to subcontract to third parties as well as any proposed subcontractors along with the essential character of the tasks concerned. This assessment must be made on a case-by-case basis while observing the principle of proportionality.

Furthermore, the Public Sector Directive does not clearly state whether the entire contract can be subcontracted. However, when taking a closer look at the provisions on subcontracting in Article 71 of the Public Sector Directive, the following wording can be found: "*the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.*"[781] Thus, the provision refers to the share of the contract that the economic operator may intend to subcontract, which indirectly can be considered an indication that only parts of the contract can be subcontracted to third parties.

4.2.4 Substitution and Exclusion of Subcontractors

In accordance with Articles 59, 60 and 61 of the Public Sector Directive, the contracting authority may verify or be required by the member state to verify whether there are grounds for exclusion of a subcontractor pursuant to Article 57 of the Public Sector Directive. According to Article 71(5)(b) of the Public Sector Directive, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which a verification which has shown that there are compulsory grounds for exclusion. The contracting authority may require or be required by the member state to require that the economic operator replaces a subcontractor where the verification has shown that there are non-compulsory grounds for exclusion.

In some cases, the contracting authority can therefore require the substitution of a subcontractor. The obligations of the contracting authority depend on whether there are compulsory or non-compulsory grounds for exclusion. In the event of compulsory grounds, the contracting authority is obliged to require that the economic operator substitutes a subcontractor, whereas, in the case of non-compulsory grounds for exclusion, it is only the member state that can require the economic

[781] Article 71(2) of the Public Sector Directive.

operator to substitute a subcontractor. This rule is generally the same as the one set out in Article 63(1) of the Public Sector Directive, which will be analysed in section 2.3 of this chapter.

In order to be able to verify whether there are grounds for exclusion of a subcontractor, the contracting authority is entitled, or may be required by the Member State in which it operates, to ask the economic operator to indicate in the procurement documents any share of the contract that it may intend to subcontract as well as any proposed subcontractors in its tender, as described in section 4.2.1 of this chapter.

However, it should also be set out explicitly in the tender documents that the main contractor must ensure that, in the event of the existence of compulsory exclusion grounds, a requirement would follow for the main contractor to replace the concerned subcontractor. Similarly, it should be stated that, in cases where a verification shows the presence of non-compulsory grounds for exclusion, it should be clarified that the contracting authority is able to require the replacement of the subcontractor in question.[782]

The Public Sector Directive does not mention in which situations and under what procedure this substitution may take place. Nevertheless, it may be relevant to include case law in order to clarity the framework of the substitution or exclusion of a subcontractor.

In the analysis of the assessment of a substitution of members in a bidding consortium, it was highlighted that the assessment of the nature of the change in the composition of a bidding consortium can, presumably, be based on an analogy application of the rules governing the changes to the tender specification, conditions, and the procedure during the award procedure.[783] This may also be the case in the substitution of a subcontractor. In such event, under the execution of the contract, the replacement of the subcontractor might constitute a substantial amendment of the tender submitted and thus constitute a substantial change to the contract.

In *Wall*,[784] the ECJ found that a substitution of a subcontractor may, in exceptional cases, constitute an amendment to one of the essential provisions of the given contract, even if the possibility of a substitution is provided for in the contract, such as in a case where the use of one subcontractor rather than another was, in the view of the particular characteristics of the services concerned, a decisive factor in the award of the contract.[785] The ECJ held that substantial amendments to essential

[782] Recital 105 of the preamble in the Public Sector Directive.
[783] See section 3.2.2 of this chapter.
[784] Case C-91/08, Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH, EU:C:2010:182.
[785] Ibid para 39.

provisions of a contract could, in certain cases, require the award of a new contract. Hereafter, the ECJ emphasized that an amendment to a contract may be regarded as substantial if it introduces conditions which, if they had been part of the original award procedure, would have allowed for the admission of tenderers, other than those originally admitted, or would have allowed for the acceptance of an offer, other than that originally accepted.[786] It should be pointed out that the Public Sector Directive retains this definition, to which the defining feature of a substantial modification is where it renders the contract materially different in character from the one initially concluded.[787] However, it should also be highlighted that the Public Sector Directive goes far beyond this definition and that public contracts may be modified without a new procurement procedure where the modifications, irrespective of their value, have been provided for in the initial procurement documents in review clauses.[788]

In *Wall*, the possibility for changing a subcontractor was provided in the contract. However, the ECJ found that it was for the national court to establish whether the change of a subcontractor would constitute an amendment to the contract during its term, which then may be regarded as a substantial modification to the contract.[789] Consequently, even if a subcontractor can be substituted according to the contract, the parties should be aware of whether this change can be regarded as a substantial modification. The Public Sector Directives do not include the contractual aspects of modifications to public contracts, and, in this respect, EU law therefore does not place any requirements on the interpretation of the concept of substantial modification from a contractual sense.[790]

4.3 Summary of Findings

Again, a number of uncertainties have been identified with regard to the framework set by the Public Procurement Directive when it comes to the application of subcontractors in public procurement. First, there is uncertainty regarding the notion of a subcontractor, even though this notion is used in the Public Sector Directive. Overall, the contracting authority has two options when it comes to choosing the framework for the economic operators to use of subcontractors. The first option is that the contracting authority does in fact not set a framework. Thus, the economic operators are free to

[786] Ibid para 38.
[787] First sentence of Article 72(4) of the Public Sector Directive,
[788] Bogdanowicz, P. (2016). The Application of the Principle of Proportionality to Modifications of Public Contracts. European Procurement & Public Private Partnership Law Review, 11(3), 194–204, p. 198.
[789] Case C-91/08, Wall AG v La ville de Francfort-sur-le-Main and Frankfurter Entsorgungs- und Service (FES) GmbH, EU:C:2010:182, para 41.
[790] Brodec, J. and Janeček, V. (2015). How Does the Substantial Modification of a Public Contract Affect its Legal Regime? Public Procurement Law Review 24(3), 90 – 105, p. 95.

make decisions regarding the use of subcontractors and do not have any information obligation in this regard. The second option is that the contracting authority sets certain requirements for the way in which the economic operators can make use of subcontractors.

The contracting authority may ask, or may be required by a Member State to ask, the economic operator to indicate any share of the contract in its tender that it may intend to subcontract to subcontractors and any proposed subcontractors. Public Sector Directive imposes the obligation to disclose the name, contact details and legal representatives of all subcontractors providing works or services at a facility under the direct supervision of the contracting authority. However, the request for information will only be applicable if the information is *"known at this point in time"*. Furthermore, Public Sector Directive facilitates that subcontractors are given direct payment by the contracting authority.

The contracting authority cannot impose a general prohibition on subcontracting. However, subcontracting may be limited in some cases.

Firstly, it should be emphasized that, in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, the Public Sector Directive clearly allows for contracting authorities to require that certain critical tasks be performed directly by the tenderer itself, or where the tender is submitted by a group of economic operators by a participant in that group. It will therefore be possible for the contracting authority to limit the use of subcontractors in connection with critical tasks.

Secondly, the contracting authority is allowed to limit the proportion of the contract that may be performed by subcontractors in places where the capacities of those subcontractors cannot be verified for the performance of the essential parts of the contract. However, this is conditional on the fact that the contracting authority can ask the economic operator to indicate, in its tender, any share of the contract that it may intend to subcontract to third parties and any proposed subcontractors as well as the essential character of the tasks concerned. This assessment must be made on a case-by-case basis while observing the principle of proportionality.

Furthermore, in some cases, the contracting authority require the substitution of a subcontractor. The Public Sector Directive does not mention in which situations and under which procedure this substitution may take place. In the analysis of the assessment of a substitution of members in a

bidding consortium, it was highlighted that the assessment of the nature of the change in the composition of a bidding consortium can presumably be based on an analogy application of the rules governing the changes to the tender specification, conditions, and the procedure during the award procedure.[791] This may also be the case in the substitution of a subcontractor.

5 The Collusion-Related Exclusion Ground in Article 57(4)(d) of the Public Sector Directive

This section will take a closer look at the discretionary exclusion ground in Article 57(4)(d) of the Public Sector Directive. Furthermore, it will discussed what significance this exclusion ground may have for collaborations between economic operators when they participate in public tenders.

5.1 The Scope of the Collusion-Related Exclusion Ground

The Public Sector Directive amended the exclusion rules by introducing new mandatory and discretionary exclusion grounds,[792] the possibility for economic operators to invoke self-cleaning measures[793] and a maximum duration of exclusion. One of the new initiatives is the collusion-related ground as a discretionary ground for excluding economic operators from tender procedures. The relevant provision is Article 57(4)(d) of Public Sector Directive which provides that a contracting authority may exclude or may be required by a Member State to exclude an economic operator from a tender procedure. The provision is worded as follows:

> *"Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:*
>
> *(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;(…)."*

Hence, the contracting authorities have the possibility to exclude economic operators that have entered into agreements with other economic operators aimed at distorting competition. As this is a discretionary ground for exclusion, there will be no obligation. However, there will be an obligation

[791] See section 3.2.2 of this chapter.
[792] For more on the background and introducing of the mandatory and discretionary exclusion grounds, see Sanchez-Graells, A. (2013). Exclusion, Qualitative Selection and Short-listing in the New Public Sector Procurement Directive 2014/24 in F Lichere, R Caranta and S Treumer (eds.). Novelties in the 2014 Directive on Public Procurement, vol. 6 European Procurement Law Series (first ed.).
[793] Article 57(6) of the Public Sector Directive introduces the rules on so-called 'self-cleaning' measures.

to do so, if the Member State has to transpose it as a mandatory exclusion ground by national legislation. Article 57(4)(d) of Public Sector Directive must be interpreted as meaning that, where an economic operator has been engaged in conduct falling within the ground for exclusion referred to in Article 57(4)(d), which has been penalised by a competent authority, the maximum period of exclusion is calculated from the date of the decision of that authority.[794]

The collusion-related exclusion ground is not limited to exclusion to agreements in an award procurement, but constitute a way to achieve distinct legal and policy objectives.[795] Hence, the opportunity to exclude an economic operator for suspected collusion is not construed in the Public Sector Directive as a penalty for its behaviour before or during the award procedure. However, the exclusion ground can be applied as a mean to ensure compliance with the principles of equal treatment and competition in the award procedure as well as to uphold the integrity, reliability and suitability of the future contractor to perform the contract.[796]

Nevertheless, the provision is not explicit regarding what type of behaviour covered that is by the exclusion ground. Article 57(4)(d) of the Public Sector Directive is worded as referring to *"agreements with other economic operators aimed at distorting competition"*. Though this provision does not contain a direct reference to the competition rules, this formulation may lead one to recall the prohibition of anti-competitive agreements in Article 101(1) TFEU. Furthermore, the provision can be read in conjunction with Recital 101 of the Public Sector Directive. According to which, the contracting authorities should further be given the possibility to exclude economic operators that have proven unreliable, such as by violating competition rules. Hence, the collusion-related exclusion ground may catch some conduct failing within Article 101(1) TFEU.[797]

The collusion-related exclusion ground in Article 57(4)(d) are worded differently from Article 101(1) TFEU. Article 101(1) TFEU refers to *"agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition"*. Hence, Article 101(1) TFEU also includes decisions by associations of undertakings and concerted practices. As a consequence, it can be

[794] Case C-124/17, Vossloh Laeis GmbH v. Stadtwerke München GmbH, EU:C:2018:855, para 42.
[795] Telles, P., and Ølykke, G. S. (2017). Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law. European Procurement & Public Private Partnership Law Review, 12(3), 239–252, p. 246.
[796] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, p. 11, section 5.2.
[797] Along these lines, see Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, Vol 1 (third ed.). Sweet & Maxwell, p. 1267; Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 36; and Friton, P. and Zöll, J. (2021). Article 57 Exclusion Ground in Caranta, R. and Sanchez-Graells (eds.). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 613.

assumed that the scope of 101(1) TFEU is wider than Article 57(4)(d) of the Public Sector Directive.[798]

There are differences in the wording of Article 57(4)(d) of the Public Sector Directive and Article 101(1) TFEU which can give rise to doubts as to which illegal practices that are to be taken into account by the contracting authority for the purpose of applying collusion-related exclusion ground.

However, it appears from the Notice on Bid Rigging Exclusion, it should be possible for Member States when transposing the Public Sector Directive into national law to consider that not only agreements but also concerted practices in public procurement aimed at distorting competition may activate the application of Article 57(4)(d) of the Public Sector Directive.

As stated in the above, the collusion-related exclusion ground may catch some conduct failing within Article 101(1) TFEU. However, it can also be discussed whether there is a need to add *"have as their object or effect the prevention, restriction or distortion of competition"* instead of "*aimed at distorting competition"* in order to ensure the same scope of Article 57(4)(d) of the Public Sector Directive. Furthermore, the wording of Article 57(4)(d) of the Public Sector Directive can be seen from a different perspective. The EU lawmakers have decided to use terms in the Public Sector Directive that are used in Article 101(1) TFEU, such as 'agreement' and 'distortion of competition', but also ones that differ from those used in Article 57(4)(d) of the Public Sector Directive. As a result, it must be assumed that it is a conscious choice of the EU lawmakers that these should not have exactly the same scope and that only some conduct failing within Article 101(1) TFEU are caught by the collusion-related exclusion ground. It is for the contracting authority to make an assessment on a case-by case basis whether the collusion-related exclusion ground can be considered applicable. The application of Article 57(4)(d) of the Public Sector Directive will be discussed in more detail below.

5.2 The Application of the Collusion-Related Exclusion Ground

As stated above, the wording of Article 57(4)(d) of the Public Sector Directive can be considered unclear and it thus raises to questions about the competence of the contracting authorities to apply

[798] Priess, H.-J. (2014). The Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive. Public Procurement Law Review 112, p. 119; and Friton, P. and Zöll, J. (2021). Article 57 Exclusion Ground in Caranta, R. and Sanchez-Graells (eds). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 613.

the collusion-related exclusion ground. At present, the EU courts have not ruled on how this ground of exclusion should be interpreted. The only issue that has been clarified is the exclusion period.[799]

The application of the collusion-related exclusion ground highlighted as particularly relevant in connection in cases with joint bidding and subcontracting. In the Notice on Bid Rigging Exclusion, it is stated that the contracting authority has a sufficient margin of appreciation under the Public Sector Directive to assess whether a case of joint bidding presents risks for the proper conduct of the award procedure, in particular whether there are indications of collusion that could trigger the exclusion ground under Article 57(4)(d) of the Public Sector Directive.[800]

According to Notice on Bid Rigging Exclusion, Article 57(4)(d) of the Public Sector Directive gives contracting authorities *"a wide margin"* to consider excluding a tenderer even if there are *"sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition"*.[801] Hence, it is for the contract authority to make an assessment of whether the collusion-related exclusion ground could be considered applicable and thus whether an economic operator must be excluded from a specific award procedure.[802]

To be able to exclude tenderers, the contracting authorities must have *"sufficiently plausible indications"* of agreements with other economic operators aimed at distorting competition. It will therefore be obvious to take a closer look at what is meant by the notion *"sufficiently plausible indications"*.

5.2.1 The Notion of Sufficiently Plausible Indications

The Public Sector Directive does not detail what could qualify as *"sufficiently plausible indications"*, which would enable a contracting authority to exclude an economic operator from the award procedure based on the collusion-related exclusion ground. However, this standard of proof is lower than those exclusion grounds that are required by contracting authorities to prove a certain misbehaviour in Article 57(4)(a) and Article 57(4)(c) of the Public Sector Directive.[803] Because the notion of sufficiently plausible indications is not explained in the Public Sector Directive, this issue is left to the Member States and the contracting authorities.[804] However, the Member States and the contracting authorities

[799] See Case C-124/17, Vossloh Laeis GmbH v. Stadtwerke München GmbH, EU:C:2018:855.
[800] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, p. 16, section 5.6.
[801] Ibid, p. 11, section 5.2.
[802] C-552/18, Indaco Service Soc. coop. sociale v Ufficio Territoriale del Governo Taranto, EU:C:2019:997, para 24.
[803] Friton, P. and Zöll, J. (2021). Article 57 Exclusion Ground in Caranta, R. and Sanchez-Graells (eds). European Public Procurement: Commentary of Directive 2014/24/EU. Edward Elgar Publishing, p. 615.
[804] According to the general principles arising from Article 57 of the Public Sector Directive.

must be aware that in implementing the provisions of the Public Sector Directive, including the conditions of Article 57, they must not go beyond what is necessary to achieve the objectives of the Public Sector Directive.[805] In the assessment of the potential anti-competitive conduct of an economic operator, it is therefore the principle of proportionality that applies. This is also highlighted in recital 101 of the Public Sector Directive, which states that in applying discretionary exclusion grounds "*the contracting authorities should pay particular attention to the principle of proportionality"*.

In addition, the contracting authority must be aware that it is up to the contracting authority alone to assess whether a candidate or tenderer must be excluded from a public procurement procedure during the stage of selecting the tenderers.[806] It is for the contracting authority to judge on a case-by-case basis and detect any suspicious conduct that may be justified by the circumstances in the given case. According the EJC, the contracting authority is not automatically bound by an assessment conducted by another contracting authority in the context of an earlier public procurement procedure and the decision of another contracting authority will therefore not be enough per se to exclude an economic operator.[807]

Furthermore, a relevant question that can be asked is when the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. In the Notice on Bid Rigging Exclusion, it is stated that *"sufficiently plausible indications"* can generally be considered when:

> *"(…) examining the possibility of excluding a tenderer from a pending award procedure due to suspected collusion, a contracting authority has the right, under the Directive, to assess all facts it is aware of that could call into question the reliability of that tenderer as a potential future contractor."*[808]

Hence, in the assessment of the conduct by the economic operator, the contracting authority can assess all facts that could call into question the reliability of that tenderer as a potential future contractor. In addition, the Notice on Bid Rigging Exclusion also states other facts that may be considered of the contracting authorities to assess:

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[805] C-395/18, Tim SpA - Direzione e coordinamento Vivendi SA mod Consip SpA og Ministero dell'Economia e delle Finanze, EU:C:2020:58, para 45.
[806] C-41/18, Meca Srl v. Comune di Napoli, EU:C:2019:507, para 34.
[807] Case C-267/18, Delta Antrepriză de Construcţii şi Montaj 93 SA v Compania Naţională de Administrare a Infrastructurii Rutiere SA, para 27.
[808] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, p. 13, section 5.4.

"The overall market behaviour of tenderers participating in the procedure (for instance, tenderers who never bid in the same award procedure or tenderers who bid only in certain regions or tenderers who appear to be taking turns in participating in award procedures).

The text of the tenders (for instance, the same typos or phrases in different tenders or comments left by mistake in the text of the tender indicating collusion among tenderers).

The prices offered in the award procedure (for instance, tenderers who offer a higher price than in previous similar procedures or offer excessively high or low prices).

Administrative details (for instance, tenders submitted by the same business representative")."[809]

The above examples are not an exhaustive list but just some of the facts that may be relevant to include in the assessment of whether the economic operator has entered into agreements with other economic operators aimed at distorting competition. All examples are behaviors that may indicate the existence of anti-competitive agreements. As stated in the above, the contracting authority can assess all facts that could call into question the reliability of that tenderer as a potential future contractor. Hence, the wording of Article 57(4)(d) of the Public Sector Directive only requires sufficiently plausible indications of an agreements that distort competition in an award procedure and there are no formal requirement of evidence.

This has also been confirmed by the ECJ in case law. In *Ecoservice*, the court stressed that "*a breach of the EU rules governing public procurement may be proved not only by direct evidence, but also through indicia, provided that they are objective and consistent and that the related tenderers are in a position to submit evidence in rebuttal*".[810] Ultimately, when assessing the extent to which the contracting authority need to proof an anti-competitive agreement, the contracting authority has a wide margin of appreciation as to whether or not to exclude a tenderer from the tender procedure in question. However, it is important that the provided facts indicating an anti-competitive agreement are objective and consistent.

Because it is clear from the wording of the provision of Article 57(4)(d) of the Public Sector Directive that, to be able to exclude tenderers, the contracting authorities must have sufficiently plausible indications of agreements with other economic operators aimed at distorting competition. Hence, another relevant question is therefore when there is an agreement aimed at distorting competition.

[809] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, p. 13, section 5.4.
[810] C-531/16, Šiaulių regiono atliekų tvarkymo centras v. Ecoservice projektai' UAB, EU:C:2018:324, para 37.

Consequently, it will be obvious to take a closer look at what is meant by the notion *"agreement aimed at distorting competition"*.

5.2.2 The Notion of an Agreement Aimed at Distorting Competition

As highlighted above, there are similarities between the wording of Article 57(4)(d) of the Public Sector Directive and Article 101 TFEU. However, the principles that arise from competition law are not directly applicable when the contracting authorities apply the collusion-related exclusion ground in Article 57(4)(d) of the Public Sector Directive.[811] For more on the scope of the public procurement rules and competition rules, see Chapter 4.

However, in the assessment of whether there is an agreement aimed at distorting competition, the competition rules will still play a role. The competition rules cannot be overlooked, especially when economic operators participate in public tenders through various types of structures, including reliance on the capacities of other entities, consortia, and subcontracting. In this situation specifically, a collaboration between economic operators may simultaneously fall within the field of application of two or more provisions of EU law.[812] Hence, a collaboration between economic operators in a public procurement procedure may give rise to doubts regarding the compliance with both the procurement rules and the competition rules. The relationship between the procurement rules and the competition rules has been addressed by Sánchez-Graells:

> *"(…) public procurement rules on teaming and joint bidding should be in perfect compliance with article 101 TFEU on agreements between undertakings and its case law – since public procurement rules cannot establish derogations or carve-outs to this fundamental provision of primary EU law."*[813]

It is emphasized that the provisions of the Public Sector Directive that facilitate the possibility of joint application for public tenders should neither be in conflict with the provisions of competition law nor disable their application, as this will create what Sánchez-Graells calls *"derogations"* or *"carve-outs"* to fundamental provisions of primary EU law. This view is echoed by Bovis:

> *"(…) exhaustive harmonisation by lex specialis legal instruments such as the public procurement Directives cannot impose limits on the application of primary Community law to supplement their legal*

[811] This is acknowledged by Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 39.
[812] Established by the ECJ in Case 74/76, Iannelli & Volpi SpA v Ditta Paolo Meroni, EU:C:1977:51, para 9.
[813] Graells, A. S. (2015), Public Procurement and EU competition rules (second ed.). Hart Publishing, p. 338.

thrust. The need for conformity with Community law is evident even in cases beyond exhaustive harmonisation and with respect to excluded contracts from the public procurement Directives." [814]

Accordingly, Bovis argues that although the public procurement directives are to be regarded as *lex specialis* legal instruments, they cannot impose limits on the application of primary EU law. The application of the provisions in the Public Sector Directive should be applied in a manner that ensures that the enforcement of the provisions in the Public Sector Directive does not lead to the violation of other provisions or norms in other legal systems. This has also been pointed out by Ølykke who states that *"(…) where a specific legal basis is lex specialis, it should be interpreted in a manner so the result does not lead to contradiction with other sets of rules that could have applied to the dispute."*[815]Accordingly, these legal scholars highlight that *lex specialis* provisions, in this case the Public Sector Directive, should be interpreted in a way that does not lead to any contradictions with other sets of rules that could have been applied to the dispute and in respect of the *lex superior* principle.

As a consequence, it must be assumed that, in connection with the interpretation and application of Article 57(4)(d) of the Public Sector Directive, it would make sense to conduct the assessment in the light of Article 101 TFEU.[816] Hence, the legal position must in principle reflect a coherent interpretation in order to avoid that the decision of a specific dispute is dependent on the chosen legal basis.[817]

It is uncertain how one should interpret an agreement aimed at distorting competition. If the notion of an agreement is to be clarified in the light of competition law, the decisive factor for the existence of an agreement in the context of competition law is that at least two distinct undertakings both have expressed their joint intention of conducting themselves on the market in a specific way.[818]

Again, it must be assumed that contracting authorities have a wide margin when it comes to the assessment of whether the economic operator has entered into agreements with other economic operators aimed at distorting competition. For the purposes of applying the exclusion ground, the principle of proportionality generally requires the contracting authority to carry out a specific and

[814] Bovis, C. (2012). Public procurement in the EU: Jurisprudence and conceptual directions. Common Market Law Review, vol. 49, Issue 1, 247–289, p. 279.
[815] Ølykke, G. S. (2011), How Does the European Court of Justice Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), p. 14.
[816] Along these lines, see Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 39.
[817] Ølykke, G. S., & Nielsen, R. (2017). EU's udbudsregler – i dansk kontekst (second ed.). DJØF Publishing, p. 860.
[818] Case T-99/04, AC-Treuhand AG v Commission of the European Communities, EU:T:2008:256, para 118.

individual assessment of the conduct of the economic operator within the limits, which are set out in the Public Sector Directive.

In assessing the existence of an anti-competitive agreement, it should be emphasized, that in the Notice on Bid Rigging Exclusion, the following is relevant to highlight:[819]

> *"In some cases, joint bidding raises doubts with the contracting authority, especially if the members of the* ***group of companies that bid jointly could easily bid in their own right*** *(or, even more, they were expected to do so)(…) The contracting authority has a sufficient margin of appreciation under the Directive to assess whether a case of joint bidding presents risks for the proper conduct of the award procedure, in particular whether there are* ***indications of collusion that could trigger the exclusion ground under Article 57(4)(d) of the Directive****.*
>
> *However, when addressing such questions, the contracting authority needs to* ***strike a balance between avoiding competition risks*** *through joint bidding and respecting the right of operators to jointly submit a tender (…) Economic operators have the right to make legitimate business choices on the activities they will undertake and contracting authorities should not per se limit this right but should instead assess the risks of collusion on a case-by-case basis".*[820]

Hence, it is highlighted by the Commission in the Notice on Bid Rigging Exclusion that the contracting authorities have a sufficient margin of appreciation under the Public Sector Directive to assess indications of collusion that could trigger the exclusion ground. Additionally, it is emphasized that doubts may arise if the members of the group of companies who bid jointly could in fact easily bid in their own right.[821] However, the problems associated with economic operator's ability to bid in their own right is not addressed in the Public Sector Directive, nor in the case law of the EU courts, which is stated in section 3 in this chapter. Nevertheless, this is an essential part of the analysis made in the competition law assessment of the collaboration between economic operators when they bid

[819] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, p. 16, section 5.6.
[820] Emphasis added.
[821] Furthermore, it is stated further down on the same page in the Notice on Bid rigging Exclusion: "A similar approach is required in the case of subcontracting: the contracting authority should carefully assess cases where a suggested subcontractor could easily have participated in its own right in the award procedure and performed the contract independently ". This will be addressed in the competition law analysis in Chapter 7.

on public contracts.[822] Furthermore, it should be noted that in the Notice on Bid Rigging Exclusion, there are several references to competition law, including to the Horizontal Guidelines.[823]

The above can be interpreted as meaning that the commission wishes to facilitate that the contracting authorities assessment of anti-competitive agreements could trigger the exclusion ground according to Article 57(4)(d) of the Public Sector Directive, which may be examined in the light of competition law. The guidelines in the Notice on Bid Rigging Exclusion are addressed to the Member States and their contracting authorities, and thus not the economic operators bidding on public contracts. The primary focus of the notice is to support the Member States and the contracting authorities in building capacity to address the problem of fight collusion in public procurement as well as to provide guidance on how to apply Article 57(4)(d) of the Public Sector Directive.

As stated in Chapter 2 of this thesis, the Commission's issued soft law instruments are binding on the commission itself, even though soft law is characterized by its non-binding force, and the commission often refer to it in its decision-making practices. The Notice on Bid Rigging Exclusion may therefore give rise to indirect legal effects for the contracting authorities. However, there is still uncertainty as to how the assessment of the application of the collusion-related exclusion ground should be carried out in relation to collaboration between economic operators when they jointly submit a tender.

5.3 Summary of Findings

In sum, there is uncertainty as to how make the assessment of the application of the collusion-related exclusion ground in relation to collaboration between economic operators when they jointly submit a tender. According to Article 57(4)(d) of Public Sector Directive, contracting authorities have the possibility to exclude economic operators that have entered into agreements with other economic operators aimed at distorting competition. However, this provision is not explicit regarding what type of behaviour covered that is by the exclusion ground. It is for the contract authority to judge whether the collusion-related exclusion ground could be considered applicable and thus whether an economic operator must be excluded from a specific award procedure based on a case-by-case basis.

Contract authority has wide margin of appreciation regarding whether or not to exclude a tenderer from the tender procedure in question. However, it is important that the provided facts indicating an

[822] This will be addressed in Chapter 7.
[823] See footnote 52 in the Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01.

anti-competitive agreement are objective and consistent, and that the contracting authority should pay particular attention to the principle of proportionality. In the assessment of the anti-competitive agreement, the contracting authority can assess all facts that could call into question the reliability of that tenderer as a potential future contractor. The collusion-related exclusion ground in Article 57(4)(d) are worded differently from Article 101(1) TFEU. However, it must be assumed that, in connection with the interpretation and application of Article 57(4)(d) of the Public Sector Directive, it would make sense to make the assessment in the light of Article 101 TFEU.

6 Concluding Remarks

This chapter examined the legal framework set by the Public Sector Directive in situations with collaboration between economic operators participating in public tenders. The Public Sector Directive allows economic operators to collaborate in a variety of ways, and the general principle of the Directive is that the contracting authority must respect the right of the economic operators to jointly submit a tender. However, there are limitations to this due to the provisions in the Public Sector Directive as well as certain case law from the ECJ. In this chapter, uncertainties have been identified when it comes to the legal framework that is set by the public procurement rules.

The Public Sector Directive facilitates a flexible approach to the reliance on third party capacities. The starting point is that an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of its links to those entities. In this situation, the economic operator shall prove that it will actually have the resources of the other entities at its disposal, which it does not own itself and which are necessary for the performance of the contract. In this regard, it is free to choose the legal nature of the links it intends to establish with the other entities on whose capacities it relies in order to perform the particular contract as well as the type of proof it chooses to put forward to showcase the existence of those links. However, there are limits when it comes to the application of relying on third party capacities, and the following limitations have been identified:

Firstly, when an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the contracting authority may require that the economic operator and those third party entities involved are jointly liable for the execution of the contract.

Secondly, the Public Sector Directive explicitly allows for limitations to the economic operators' right to rely on third party capacities. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks are performed directly by the tenderer itself.

Thirdly, an economic operator can only rely on a third party´s capacity for educational and professional qualifications when the latter will be performing the works or services for which these capacities are required.

When it comes to the application of bidding consortia in public tenders, a very general framework has been set by the Public Sector Directive. Bidding consortia cannot be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate in a procurement procedure. Furthermore, the general rule is that a contracting authority cannot impose any conditions that are different from those imposed on individual participants for the performance of a contract when dealing with a group of economic operators. The Public Sector Directive does not provide clear instructions for how to assess the qualification of groups of economic operators seeking to participate in a public tender as a bidding consortium. However, it can be deduced that the contracting authority must assess the qualifications of the bidding consortium as a whole, and the composition of consortia must be assessed with regard to the general principles of EU law in particular, the principles of equal treatment and transparency. Additionally, there is uncertainty when it comes to a change of consortium membership in a bidding consortium. A change of consortium membership does not, per se, provide a basis for removing an economic operator, and, therefore, it can be argued that there should be an assessment of the nature of this change.

Subcontracting in public tenders is also the Public Sector Directive, however the Directive does not provide significant rules on the application of subcontractors. The Directive does not define the concept of a subcontractor, even though it uses the concept. The contracting authority may ask, or may be required by a Member State to ask, the economic operator to indicate, in its tender, any share of the contract that it may intend to subcontract to subcontractors as well as any proposed subcontractors. The Public Sector Directive imposes the obligation to disclose the name, contact details and legal representatives of all subcontractors providing works or services at a facility under the direct supervision of the contracting authority. However, the request for information will only be applicable if the information is known at this point in time. The contracting authority cannot impose a general prohibition on subcontracting. However, subcontracting may be limited in some cases and the Public Sector Directive clearly allows that, in the case of works contracts, service contracts and

siting or installation operations in the context of a supply contract, contracting authorities may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators by a participant in that group. Additionally, in some cases, the contracting authority can require the substitution of a subcontractor. The Public Sector Directive does not mention in which situations and under which procedures this substitution may take place. In the analysis of the assessment of a substitution of members in a bidding consortium, it was highlighted that the assessment of the nature of the change in the composition of a bidding consortium can presumably be based on an analogy application of the rules governing the changes to the tender specification, conditions, and the procedure during the award procedure, and this may also be the case in the substitution of a subcontractor.

Furthermore, this chapter has also examined the discretionary exclusion grounds in Article 57(4)(d) of the Public Sector Directive and discussed what significance these exclusion grounds may have for collaborations between economic operators when they participate in public tenders. It has been found that there is uncertainty as to how to make the assessment of the application of the collusion-related exclusion grounds in relation to collaborations between economic operators when they jointly submit a tender. Contracting authorities have wide margin of appreciation regarding whether or not to exclude a tenderer from the tender procedure in question. However, it is important that the provided facts indicating an anti-competitive agreement are objective and consistent and that the contracting authorities pay particular attention to the principle of proportionality. In the assessment of the anti-competitive agreement, the contracting authority can assess all facts that could call into question the reliability of that tenderer as a potential future contractor. The collusion-related exclusion grounds in Article 57(4)(d) are worded differently from Article 101(1) TFEU. However, it must be assumed that, in connection with the interpretation and application of Article 57(4)(d) of the Public Sector Directive, it would make sense to make the assessment in the light of Article 101 TFEU.

CHAPTER 6

Collaboration between Economic Operators from a Competition Law Perspective

1 Introduction

This chapter focuses on the legal framework set by the competition rules in situations of collaboration between economic operators participating in public tenders. The Public Sector Directive allows economic operators to collaborate and have relations in a variety of ways, yet, with some set limitations for the different types of collaborations. The competition law assessment of legitimate collaborations under procurement law has not received much attention. However, in Scandinavia, there has been a renewed special interest in collaborations between economic operators in public procurement procedures, which mostly can be observed in connection with cases at national level.[824]

A collaboration between economic operators participating in public tenders can potentially be prohibited by the competition rules. Article 101(1) TFEU explicitly prohibits all agreements between undertakings that may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market. Hence, from a competition law perspective, it will be relevant to examine whether the collaboration between the economic operators participating in public tenders can be regarded as an anti-competitive agreement caught by the prohibition in Article 101(1) TFEU. However, even if collaboration can be classified as an anti-competitive agreement, it may in some cases be considered as lawful under the competition rules.[825] Until now, there has been no competition law detail regulation of participation in collaboration for the purpose of a tender process. However, on 1 March 2022, the Commission published its draft for reviewed guidelines on the application of Article 101 TFEU to horizontal co-operation agreements.[826] As new addition to the proposed horizontal guidelines, a whole section specifically deals with the competition law assessment of bidding consortia.[827]

[824] For a brief presentation of these national cases see Chapter 1 section 3.
[825] This will be discussed below.
[826] Approval of the content of a draft for a communication from the Commission. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final.
[827] Ibid, see section 5.5. on bidding consortia.

1.1 Outline

In the following, there will be a presentation of the legal framework for the collaborations between economic operators set by the competition rules. As presented in section 0 of Chapter 1, this section will focus on the three different types of collaboration that can be entered by economic operators. These are as follows: (1) reliance on other economic operators' capacity; (2) bidding consortia; and (3) subcontracting. However, the competition law assessment of these types of collaboration will differ from the treatment of the legal framework set by the Public Sector Directive in Chapter 5. The reason for this is that, from a competition law perspective, the form or designation of the collaboration is not decisive, but it is the content of the collaboration that is decisive for the competition law assessment.

This chapter will therefore set off by addressing the competition law approach to the assessment of bidding consortia in public tenders. Since the competition law assessment depends on content of the collaboration, the approaches and principles that are expressed in section 2 in this chapter regarding bidding consortia may thus be applicable to other forms of collaborations between economic operators in public tenders, including subcontracting as well as reliance on other economic operators' capacity.

The analysis of the approach to bidding consortia will be followed up by an analysis of the approach to the use of subcontractors and reliance on other economic operators' capacity. The presentation of each type of collaboration will be structured in a similar fashion. Each section begins with a clarification of how the specific collaboration type are may constitute a breach of competition law, which subsequently will be followed by an analysis of the assessment under Article 101 TFEU.

2 Assessment of Bidding Consortia in Public Tenders

2.1 Why Bidding Consortia Can Constitute a Breach of Competition Law

The first thing that needs to be addressed is the reason why bidding consortia can be problematic from a competition law point of view. Bidding consortia that participate in public tenders may require the economic operators to set a common selling price, i.e. the price offered to the contracting authority. Furthermore, bidding consortia can involve a distribution of the tendered tasks prior to the submission of the bid so that each economic operator will be able to set its prices depending on their individual responsibilities and risks associated with the possible performance of the tendered public contract. This division of tasks can take many forms. Sometimes it follows the contracting entity's

division of a tender into contract lots; in other situations, it may be based on the costs associated with performing the task by the economic operators as well as their estimation of the value of the tender contract. The economic operators participating in tenders set their prices based on own-cost parameters, but they will, however, also recognise that their own current and past actions will be treated by rivals as signals of costs and intentions of the economic operators.[828]

Hence, from a competition law perspective, bidding consortia agreements may in some situations be classified as *commercialisation agreements* or *joint selling agreements*, where the economic operators agree on the commercial aspects related to the sale of the product, including the price.[829] According to Article 101(1) TFEU, directly or indirectly fixed purchases or selling prices as well as any other trading conditions are prohibited. Furthermore, the prior division of tasks resemble an agreement on the share markets, which, similar to pricing, is explicitly mentioned as an example of a competition-restricting agreement that is prohibited by Article 101(1) TFEU. As a result, collaborations between the economic operators in the competition for public contracts may have some inherent characteristics that are explicitly covered by the prohibition of restrictive agreements in Article 101(1) TFEU. However, it is generally accepted that some bidding consortia can benefit the competition and that those concerned should thus be permitted according to the competition rules.[830]

One of the major competition concerns when it comes to joint selling agreements is that these may lead to price fixing and facilitate an output limitation, since the parties may decide on the volume of products to be put on the market. This type of agreement may not only eliminate price competition between the economic operators but also restrict the total volume of products to be delivered by the economic operators.[831] In the public procurement setting, the price competition must be regarded as the competition for the individual contract during the contract period in question.[832] As previously described, the traditional objection to joint bidding is that it may suppress competition by reducing the total number of bids tendered for the contract.[833] In the event of a reduction in total bids, the degree of competition may be decreased and the prices that the contracting authorities have to pay

[828] See Chapter 3, section 3.3.4.
[829] See guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 225.
[830] Ibid, para 20.
[831] Ibid, para 234.
[832] See Chapter 3, section 3.3.1.
[833] Smith, J. L. (1983). Joint Bidding, Collusion, and Bid Clustering in Competitive Auctions. Southern Economic Journal, Vol. 50, No. 2, pp. 355-36, p. 355. See also Markham, J. W. and Papanek, G. F. (1970). The Competitive Effects of Joint Bidding by Oil Companies for Offshore Oil Leases in Industrial Organization and Economic Development. Houghton Mifflin Company, p. 119.

for the product will be higher.[834] Additionally, it is generally the view that competition provides better incentives for innovation, in contrast to monopoly and high market concentration which both tend to limit and delay innovation.[835] Hence, the dynamic view of competition clarifies the need for competition because this may also be of importance for innovation, and economic operators that are under competitive pressure will therefore have more of an incentive to innovate and gain market share.

Furthermore, another specific competition concern related to joint selling agreements are that these may also lead to an exchange of strategic information related to aspects within or outside the scope of the collaboration or to commonality of costs.[836] Hence, the exchange of information may be conductive to restricting competition.[837] The undertakings can, within the framework of the competition rules, only exchange information to a limited extent, and whether or not such exchange of information will have restrictive effects on competition depends on both the economic conditions on the relevant markets and the characteristics of exchanged information.[838]

The award of public contracts normally takes place through public tenders, and the public procurement markets have specific characteristics. Contracting authorities usually follow relatively stable purchasing patterns with frequently repeated award procedures, similar quantities and standard product or service specifications, without major changes compared to previous procedures. In the public procurement market, competition between the economic operators only takes place within certain parts of the market, often with several years in between.[839] Consequently, the economic operators that participate in the tenders know that the public procurement markets are a repeated competition.[840] Hence, an exchange of strategic information related to aspects within or outside the scope of the bidding consortia can be problematic from a competition law perspective, and the public procurement market can facilitate an increased risk of collusion compared to other markets.[841]

[834] See Chapter 3, section 3.2.1.
[835] See Chapter 3, section 4.1.
[836] See guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 233.
[837] Competitively sensitive information can concern prices, production, customers, markets, sales and costs, but can also concern other commercial terms.
[838] See guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 75.
[839] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, Official Journal of the European Union, (2021/C 91/01), para 1.2.
[840] See Chapter 3, section 3.3.1.
[841] Albano, G., Buccirossi, P., Spagnolo, G., & Zanza, M. (2006). Preventing collusion in procurement. In N. Dimitri, G. Piga, & G. Spagnolo (Eds.), Handbook of Procurement, 347-380, Cambridge University Press, p. 347.

However, other theories of harm[842] than those typically associated with joint selling can also be relevant in the assessment of bidding consortia.[843] The possible competition concerns that can arise from the bidding consortia will depend on different factors because the nature and content of an agreement relates to factors such as the area and objective of the collaboration, the competitive relationship between the parties and the extent to which they combine their activities.[844] Consequently, in the assessment of competition concern related to the specific bidding consortia must follow a case-by-case analysis.

2.2 The Assessment under Article 101 TFEU

The assessment under Article 101 TFEU consists of two parts.[845] *The first part* is to assess whether an agreement between undertakings, which is capable of affecting trade between Member States, has an anti-competitive object or actual or potential restrictive effects on the competition. If the agreement is found to be restrictive of competition within the meaning of Article 101(1) TFEU, the second part of the assessment becomes relevant. *The second part* is to assess the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) TFEU. Hence, the assessment of the bidding consortia under Article 101 will follow this structure.[846]

In the Horizontal Guidelines, the Commission states that a commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the collaboration.[847] Furthermore, according to the Commission, a specific application of this rule would be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually, because the parties to

[842] The theory of harm is outlining why the conduct constitutes a breach of competition law and explains in particular why that conduct causes harm to competition that should be prohibited. See e.g. Zenger, H. and Walker, M, (2012). Theories of Harm in European Competition Law: A Progress Report, European Public Law: EU eJournal, 185-209.
[843] According to Ritter, other theories of harm can be relevant, namely exclusivity clauses and "spillover" information exchanges, see Ritter, C. (2017). Joint Tendering Under EU Competition Law. Concurrences N° 2-2017, Art. N° 84019, p. 13.
[844] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 32.
[845] Ibid, para 20.
[846] This chapter will focus on the first part of the assessment under Article 101 TFEU.
[847] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 237.

the consortia arrangement are thus not potential competitors for implementing the project, meaning that there is no restriction of competition within the meaning of Article 101(1) TFEU.[848] In legal literature, this rule has been referred to as 'a safe harbour for joint bidding by non-competitors'.[849] However, in this context, the use of the word 'normally' expresses that this statement is with certain reservations and hence a presumption rule.[850] In addition, according to the wording of the rule in Horizontal Guidelines, the application of this rule will imply objective necessity and an assessment of whether one party could enter a market individually as well as if the party could enter the market with fewer parties than the current participants.

This approach to the assessment of bidding consortia is broadly reflected in decisions by the Commission in with regards to consortia agreement for the purpose of submission of public tenders. The Commission has not issued a decision within this area in many years, however, this legal position in Horizontal Guidelines can be traced back to a Commission Notice from 1968.[851] The following decisions are therefore considered as a valid indicator of how the Commission applies its own guidelines in practice.

Eurotunnel[852] concerned a public tender concerning two contracts regarding the construction of a tunnel to link Britain and France. In the legal assessment of the Article 101(1) TFEU, the Commission stated that the contracts regulate relations between the parties with respect to the completion of the specific project concerned and that they do not impose or imply any restriction on the freedom of the member firms of the contractor. In this connection, the Commission referred to its own guidelines[853] and stated that "*agreements having as their sole object the setting up of consortia for the joint execution of orders, where each of them by itself is unable to execute the orders, do not restrict competition"*.[854] Hereafter, the Commission clarified that this in particular applies to undertakings belonging to different industries but also to undertakings in the same industry to the extent that their contribution under the consortium consists only of goods or services which cannot be supplied by the order participating undertakings. The Commission concluded by stating that *"(…) even in the case of consortia formed by*

[848] Ibid, para 237.
[849] See Thomas. C. (2015). Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law. Journal of European Competition Law & Practice, Vol. 6, No. 9, p. 632.
[850] For this perception, see Løjmand, H. S. (2021). Et retligt og økonomisk perspektiv på tilbudskontorier i lyset af konkurrencelovens forbud mod konkurrencebegrænsende aftaler. Southern University, PhD thesis, p. 134.
[851] Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises from 1968, para 5.
[852] 88/568/EEC: Commission Decision of 24 October 1988 relating to a proceeding under Article 85 of the EEC Treaty, IV/32.437/8 – Eurotunnel
[853] Notice concerning agreements, decisions and concerted practices in the field of cooperation between enterprises, OJ C 75, 29.7.1968.
[854] 88/568/EEC: Commission Decision of 24 October 1988 relating to a proceeding under Article 85 of the EEC Treaty, IV/32.437/8 – Eurotunnel, para 17.

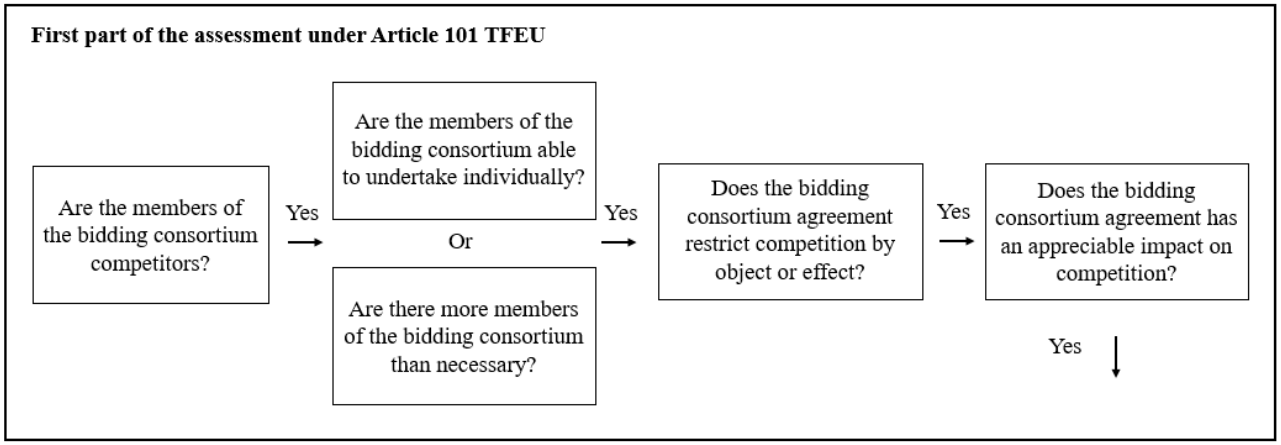
enterprises which normally compete which each other there is no restraint of competition if the participating enterprises cannot execute a specific order by themselves". Accordingly, it found that even in the case of undertakings, which normally are considered as competitions, the competition will not be restrained if the consortium members cannot execute a specific order by themselves.

Two years after *Eurotunnel,* the Commission one again took a position on a case concerning the participation of consortium in a tender. In *Consortium ECR 900*,[855] the Commission took a stand on a cooperation agreement to develop, manufacture and sell digital cellular mobile telephone systems, also called the GSM system. The parties were setting up a consortium known as ECR 900 for the purpose of the submission of tenders for the GSM system in invitations to tender. In the legal assessment of whether the agreement was caught by Article 101(1) TFEU, the Commission found that the parties to the agreement have agreed to cooperate on the development and manufacturing of the GSM system and that this agreement did not constitute a restriction of competition. The reason why the Commission found that this agreement did not restrict competition was that the facts showed that development and manufacturing by individual companies would not take place because of the high cost involved, and that the parties to the agreement would hardly be able to comply with the timetable laid down if they were to proceed individually.[856] Furthermore, the Commission pointed out that the financial expenditure and the staff required in the development and manufacturing of the GSM system was so great that realistically there is no scope for undertakings to act individually. Lastly, the Commission found that parties to the agreement could not be expected to bear the financial risk involved in the development and manufacture of the GSM system alone.[857] Consequently, the Commission found that the agreement did not have as it object or effect the restriction of competition within the internal market, and, based on the known facts, it therefore did not see a reason to take any action under Article 101(1) of TFEU against the consortium. In this decision, emphasis was placed on whether the parties to the consortium agreement could realistically act individually.

From the above, it can be deduced from the Commission's issued soft law instruments and its decisions that the following procedure can be applied to assess whether a bidding consortium submitting a joint bid in a public tender can be considered in compliance with prohibition in Article 101(1) TFEU. The systematics are illustrated below.

[855] 90/446/EEC: Commission Decision of 27 July 1990 relating to a proceeding under Article 85 of the EEC Treaty, IV/32.688 – Konsortium ECR 900.
[856] Ibid, part 2, para 2.
[857] Ibid, part 2, para 2.

Figure 7 ***Assessment of Bidding Consortia in Public Tenders***[858]



In the first part of the assessment under Article 101 TFEU, it needs to be clarified whether the economic operators in the bidding consortia can be considered as competitors. In the situation where the member of the bidding consortia can be considered competitors, it should be assessed whether members of the bidding consortium are able to undertake individually and whether there are more members of the bidding consortia than necessary. In the situation where the economic operators are able to undertake individually, or where there are more members than necessary, it must be assessed whether the bidding consortium agreement has as its object or effect of restricting competition and whether the bidding consortium agreement has an appreciable impact on competition.[859]
Hence, this can lead to a need of clarifying when economic operators can be considered competitors in a public tender, how to assess to *'able to undertake individually'*, how to evaluate whether all the members of the bidding consortia are necessary, and, lastly, how to investigate whether the bidding consortium has the object or effect of restricting competition.

It should be emphasized that there is some uncertainty regarding this approach to the assessment of bidding consortia. The EJC have not yet ruled on bidding consortia in public tenders under competition rules. Nevertheless, this approach is seen applied by the Danish Supreme Court in the *Road Markings* case in Denmark.[860] However, another approach to the assessment of bidding consortia

[858] Author's own creation.
[859] In this direction, see Thomas. C. (2015). Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law. Journal of European Competition Law & Practice, Vol. 6, No. 9.
[860] Judgment by the Danish Supreme Court of 27 November 2019 in the case 191/2018, Danish Competition Council v Eurostar A/S and GVCO A/S.

can be identified in Advisory Opinion in the *Ski Taxi/ Follo Taxi* case.[861] Thus, different approaches to the assessment of bidding consortia have been identified.[862]

2.3 When can Economic Operators be Considered Competitors

As stated above, in the first part of the assessment under Article 101 TFEU, it needs to be clarified whether the economic operators that are members of the bidding consortia can be considered as competitors. In doing so, there must be distinguish between whether economic operators are competitors according to the traditional view or whether the economic operators are competitors in relation to a particular procurement procedure.

This distinction is seen in *Eurotunnel*[863]*,* where the Commission held that *"(…) even in the case of consortia formed by enterprises which normally compete which each other there is no restraint of competition if the participating enterprises cannot execute a specific order by themselves".* Hence, the Commission found that even in the case of undertakings which normally are considered as competitions, the competition will not be restrained if the consortium members cannot execute a specific order by themselves. To do so, the Commission emphasized that a consortia formed by undertaking may be competitors in the traditional view while at the same time being non-competitors in relation to a particular procurement procedure.

The same starting point is also highlighted in legal literature where the following has been stressed by Ritter in relation to the assessment of joint tendering: *"The parties may be competitors in the broader sense, meaning that they are both active in the same business. But what matters here is whether they are competitors for the purpose of the particular procurement procedure at issue.*"[864] The decisive factor in assessing the legality of the bidding consortia is whether the economic operators are competitors in relation to a particular procurement procedure, and not whether companies are competitors in the traditional sense. As a consequence, it will be necessary to look more closely at the distinction between competitors in the traditional view and competitors for a particular procurement procedure.

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[861] See the Judgment of the Borgarting Court of Appeal of 17 March 2015 in case 13-075034ASD-BORG/01, Staten v/ Konkurransetilsynet v. Follo Taxisentral Ba, Ski Follo Taxidrift AS and Ski Taxi Ba. This decision was confirmed by the Norwegian Highest court on 22 June 2017 in case HR-2017-1229-A and Advisory Opinion of the EFTA Court of 22 December 2016 in case E-03/16, Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet.

[862] For an analysis of these approaches to the assessment of consortia agreements in public tenders, see Løjmand, H. S. (2021). Et retligt og økonomisk perspektiv på tilbudskontorier i lyset af konkurrencelovens forbud mod konkurrencebegrænsende aftaler. Southern University, PhD thesis, p. 252.

[863] 88/568/EEC: Commission Decision of 24 October 1988 relating to a proceeding under Article 85 of the EEC Treaty, IV/32.437/8 – Eurotunnel

[864] Ritter, C. (2017). Joint Tendering Under EU Competition Law. Concurrences N° 2-2017, Art. N° 84019, p. 4.

The traditional view of the concept of competitors includes both actual and potential competitors. Actual competitors are defined as undertakings, which are active on the same relevant market, whereas potential competitors are defined as undertakings, which have real concrete possibilities to undertake within a short timeframe, the necessary steps to enter the relevant market where the other undertaking is already active.[865] The assessment of the traditional view of concept of competitor must be based on realistic ground - the mere theoretical possibility to enter a market is not sufficient.[866] Furthermore, the ability to enter is more important than the intention to enter.[867] Thus, in the assessment of the traditional view of the concept of competitors, the decisive factor is the definition of the relevant market(s), which is determined on the basis of an analysis of demand and supply substitution for the product market and that geographic market.[868]

The assessment of whether the economic operators can be considered as competitors in relation to a particular procurement procedure will differ from the traditional view of the concept of competitors. As already stressed, the Horizontal Guidelines states that "*companies involved to participate in projects that they would not be able to undertake individually, because the parties to the consortia arrangement are thus not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1)".*[869] Thus, from a bidding consortia perspective, this will entail that if the members of the bidding consortia are already in a position to tender individually, this will mean they will be considered actual competitors for a particular procurement procedure.

Furthermore, if the the members of the bidding consortia do not already have the resources to carry out the contract individually, but has a real concrete possibility to acquire it within a short time frame, they are potential competitors for a particular procurement procedure.[870] As stated above, the theoretical possibility to enter a market is not sufficient and the ability to enter is more important

[865] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 10.
[866] Ibid, para 10.
[867] The General Court held that: "(…) while the intention of an undertaking to enter a market may be of relevance in order to determine whether it can be considered to be a potential competitor in that market, nonetheless the essential factor on which such a description must be based is whether it has the ability to enter that market". See Case T-461/07, Visa Europe Ltd and Visa International Service v European Commission, EU:T:2011:181, para 168.
[868] Commission Notice on the definition of relevant market for the purposes of Community competition law, para 4.
[869] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 237.
[870] What constitutes a 'short period of time' depends on the facts of the case at hand, its legal and economic context, and, in particular, on whether the company in question is a party to the agreement or a third party. See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, footnote to para 10.

than the intention to enter. Hence, from a public tender perspective, the competitor assessment must take into account whether the member of the bidding consortia have the ability to tender/bid.

This approach can also be supported by draft for the Horizontal Guidelines. Here, the competitor assessment in relation to bidding consortia is addressed where following is stated:[871]

> *"The assessment of whether the parties can* ***each compete in a tender individually, thus being competitors, depends firstly on the requirements included in the tender rules****. However, the mere theoretical possibility of carrying out the contractual activity alone does not automatically make the parties competitors: there must be a* ***realistic assessment of whether an undertaking will be capable of completing the contract on its own****, considering the specific circumstances of the case, such as the size and abilities of the undertaking, and its present and future capacity assessed in light of the evolution of the contractual requirements".*[872]

Hence, according to the draft for the horizontal guidelines, when assessing the legality of a bidding consortia, the competitor assessment should be based on whether the members of the bidding consortia each can compete in a tender individually. Thus, put it another way, the competitor assessment must take into account of the individual economic operator's ability to tender/bid on the public contract. Although these guidelines are not applicable, they can still give an indication of how the rules can be interpreted.

2.3.1 When are the Economic Operators Able to Undertake Individually –The Ability to Bid

In order to assess whether the individual economic operator have the ability to bid on the public contract, it is relevant to know which benchmark this assessment should be made on.

In *Consortium ECR 900*,[873] the Commission placed particular emphasis on the tender requirements including the timetable, the financial expenditure and the staff required in the development and manufacture of the GSM system, which resulted in that *realistically there is no scope for undertakings to act individually*, see section 2.2 in this chapter. Hence, the ability to bid depends on an assessment of the economic operator's ability to meet the tender requirements.

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[871] Approval of the content of a draft for a communication from the commission. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final, para 392.
[872] Emphasis added.
[873] 90/446/EEC: Commission Decision of 27 July 1990 relating to a proceeding under Article 85 of the EEC Treaty, IV/32.688 – Konsortium ECR 900.

This interpretation finds also support in the legal literature. Ritter states that "*[t]he "ability to bid" means having the ability to meet the tender specifications – in terms of having sufficient spare capacity, equipment, staff, regulatory permits, quality certifications, etc.(…)".*[874]

This is further narrowed down by Anchustegui who states that:[875]

> *"In my view, the assessment concerning the ability to tender independently should be done with regard to the* ***minimum tender requirements set in the contract notice****. Also, the test is met if the parties are able to submit an independent compliant tender, not if the individual tender would have been likely to be awarded the public contract".*[876]

According to Anchustegui, the assessment concerning the ability to tender independently should be done with regard to the minimum tender requirements.[877] However, another view is put forward by Kuźma and Hartung who found the following:

> *"Classifying contractors as potential competitors exclusive on the basis of them satisfying the minimum conditions for taking part in the procedure, while ignoring other circumstances that are analysed in the context of the markets on which the public party does not intervene, seems unreasonable. Furthermore, all these additional factors (e.g. the lack of personnel) that the contractor entering the procedure must take into account affect his bid, or rather the price that would be bid if he decided to participate in the procedure. If there are too many factors increasing the price, the bid will become uncompetitive and its submission cannot be considered an 'economic viable strategy"*[878]

Hence, in the view of Kuźma and Hartung to categorize the contractors as potential competitors exclusive on the basis of them satisfying the minimum requirements for taking part in the procedure does not seem unreasonable, because level of requirements can cause the bid to become uncompetitive.

Furthermore, the draft for the Horizontal Guidelines should again be highlighted. Here, it appears that the mere theoretical possibility of carrying out the contractual activity alone does not

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[874] Ritter, C. (2017). Joint Tendering Under EU Competition Law. Concurrences N° 2-2017, Art. N° 84019, p. 7.
[875] Anchustegui, I., H. (2017). Joint Bidding and Object Restrictions of Competition: The EFTA Court's Take in the Taxi Case. European Competition and Regulatory Law Review, Vol. 1 2017, Issue 2, 174-179; p. 178.
[876] Emphasis added.
[877] According to the Public Sector Directive, the minimum requirements are set by the contracting authority and are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess in order to allow the contracting authority to award the contract in accordance with the chosen award criteria. See Recital 45 of the preamble to Directive 2014/24/EU of The European Parliament and of The Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC.
[878] Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 176.

automatically make the parties competitors. Subsequently, it is stressed that there must be a "*realistic assessment of whether an undertaking will be capable of completing the contract on its own*" where the specific circumstances of the case must be taken into account.[879] Hence, this can be interpreted as meaning that, in the assessment whether the individual economic operator have the ability to bid on the public contract, the benchmark initially depends on the requirements included in the tender requirements and the specific circumstances of the case, such as the size and abilities of the undertaking, and its present and future capacity assessed in light of the evolution of the contractual requirements. As previously stated, although these guidelines are not applicable, they can still give an indication of how the rules can be interpreted.

From the above, it can be deduced that the competitor assessment must take into account the individual economic operator's ability to tender/bid on the public contract with the benchmark of whether this can meet the tender requirements. However, it is uncertain which tender requirements can be included the assessment of whether the economic operators can be considered competitors for a particular procurement procedure.

2.4 Are There More Members of the Bidding Consortium than Necessary

As part of the assessment under Article 101 TFEU, it needs to be clarified if there are more members of the bidding consortium than necessary. As highlighted above, in the Horizontal Guidelines, the Commission states that following: [880]

> *"A commercialisation agreement is normally not likely to give rise to competition concerns if it is objectively necessary to allow one party to enter a market it could not have entered individually or with a more limited number of parties than are effectively taking part in the co-operation, for example, because of the costs involved. A specific application of this principle would* ***be consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually****. As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1)".*[881]

[879] Approval of the content of a draft for a communication from the Commission. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final, para 392.
[880] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 237.
[881] Emphasis added.

According to Commission, consortia arrangements that allow the involved companies to participate in projects that they would not be able to undertake individually are not likely to give rise to competition concerns.

The use of the plural term 'companies' indicates that it is all members of the bidding consortium who must be able to submit bids through the collaboration, which is not the case if one consortium member already have the ability to bid without being part of the bidding consortia. Thus, this basically entails, that a bidding consortia consisting of one economic operator with the ability to bid alone and an economic operator who cannot will not be considered as necessary.[882]

Furthermore, in the Horizontal Guidelines there is an example of a commercialisation agreement by more parties than necessary to enter a market.[883] This commercialisation agreement is between four undertakings, and the question is whether the parties would have been in a position to enter the market either individually or in collaboration with fewer parties than the four currently taking part in the agreement. In this case, the agreement could have been implemented by only three of the parties instead of the four actually taking part in the collaboration. The Commission states the following on the analysis under Article 101 TFEU:

> *"(…) the fact that the agreement involves price fixing and could have been carried out by fewer than the four parties means that Article 101(1) applies. The agreement thus needs to be assessed under Article 101(3)."*

Hence, according to the Horizontal Guidelines, if there are more economic operators than necessary, the collaboration can potentially restrict competition even if all of economic operators cannot individually fulfil the contract. It must be assumed that the reason for this is, that if a bidding consortia consist of, for example, three members, and the contract only requires two of the member in order to carry out the contract, it is possible that one of the member of the bidding consortia would have go together with other economic operators and thus, an additional bid on the public contract could have been submitted. Hence, this could potentially restrict competition. This reasoning is also stated in legal literature. Ritter specifies the following:[884]

> *"What about a scenario with more than two parties? Each additional firm taking part in a joint tender would be considered a potential competitor if it realistically could have bid separately otherwise. By contrast, an*

[882] This is acknowledge by Løjmand. See Løjmand, H. S. (2021). Et retligt og økonomisk perspektiv på tilbudskontorier i lyset af konkurrencelovens forbud mod konkurrencebegrænsende aftaler. Southern University, PhD thesis, p. 205.
[883] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 253.
[884] Ritter, C. (2017). Joint Tendering Under EU Competition Law. Concurrences N° 2-2017, Art. N° 84019, p. 7.

additional firm that could not realistically bid separately may take part in the joint tender without being considered a potential competitor. ***It is not a matter of ensuring that a joint tender includes as few parties as possible. It is a matter of ensuring that the joint tender does not reduce the number of separate tenders that could realistically have taken place otherwise."***[885]

Thus, Ritter finds that it is not a matter of ensuring that a joint tender includes as few parties as possible, but ensuring that the joint tender does not reduce the number of separate tenders.

It can therefore be deduced that the Horizontal Guidelines can be read as if there are more members of the bidding consortium than necessary, then the collaboration can potentially restrict competition. In the situation where a bidding consortia consists of one economic operator with the ability to bid alone and an economic operator who does not have the ability to bid alone, the bidding consortia cannot be considered as necessary.

2.5 Does the Bidding Consortium Agreement Restrict Competition by Object or Effect

For an agreement to be caught by Article 101(1) TFEU it must have the objective or effect of preventing, restricting, or distorting competition. As part of the assessment under Article 101 TFEU, it needs to be clarified whether the bidding consortium agreement restrict competition by object or effect.

Restriction of competition by object and effect must be seen as alternative and not cumulative requirements of Article 101(1) TFEU. The distinction between restrictions of competition by object and effect for the purpose of applying Article 101(1) TFEU has not always been clearly explained by the ECJ in case law and they are often referred to in connection and not separately. In *Beef Industry Development Society*,[886] the ECJ defined the distinction between restrictions of competition by object and effect in the following way:

> *"The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition."*[887]

Hence, a restriction of competition by object can be defined as conducts that by their very nature have the potential to restrict competition. On several occasions, the ECJ has ruled on several

[885] Emphasis added.
[886] Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd., EU:C:2008:643
[887] Ibid, para 17.

occasions that the concept of restriction of competition *by object* must be interpreted restrictively.[888] As a general rule, once the conduct has been categorized as a by object restriction, there is no need to take account of the concrete effect of the agreement.[889] Another consequence of a qualification as a *by object restriction* is the possibility of exempting an anti-competitive agreement from being caught by Article 101(1) TFEU. An infringement by object cannot benefit from a block exemption neither on the basis of the nature of those restrictions or the fact that those restrictions are likely to produce negative effects on the market. Furthermore, infringement by object cannot be exempted according to the safe harbour of the De Minimis Notice.[890] However, an infringement by object can be have the possibility of obtaining an exemption under Article 101(3) TFEU, meaning that this provision does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect.[891]

If an agreement does not restrict competition by object, it must be examined whether it has restrictive effects on competition. Thus, this will entail that the assessment of the whether the bidding consortium agreement restricts competition by object or effect will start out with an assessment of whether the agreement can be categorized as an infringement by object.

2.5.1 The Assessment of whether the Bidding Consortium Agreement Restricts Competition by Object

The assessment of the bidding consortium agreement restricts competition by object should be based on a number of factors. According to the guidelines on the application of Article 101(3) TFEU, the following factors can be included in the assessment:[892]

> *"These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market. In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object (...)." The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement*

[888] See e.g. Case C-228/18, Gazdasági Versenyhivatal v Budapest Bank and more, EU:C:2020:265, para 54; and C-307/18, Generics (UK) Ltd and Others v Competition and Markets Authority, EU:C:2020:52, para 67.
[889] See, for example, Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd., EU:C:2008:643, para 16.
[890] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291, para 11.
[891] Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, para.20
[892] Ibid, para.22.

> *does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition (…)"*[893]

According to above, the assessment of whether an agreement restricts competition by object can be based on (1) the content of the agreement, (2) the objectives it seeks to attain, and (3) the economic and legal context of which it forms part.[894] Furthermore, although the intention of the parties is not a necessary factor in the assessment of whether an agreement can be categorized as a 'by object restriction', it has nonetheless been seen that the Commission has included this in its analysis.[895] As a result, this factor can also be included in the assessment as a fourth element. These four elements will therefore form the framework for how it can be assessed whether a bidding consortium agreement restricts competition by object.[896]

The starting point for the assessment of whether an agreement restrict competition by object is the content of the bidding consortium agreement, which may be deduced from what the parties have written, said or done.[897]

The bidding consortium is often formed by a contract, which delineates the rights and obligations of each member, including the division of profits. Thus, the bidding consortium will typically be based on a contract/ consortium agreement. According to Kuźma and Hartung, the consortium agreement can be described as follows:[898]

> *"In most EU Member States, a consortium agreement is an unnamed agreement, concluded on the basis of contractual freedom. The content and scope of such an agreement, especially the method of establishing the rights and duties of the contractors applying jointly for a public contract, can be highly differentiated, depending on the national law of the country of origin of the contractors and the country in which they are tendering for the public contract, the conditions of the given contract and the*

[893] Emphasis added.
[894] See also Joined cases 29/83 and 30/83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities, EU:C:1984:130, para 26; and Joined cases C-96/82, NV IAZ International Belgium and others v Commission of the European Communities, paras 23.25.
[895] See e.g., Joined Cases C-501/06 P, GlaxoSmithKline Services Unlimited v Commission of the European Communities, EU:C:2009:610, para 58.
[896] However, two other methods have been used to assess whether an agreement has as its object the restriction of competition. See Bailey, D. (2021). Restrictions of Competition by Object under Article 101 TFEU. Common Market Law Review 49: 559–600, p. 570.
[897] Bailey, D. (2021). Restrictions of Competition by Object under Article 101 TFEU. Common Market Law Review 49: 559–600, p. 576.
[898] Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 123.

organizational and business conditions of the individual consortium members (including tax) as well as other local factors."

Hence, a consortium agreement is concluded on the basis of contractual freedom and the content and scope of such an agreement. Here, the method of establishing the rights and duties of the contractors applying jointly for a public contract can in particular be highly differentiated. It is therefore limited how much that can be said about the content of the bidding consortia agreement in general, as it must be expected that these can be very different depending on the Member State, the tender procedure etc.

As stated in section 2.1, bidding consortia participating in public tenders may require the economic operators to set a common selling price, hence the price offered to the contracting authority Furthermore, bidding consortia can also involve a distribution of the tendered tasks prior to the submission of the bid so that each economic operator will be able to set prices depending on their responsibilities and risks associated with the possible performance of the tendered public contract. As a consequence, the content of the bidding consortium agreement may be considered to involve price fixing and market sharing.

The content of the bidding consortium agreement can include obligations to integrate resources and actives of the members of the consortium. Among these obligations, there may be settlement on joint production for the purpose of participating in the tender procedure. In situations where the content of the bidding consortium agreement and the collaboration between the members of the bidding consortium can be considered as merely ancillary to the main integration of the members of the bidding consortium in the production process, this will entail that the centre of gravity of the bidding consortium agreement lies in the production activity.[899] Thus, this will entail that the assessment must be carried out in accordance with the rules applicable to production agreements.

If the bidding consortium agreement is assessed in accordance with the rules applicable to production agreements can entail that there will be a different legal position to price fixing or market sharing. Normally, agreements which involve price fixing or market sharing will typically be considered to restrict competition by object. According to the Horizontal Guidelines, this will not be the case with production agreements where:[900]

[899] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paras 13-14 and 228.
[900] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para.160.

> *"[T]he parties agree on the output directly concerned by the production agreement (for example, the capacity and production volume of a joint venture or the agreed amount of outsourced products), provided that the other parameters of competition are not eliminated; or*
>
> *a production agreement that also provides for the joint distribution of the jointly manufactured products envisages the joint setting of the sales prices for those products, and only those products, provided that that restriction is necessary for producing jointly, meaning that the parties would not otherwise have an incentive to enter into the production agreement in the first place".*

Hence, when the bidding consortium agreement is assessed in accordance with the rules applicable to production agreements, price fixing for the products or services is generally not considered a restriction by object. In the two cases above, a by effect assessment is required as to whether the agreement gives rise to likely restrictive effects on competition within the meaning of Article 101(1) TFEU.

In the legal literature, an example is given of when a bidding consortium agreement can be regarded as a production agreement or a joint selling agreement. Ritter states that *"[i]f the cooperation entails some integration of production assets, such as a new plant, it would be considered joint production. If the cooperation is merely a way to sell the parties' products through a single channel in order to eliminate competition between them, this would be seen as joint selling*".[901]

The bidding consortia agreements that mainly or exclusively include joint commercialisation have to be considered as commercialisation agreements and therefore have to be assessed in accordance with the rules applicable to agreements on commercialisation. As stated in the above, price fixing is one of the major competition concerns arising from commercialisation agreements and they are thus likely to restrict competition by object.[902]

As mentioned, bidding consortia participating in public tenders often require the economic operators to set a common selling price, which can be interpreted as price fixing. In the Advisory Opinion in the *Ski Taxi/ Follo Taxi*,[903] the EFTA Court found that the joint bidding for patient transportation can be qualified as a form of horizontal price fixing, which means that it is highly likely to amount to

[901] For this point see Ritter, C. (2017). Joint Tendering Under EU Competition Law. Concurrences N° 2-2017, Art. N° 84019, p. 11.
[902] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para.234.
[903] Advisory Opinion of the EFTA Court of 22 December 2016 in case E-03/16, Ski Taxi SA, Follo Taxi SA og Ski Follo Taxidrift AS v Staten v/Konkurransetilsynet.

an object restriction of competition.[904] In this case, there was no written agreement for the submission of the tender. However, in the assessment of the content of the agreement and the objectives of the agreement, the EFTA Court stated:[905]

> *"First, as regards the content of the agreement's provisions and its objectives, the Court notes that, although there appears to be no written agreement relating specifically to the submission of joint bids in the two tender procedures, SFD Shareholders' Agreement states that "**there will be less competition between (Ski Taxi and Follo Taxi) in the market than previously", and "this applies to (…) pricing policy in tenders**".*

Accordingly, the EFTA Court emphasized that in the Shareholders' Agreement there was stated that the agreement will entail less competition between the members of the bidding consortia, thereby revealing an aim to limit competition between the parties.[906] Furthermore, the EFTA Court found that the submission of a joint bid by SFD on behalf of Ski Taxi and Follo Taxi entailed an agreement on the price offered to the contracting authority. Thus, the submission of a joint bid could be seen as a form of price fixing.[907] In the assessment of the economic and legal context of bidding consortia agreement, emphasis was in particular placed on the question of whether the members of the bidding consortium was actual or potential competitors.[908] In the assessment of whether the bidding consortia agreement could restrict competition by object, the EFTA Court attached great importance to the ability to tender independently as well as whether the cooperation may constitute an ancillary activity. In the Advisory Opinion in the *Ski Taxi/ Follo Taxi,* the EFTA found the submission of a joint bid could be seen as a form of price fixing. Although the ECJ does not have an obligation to take into account the case law of the EFTA Court, it is conceivable that this may affect the case law of the ECJ.

In Chapter 1 section 3, it has also been seen in national cases from the Scandinavian countries regarding competition law assessment of joint tendering that the cases seem to share the assessment that bidding consortia in public procurement procedures can be considered as leading to price fixing and market sharing between the members of a bidding consortium. Consequently, it can be deduced that there may be a tendency in the Scandinavian countries to characterise a violation of the

[904] Whether the submission of joint bids by SFD on behalf of Ski Taxi and Follo Taxi in the two tender procedures is to be considered a restriction of competition by object is a matter of fact and as such for the referring court to assess.
[905] Ibid, para 96.
[906] This is also highlighted by Anchustegui. See Anchustegui, I., H. (2017). Joint Bidding and Object Restrictions of Competition: The EFTA Court's Take in the Taxi Case. European Competition and Regulatory Law Review, Vol. 1 2017, Issue 2, 174-179; p. 177.
[907] Ibid, para 91.
[908] Ibid, para 97.

competition rules in a joint bidding in public procurement procedures as an object restriction of the competition. Although these national cases can be seen as a tendency towards an approach of joint tendering in public procurement procedures leading to price-fixing and market sharing between the members of a bidding consortium, which is also the case in the EFTA Court's Advisory Opinion, there are no EU legal sources which suggest that the ECJ will apply the same approach.

In this relation, it may be considered problematic if the ECJ adopts the approach of classifying the submission of a joint bid in a public tender as a form of price fixing, which is a view that is also apparent from legal literature. Anchustegui states the following:[909]

> *"The EFTA Court held that the joint bidding scheme constituted a form of pricing fixing because the parties agreed on the price offered to the contracting authority.* ***This adopts a strict treatment to joint bidding in general*** *as it appears that it will (almost always) amount to an object restriction because the essence of joint bids is to agree on the offered contractual conditions, including price".*[910]

In addition, this problem is also put in abstract terms by Sanchez-Graells:[911]

> *"In abstract terms and taken to its logical extreme****, equating joint bidding to illegal price-fixing could be tantamount to setting a blanket a priori prohibition of joint tendering in public procurement as an infringement of Article 53(1) EEA—and, potentially, Article 101(1) TFEU****— even between non-competing undertakings (ie undertakings that can only be notionally considered as potential competitors under possibly thin or extremely abridged counterfactual scenarios). Such approach would tend to proscribe joint tendering as such because tenders for public contracts need to include an element of price, except in limited fixed-price tenders based on quality competition only (…)".*[912]

Accordingly, several problematic aspects are associated with the approach of classifying the submission of a joint bid in a public tender as a form of price fixing. Thus, this classification can entail that bidding consortia is seen as facilitating illegal price fixing with the result of that bidding consortia participating in public tenders is generally seen as an infringement of Article 101(1) TFEU. As previously mentioned, classifying the submission of a joint bid in a public tender as a form of price

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[909] Anchustegui, I., H. (2017). Joint Bidding and Object Restrictions of Competition: The EFTA Court's Take in the Taxi Case. European Competition and Regulatory Law Review, Vol. 1 2017, Issue 2, 174-179; p. 177.
[910] Emphasis added.
[911] Sanchez-Graells, A. (2017). *Ski Taxi: Joint Bidding in Procurement as Price-Fixing?* Journal of European Competition Law & Practice, Vol. 9, Issue 3, March 2018, 161–163;
[912] Emphasis added.

fixing will also entail that it will or almost always amount to an object restriction[913] because the essence of joint bids is to agree on the offered contractual conditions, including the price offered to the contracting authority.

In the situation where the bidding consortium agreement is considered as to restrict competition by object, there is no need to take account of the concrete effect of the agreement.[914] Hence, this can be descried as a 'presumption rule', i.e. when a conduct is categorized as an infringement by object, harmful effect on competition are presumed.[915] In this situation, the only possibility for the bidding consortium to not get caught by the prohibition in Article 101(1) TFEU is an exemption under Article 101(3) TFEU.

2.5.2 The Assessment of the Bidding Consortium Agreement Restricting Competition by Effect

If the bidding consortium agreement does not restrict competition by object, it must be examined whether it has restrictive effects on competition. In this assessment, one must take into account not only actual but also potential effects. According to the Guidelines on the application of Article 101(3) TFEU, in the assessment of whether the agreement can be categorized as an infringement by effect, the agreement must affect actual or potential competition to such extent that negative effects on prices, output, innovation or the variety or quality of goods and services on the relevant market can be expected with a reasonable degree of probability and such negative effects must be appreciable.[916] Thus, it will be a case-by-case assessment of whether the bidding consortium agreement has the effect of restricting competition.

The bidding consortium agreement will then be considered as restrictive by effect and hence covered by the prohibition in Article 101(1) TFEU where the following factors are present:

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[913] Another way in which restrictions by object have been identified is by analogy to decided cases. In European Night Services, the General Court held that "obvious restrictions of competition such as price-fixing, market-sharing and the control of outlets". Hence, price fixing was found to be an infringement by object. See Joined cases T-374/94, T-375/94, T-384/94 and T-388/94, European Night Services Ltd (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission of the European Communities, EU:T:1998:198, para 136. Furthermore, non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers, see Guidelines on the application of Article 81(3) of the Treaty, OJ C101, para 23.

[914] See, for example, Case C-209/07, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd., EU:C:2008:643, para 16.

[915] This presumption rule produces a certain number of false positives.

[916] Guidelines on the application of Article 81(3) of the Treaty, OJ, para.24.

> *"(…) [S]how that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking (…)."*[917]

Hence, the assessment of whether the agreement restrict competition by effect involves an objective analysis of how the agreements impact the competition situation. Furthermore, the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In other words, if there is appreciably less competition as a result of the agreement, Article 101(1) TFEU will apply.[918] This is further clarified by Bergqvist as an approach that "*essentially involves a counterfactual analysis where the effect is compared to competition in the absence of the restriction in dispute. Only where this involves an appraisable reduction would Article 101 (1) be applicable"*.[919] Thus, according to Bergqvist, the assessment must involve a counterfactual analysis where the effect is compared to competition in the absence of the restriction in dispute.

As stated in above, in situations where bidding consortium can be considered as merely ancillary to the main integration of the members of the bidding consortium in the production process, this will entail that the center of gravity of the bidding consortium agreement lies in the production activity and thus this will imply that the assessment must be carried out in accordance with the rules applicable to production agreements.[920] These bidding consortia agreements will be subject to an assessment of whether they restrict competition by effect.

The assessment of whether the bidding consortium agreement has restrictive effects on competition must involve an objective analysis of the agreements impact on the competition situation. As stated in the above, it can be deduced that there may be a tendency in the Scandinavian countries to characterise a violation of the competition rules as a result of joint bidding in public procurement procedures as an object restriction of the competition. Hence, there are no examples regarding joint bidding consortium agreements in participating for public tenders that only restrict competition by effect.

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[917] C-56/65, Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.), EU:C:1966:38, pp. 249-250
[918] See Faull, J. and Nikpay, A. (2014). The EU Law of Competition (third ed.). Oxford University Press, p. 246.
[919] Bergqvist, C. (2020). When Does Agreements Restrict Competition in EU Competition Law? University of Copenhagen Faculty of Law Research Paper, p. 17.
[920] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, paras 150-193.

The assessment of whether the bidding consortium agreement as affect actually or potentially restricts competition to such an extent that it leads to negative effects on prices, output, innovation or the variety or quality of goods and services on the relevant market will include an understanding of the relevant market. Thus, this leads to the question of how to define the relevant market in a public tender context as well as to understand how the relevant market is to be applied in the analysis of whether there is an anti-competitive agreement.

The public procurement market may be defined as a bidding market. However, although the Commission has often referred to bidding markets, it has not provided nevertheless any clear definition given by the Commission.[921] Patterson and Shapiro states that the Commission describes a true bidding market as one where:[922] *"(…) [T]enders take place infrequently, while the value of each individual contract is usually very significant. Contracts are typically awarded to a single successful bidder (so-called 'winner-takes-all' principle). Strong incentives therefore exist for all competitors to bid aggressively for each contract."*[923]

Thus, the definition by Patterson and Shapiro contains characteristics that reflect the public procurement market.[924] As found in Chapter 3 section 3.3, the award of public contracts normally takes place through public tenders, and the public procurement markets have specific characteristics. Contracting authorities usually follow relatively stable purchasing patterns with frequently repeated award procedures, containing similar quantities and standard product or service specifications, and without major changes compared to previous procedures.[925] In the public procurement market, competition between the economic operators only takes place within certain parts of the market, often with several years in between. Consequently, the economic operators that participate in the tenders know that the public procurement markets are a repeated competition. Furthermore, public tenders are typically categorised as winner-takes-it-all markets, meaning that each economic operators either wins all or none of the tendered contracts.[926]

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[921] Szilágyi, P. (2009). Bidding Markets and Competition Law in the European Union and the United Kingdom - Part 1. European Competition Law Review, Vol. 29, No. 1, p. 21.
[922] Patterson, D. E. and Shapiro, C. (2001). Transatlantic Divergence in GE/Honeywell: Causes and Lessons. Antitrust Magazine, Fall 2001, p. 25.
[923] Ibid, p. 25. This is based on the Commission's statement from Pirelli/BICC merger (European Commission, 2000).
[924] The bidding markets are used in broad term for evaluating markets which at least partially replicate some of the characteristics of 'true' bidding markets.
[925] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, Official Journal of the European Union, (2021/C 91/01), para 1.2.
[926] Anton, J. J., Brusco, S. and Lopomo, G. (2010). Split-award procurement auctions with uncertain scale economies: Theory and data. Games and Economic Behavior 69 (2010) 24–41, p. 41.

One problem with the assessment of restrictive effects on competition in a bidding market is that of defining the relevant market. As stated in the above, public tenders are typically categorised as winner-takes it all markets, yet, the fact that another economic operator was not awarded with the public contract in the particular public tender does not mean that this economic operator did not pose a significant competitive constraint on the winning economic operator. Hence, in this situation, the market shares may not be a good indicator of the competitive implication of the economic operators.[927] Furthermore, the link between market share and market power is probably less direct in bidding markets than in other markets.[928] Another problem associated with defining the relevant market in a bidding market is the analysis based on concept of substitutability, including demand substitution.[929] Hence, in the public procurement market, demand is set by the contracting authorities on the basis of the requirement specifications, and demand substitution can therefore be difficult to apply is equal or close to zero.[930] An example of this has been seen in the *Road Markings* case in Denmark.[931] Here, it was found that there was no demand substitution between road markings and other types of signals on the roads, just as there is no there geographical demand substitution as contracting authorities could not substitute road marking in one geographical area with road marking in another geographical area.

Even though the public procurement markets have specific characteristics, which may complicate the definition of the relevant market, it must be expected that the relevant market can still be applied to identify and define the competition between the economic operators in public tenders. However, the question is still how to define the relevant market in public tenders.

As found in the above, the decisive factor in assessing the legality of the bidding consortia is whether the economic operators are competitors in relation to a particular procurement procedure, and not whether companies are competitors in the traditional sense. Hence, this is why it must also be

[927] Faull, J. and Nikpay, A. (2014). The EU Law of Competition (third ed.). Oxford University Press, p. 87.
[928] Ibid, para 61.
[929] For the application of demand substitution, see Commission Notice on the definition of relevant market for the purposes of Community competition law, *OJ C 372*, para.13
[930] This argument has been put forward by Bergqvist. See Bergqvist, C. (2019). Konkurrenceretten (first ed.), Djøf Publishing, p. 99.
[931] Decision of the Danish Competition Council of 24 June 2015 in case 14/04158, Danish Competition Council v Eurostar A/S and GVCO A/S. The Danish Supreme Court gave support to the interpretation applied by the Competition Council in Judgment by the Danish Supreme Court of 27 November 2019 in the case 191/2018, Danish Competition Council v Eurostar A/S and GVCO A/S.

assumed that this is the hat this is the case when defining the relevant market in public tenders. There can also be found support in legal literature. The following is specified by Kuźma and Hartung:[932]

> *(…) it appears that, in most cases regarding the anti-competitive nature of cooperation agreements concluded in order to participate in one or more public procurement procedures,* ***the precise definition of the relevant market will not be a necessary element*** *of the examination concluded by competent antitrust authorities or contracting authorities and authorities adjudicating on public procurement matters. This is because* ***the main reference point for this examination will be the given public procurement procedure, also taking into account broader market aspects,*** *as the case may be, while the nature of a possible infringement is such that its determination should be possible without a precise decision about the relevant market.*[933]

Accordingly, Kuźma and Hartung states that the main reference point for this examination will be the given public procurement procedure, however, broader market aspects may also be taking into account. Furthermore, it is also stated that the precise definition of the relevant market will not be a necessary element of examination on public procurement matter.

Thus, therefore it must be assumed that the assessment of restrictive effects on competition by a bidding consortium participating in a public tender is based on the relevant market that are given by public procurement procedure. The assessment of the restrictive effects on competition must be investigated in the light of the public procurement procedure concerned, without being limited by the broader market aspects.

2.5.3 The Assessment of the Bidding Consortium Agreement Appreciable Impact on Competition

In the assessment of whether the bidding consortium agreements has an appreciable impact on competition, there must be distinguish between whether it is found that the bidding consortium agreement can be can be categorized as an infringement by object or by effect.

The approach to appreciability in object cases is that if it is found that the bidding consortium agreement can be can be categorized as an infringement by object it will not able to be except from

[932] Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 145.
[933] Emphasis added.

the prohibition in Article 101(1) TFEU because of insignificant market shares.[934] In *Expedia,*[935] the ECJ found *that "an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition".*[936] Thus, an infringement by object will be considered to have an appreciable restriction on competition and therefore, this should not be investigated in object cases. However, this approach was been a controversial question because this is a new approach of the ECJ.[937]

Before *Expedia,* the ECJ had the position that there should be conducted an appreciability analysis in both objects effects cases because it was found that an agreement that does not appreciably restrict competition cannot be anti-competitive.[938] Hence, in the situation where the bidding consortium agreement is considered as a restrict competition by object, there is no need to make an assessment of the appreciable impact on competition.

Whereas, if it is found that the bidding consortium agreement can be can be categorized as an infringement by effect, there is a need to make an assessment of the appreciable impact on competition. As stated in above, whether the agreement can be categorized as an infringement by effect, the agreement must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability and such negative effects must be appreciable.[939]

The assessment of whether the bidding consortium agreement was appreciable impact on competition should start out by investigating if the agreement can be covered by the De Minimis Notice.[940] According to the Minimis Notice, a joint bidding consortium agreement between actual or potential competitors whose aggregate market share does not exceed 10 % on any of the relevant markets affected by the agreement, will as a starting point not be caught by the prohibition of Article

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[934] See Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, OJEU C 291, p. 1.
[935] Case C-226/11, Expedia Inc. v Autorité de la concurrence and Others, EU:C:2012:795.
[936] Ibid, para 37.
[937] For more on this matter, see e.g. Akman, P. (2014). The New Shape of the De Minimis Defense for Anti-Competitive Agreements. The Cambridge Law Journal, 73(2), 263–266; Bushell, G. M. and Healy, M. (2013). Expedia: The de minimis Notice and 'by object' Restrictions, Journal of European Competition Law & Practice, Volume 4, Issue 3, June 2013, Pages 224–226,
[938] The ECJ changed the approach in e.g. Case 5-69, Franz Völk v S.P.R.L. Ets J. Vervaecke, EU:C:1969:35.
[939] Guidelines on the application of Article 81(3) of the Treaty, OJ, para.24.
[940] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union, OJ C 291.

101(1) TFEU.[941] If covered by the de minimis rule, a bidding consortium agreement can thus be legal even if it has the effect of restricting competition.

The De Minimis Notice provides market share thresholds below, which the Commission consider, an agreement cannot have appreciable effect. Hence, the De Minimis Notice is binding on the Commission and should also be seen as help to the courts and authorities in the Members States.[942] The assessment of whether the De Minimis Notice apply should be based on the aggregate market share in accordance to the market, where the parties normally compete and not according the public procurement procedure in question.

In case of the De Minimis Notice does not apply, there needs to be a further investigation of the appreciable impact on competition. However, there are no examples regarding joint bidding consortium agreements in participating in public tenders that only restrict competition by effect. Therefore, case law cannot be used as guideline for how to assess the appreciable impact on competition in effect cases. According to legal literature, analyses of bidding data are often helpful in evaluation the nature of competitive interaction among firms in bidding markets.[943] The bidding data can give information about how often the economic operators meet in connection with tenders, as well as how the price is affected by the tenders. However, the problem with the application of bidding data is that this information is not necessarily available for economic operators.

2.6 Summary of Findings

Bidding consortia agreements may in some situations be classified as commercialisation agreements or joint selling agreements, which will have an impact on the assessment of this collaboration. The following procedure can be applied to assess whether an established bidding consortium can be considered in compliance with prohibition in Article 101(1) TFEU in order for it to submit a joint bid in a public tender.

To begin with, it needs to be clarified whether the economic operators in the bidding consortia can be considered as competitors. In the situation where the member of the bidding consortia can be considered competitors, it should be assessed whether members of the bidding consortium are able to undertake individually and whether there are more members of the bidding consortia than

[941] Ibid, para.8.
[942] Ibid, para.1.4.
[943] Faull, J. and Nikpay, A. (2014). The EU Law of Competition (third ed.). Oxford University Press, p. 87.

necessary. In the situation where the economic operators are able to undertake individually, or where there are more members than necessary, it must be assessed whether the bidding consortium agreement has as its object or effect of restricting competition and whether the bidding consortium agreement has an appreciable impact on competition

The decisive factor in assessing the legality of the bidding consortia is whether the economic operators are competitors in relation to a particular procurement procedure, and not whether companies are competitors in the traditional sense. When assessing the legality of a bidding consortia, the competitor assessment must take into account the individual economic operator's ability to tender/bid on the public contract with the benchmark of whether this can meet the tender requirements. However, it is uncertain which tender requirements that need to be included the assessment of whether the economic operators can be considered competitors for a particular procurement procedure.

Furthermore, it needs to be clarified if there are more members of the bidding consortium than necessary. Thus, this basically entails that a bidding consortia consisting of one economic operator with the ability to bid alone and an economic operator who cannot will not be considered as necessary.

As part of the assessment under Article 101 TFEU, it needs to be clarified whether the bidding consortium agreement restricts competition by object or effect. This will start out with an assessment of whether the agreement can be categorized as an infringement by object. The following can be considered in the assessment of whether an agreement restrict competition by object: (1) the content of the agreement, (2) the objectives it seeks to attain, and (3) the economic and legal context of which it forms part. Furthermore, the intention of the parties is not a necessary factor in the assessment of whether an agreement can be categorized as a by object restriction. In national cases from the Scandinavian countries regarding competition law assessment of joint tendering, they seem to have in common that bidding consortia in public procurement procedures can be considered as leading to price fixing and market sharing between the members of a bidding consortium.

Although these national cases be seen as a tendency towards an approach of joint tendering in public procurement procedures leading to price-fixing and market sharing between the members of a bidding consortium, which is also the case in the EFTA Court's Advisory Opinion, there are no EU legal sources suggesting that the ECJ will apply the same approach.

If the bidding consortium agreement does not restrict competition by object, it must be examined whether it has restrictive effects on competition. The assessment of whether the agreement restrict competition by effect involves an objective analysis of the agreements impact on the competition

situation which will include an understanding of the relevant market. It must be assumed that the assessment of restrictive effects on competition by a bidding consortium participating in a public tender is based on the relevant market that are given by public procurement procedure. The assessment of the restrictive effects on competition must be investigated in the light of the public procurement procedure concerned, without being limited by the broader market aspects. Furthermore, there is uncertainty about the role of the relevant market in investigating bidding consortia participating in a public tenders.

In the situation where the bidding consortium agreement is considered as a restrict competition by object, there is no need to make an assessment of the appreciable impact on competition. Whereas, if it is found that the bidding consortium agreement can be can be categorized as an infringement by effect, there is a need to make an assessment of the appreciable impact on competition.

3 Assessment of Subcontracting in Public Tenders

3.1 Why Subcontracting Can Constitute a Breach of Competition Law

Another type of collaboration that may appear in public procurement procedures is the use of a subcontractor. In the Public Sector Directive, there is nothing indicating that subcontractors, within the meaning of the Directive, cannot include economic operators which are at the same level in the supply chain as the main contractor. Hence, both horizontal subcontracting agreements and vertical subcontracting agreements may appear in public tenders.[944] Horizontal subcontracting agreements are defined as the agreements concluded between companies operating in the same product market irrespective of whether they are actual or potential competitors. However, vertical subcontracting agreements are concluded between companies operating at different levels of the market.[945]

The first thing that needs to be addressed is the reason why subcontracting can be problematic from a competition law perspective. Subcontracting occurs when an economic operator that has been awarded a public contract entrusts another entity with the performance of parts of the works or services that are the subject matter of the contract. The entity that is entrusted with the performance of parts of the works or services is referred to as a subcontractor. Hence, the role of the subcontractor is limited to the performance of a part of the contract on the terms and conditions agreed upon with the main contractor, and it does not have a contractual relationship with the contracting authority.

[944] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 151.
[945] Ibid, para 151.

However, this construction of an agreement between the main contractor and a subcontractor does not necessarily affect the extent to which the collaboration can restrict competition.

Horizontal subcontracting agreements between competitors may entail the same effects on competition as those that occur with bidding consortia among competitors. In situations with horizontal subcontracting agreements between competitors, it can be considered problematic if one of the parties to one of the subcontracting agreements has the ability to bid individually on the public contract. Thus, the subcontracting agreement may be clarified as a joint selling agreement. One of the major competition concerns with this kind of agreement is how it might lead to price fixing that can facilitate an output limitation, as the parties can decide on the volume of products to be put on the market.[946] As found in Chapter 3, horizontal subcontracting agreements can both cause positive and negative effects on competition as seen in connection with bidding consortia agreements. On the one hand, horizontal subcontracting agreements may enable firms to better allocate production among themselves, thereby promoting production efficiency. On the other hand, they may also facilitate collusion while such agreements affect an economic operators' cost structures and consequently their outputs.

Competition concerns can also rise in situations with vertical subcontracting agreements. However, in this context, it should be mentioned that vertical restraints generally are considered less harmful than horizontal restraints in terms of competition. According to the Guidelines on Vertical Restraints, the background for this position lies in the fact that:[947]

> *"[Horizontal restraints] concern an agreement between competitors producing identical or substitutable goods or services. In such horizontal relationships the exercise of market power by one company (higher price of its product) may benefit its competitors. This may provide an incentive to competitors to induce each other to behave anti-competitively. In vertical relationships the product of the one is the input for the other, in other words the activities of the parties to the agreement are complementary to each other. This means that the exercise of market power by either the upstream or downstream company would normally hurt the demand for the product of the other.* ***The companies involved in the agreement therefore usually have an incentive to prevent the exercise of market power by the other****."*[948]

[946] Ibid, para 234. However, other theories of harm than those typically associated with joint selling can also be relevant in the assessment of horizontal subcontracting agreements between competitors.
[947] Guidelines on Vertical Restraints, OJ C 130, para 98.
[948] Emphasis added.

Hence, according to the Commission, the parties in a vertical agreement may usually have an incentive to prevent the exercise of market power by the other parties to the agreement. From a competition law perspective, it is acknowledge that vertical restraints can result in both positive and negative effects on competition.[949]

Vertical subcontracting in public procurement procedures might impact competition both positively and negatively. As found in Chapter 3, vertical subcontracting agreements can reduce transactions costs and help the economic operators in achieving other economic benefits for operating at different levels of the production and distribution chain. Furthermore, it was also emphasized that one of the classical explanations for vertical collaboration, including vertical subcontracting, is the double marginalization problem, which may also reduce the hold-up problem.[950] Vertical subcontracting agreements may also entail negative effects on the competition in situations with the delivery of an important component or other input to its final product, which can lead to foreclosure problems provided that the parties have a strong position as either suppliers or buyers on the relevant input market. An anti-competitive foreclosure of other suppliers or other buyers occurs when there are raised barriers to entry or expansion,[951] which may harm the contracting authorities in particular by increasing prices.[952]

The potential competition concerns that can arise from subcontracting agreements depend on various factors, while the nature and content of an agreement relates to factors such as the area and objective of the collaboration, the competitive relationship between the parties and the extent to which they decide to combine their activities. Consequently, in the assessment of competition concerns relating to a specific subcontracting agreement, one must follow a case-by-case analysis.

In the paragraphs above, a distinction is made between horizontal subcontracting agreements and vertical subcontracting agreements, and this particular division will also form the framework for the analysis of the assessment of subcontracting agreement in public tenders under Article 101 TFEU.

[949] The Chicago School denies the anti-competitive character of vertical restraints with the result that vertical should be treated as completely lawful agreements. See Hildebrand. D. (2016). The Role of Economic Analysis in EU Competition Law: The European School. International Competition Law Series. Wolters Kluwer, p. 333.
[950] Guidelines on Vertical Restraints, OJ C 130, para 107.
[951] Ibid, para 100.
[952] Ibid, see para 101.

3.2 The Assessment under Article 101 TFEU

3.2.1 Assessment of Horizontal Subcontracting Agreements

In the assessment of the horizontal subcontracting agreements, the content of the collaboration is decisive for the competition law assessment. As highlighted above, horizontal subcontracting agreements between competitors may entail the same effects on competition as that which would occur with bidding consortia between competitors. Therefore, it is obviously necessary to investigate whether these should be assessed in the same way as bidding consortia participating in public tenders from a competition law perspective.

The procedure that can be applied to assess whether a bidding consortium submitting a joint bid in a public tender can be considered to be in compliance with the prohibition in Article 101(1) TFEU is deduced from the Commission's issued soft law instruments and decisions, see section 2.2 in this chapter. In this procedure, emphasis is on the Horizontal Guidelines as an interpretative contribution. The Horizontal Guidelines provide an analytical framework for the most common types of horizontal collaboration agreements, including subcontracting.[953] Furthermore, in the draft for the Horizontal Guidelines, it is explicitly stated that the guidelines apply to horizontal subcontracting agreements.[954]

In the Notice on Bid Rigging Exclusion, it is advocated to use a similar procedure for the assessment of subcontracting agreements to that of bidding consortia agreements:[955]

> *"In some cases, joint bidding raises doubts with the contracting authority, especially* ***if the members of the group of companies that bid jointly could easily bid in their own right*** *(or, even more, they were expected to do so) (…)"*
>
> *"A similar approach is required in the case of subcontracting: the contracting authority should carefully assess cases where a* ***suggested subcontractor could easily have participated in its own right in the award procedure and performed the contract independently.*** *Cases where two tenderers cross-subcontract one another may also be considered by the contracting authority as a potential indication of collusion to be examined under Article 57 of the Directive, given*

[953] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 5.
[954] Approval of the content of a draft for a communication from the Commission. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final.
[955] Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground, 2021/C 91/01, para 5.6.

> *that such subcontracting agreements usually allow the parties to know each other's financial offer, thus calling into question the parties' independence in formulating their own tenders. Although subcontracting agreements such as those mentioned above may be considered a 'red flag' indicating potential collusion, contracting authorities should avoid general presumptions that subcontracting by the successful tenderer to another tenderer in the same procedure constitutes collusion among the economic operators concerned, without allowing those operators the possibility to provide arguments to the opposite*".[956]

Firstly, the Commission states that joint bidding, which must be assumed to cover bidding consortia agreements in this context, may give rise to competition concerns, especially if the members of the group of companies that bid *jointly could easily bid in their own right*. Hereby, it is indicated that it needs to be assessed whether a bidding consortium would be able to undertake individually or not.

Secondly, when it comes to subcontracting agreements, the Commission specifies that the contracting authority should carefully assess cases where a suggested subcontractor could *easily have participated in its own right in the award procedure and performed the contract independently*. Accordingly, the assessment of the subcontractor must be based on whether the subcontractor easily could have participated in its own right in the award procedure and performed the contract individually. By using the word *and*, it is indicated that these are cumulative requirements for the assessment of the use of subcontractors in public tenders.

The differences in the wording of the tests regarding bidding consortia and subcontracting can be interpreted to mean that there may be a differentiation in the approaches to the assessment of these collaboration types. Hence, when analysing subcontracting agreements, the ability to participate on one's own right in the award procedure can be considered, as the subcontractor independently satisfies the tender requirements for participating in the public tender. However, the ability to satisfy the tender requirements for participating in the procedure may be interpreted as the ability to perform the contract independently. However, it is not unthinkable that there may be situations where an economic operator, in practice, has the ability to perform the contract independently, but the tender requirements are set in such a way that the economic operator is unable to meet them alone. In such a situation, it must be assumed that the approach in the Notice on Bid Rigging Exclusion should be interpreted as meaning that, in the assessment of whether the subcontractor could easily have

[956] Emphasis added.

participated in its own right in the award procedure and performed the contract independently, the benchmark initially depends on the tender requirements and hence the ability to bid.

In the legal literature, it is also discussed whether horizontal subcontracting agreements should be assessed the same way as bidding consortia participating in public tenders from a competition law perspective. It is indicated by Thomas that, in principle, the assessment of joint bidding and subcontracting under competition law should be similar to that of bidding consortia.[957] In addition, he also states that:

> *"In particular, the European Commission's safe harbor for joint bidding by undertakings that objectively could not have bid separately surely applies also to bids by consortia structured as subcontracting. However, once it is concluded that both the prime contractor and the subcontractor could independently have bid for the contract, then a distinct consideration does arise in the context of subcontracting."*[958]

Accordingly, Thomas displays the view that a subcontractor should be allowed to participate in projects that they would not be able to undertake individually, since the parties to the subcontracting arrangement thus are not potential competitors for the implementation of the project, meaning that there is no restriction of competition within the meaning of Article 101(1) TFEU.[959] Furthermore, it is also emphasized by Sanchez-Graells that a similar approach as seen in the assessment of bidding consortia is required when it comes to subcontracting:[960]

> *"A basic and preliminary criterion that needs to be set clearly is that public procurement rules on teaming and joint bidding should be in perfect compliance with Article 101 TFEU on agreements between undertakings and its case law. That is, they must not prohibit cooperation [bidding consortia] that would be allowed under the competition rules, such as the submission of a joint bid by two specialist companies which expertise is needed to carry out a single project (for instance, the cooperation between a hospital and a software company to supply new remote image diagnostics services). They must also*

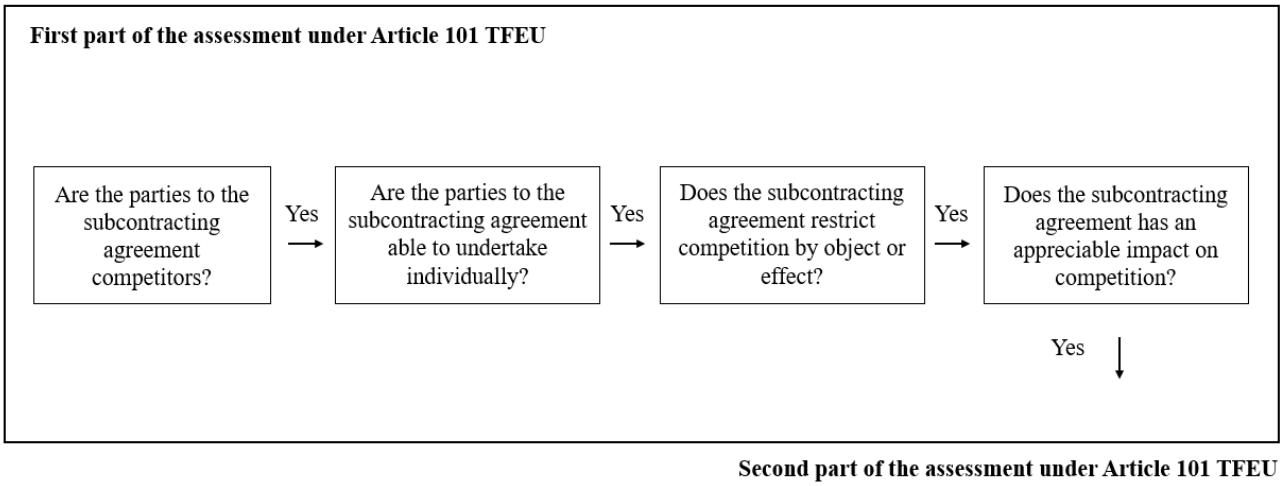
[957] Thomas. C. (2015). Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law. Journal of European Competition Law & Practice, Vol. 6, No. 9, 629-638, p. 636.
[958] Thomas. C. (2015). Two Bids or not to Bid? An Exploration of the Legality of Joint Bidding and Subcontracting Under EU Competition Law. Journal of European Competition Law & Practice, Vol. 6, No. 9, 629-638, p. 636.
[959] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 237.
[960] Sanchez-Graells, A. (2016). EU Competition Law and State Aid Issues In Public Procurement. In Risvig Hamer (ed.). Grundlæggende udbudsret (first ed.) DJØF Publishing, p.703.

> *not allow collusion that would be prohibited under the competition rules, such as the submission of a joint bid by direct competitors that are actually splitting the contract amongst themselves.* ***Similar considerations apply when it comes to subcontracting****, which is an alternative way of instrumenting an agreement between undertakings that would otherwise be at least potential competitors for a public contract. In this regard, teaming, joint bidding and subcontracting must be seen as instances of collaboration between undertakings and, consequently, should be prohibited if they have as their object or effect the prevention, restriction or distortion of competition (...)"*[961]

In case law, there has currently not been observed any examples of horizontal subcontracting agreements being assessed in the same way as bidding consortia participating in public tenders from a competition law perspective. Hence, it is very uncertain whether this will be the case when a potential case involving the use of subcontractors in public tender is being investigated by the EU Courts.

However, there is much that indicates that horizontal subcontracting agreement should be assessed with a similar approach as bidding consortia. The following procedure may be applied to assess whether the use of horizontal subcontracting in a public tender can be considered to be in compliance with the prohibition in Article 101(1) TFEU. The systematics are illustrated below:[962]

Figure 8 ***Assessment of Horizontal Subcontracting in Public Procurement***[963]



[961] Emphasized added.
[962] In the procedure, the question of whether the agreement concerns more members than necessary is not included, as it is expected that a subcontracting agreement is between the public authority and a single subcontractor.
[963] Author's own creation.

However, the content of the subcontracting agreement can include obligations to integrate resources and actives of the parties to the agreement. Among these obligations, there may be settlements on joint production for the purpose of participating in the tender procedure. Thus, this will entail that the assessment must be carried out in accordance with the rules applicable to production agreements.

Further, there are special guidelines for horizontal subcontracting agreements, which are categorised as production agreements. Joint production agreements are covered by the Specialisation Block Exemption Regulation[964] if they are concluded between parties with a combined market share that does not exceed 20 % in the relevant market(s), provided that the other conditions for the application of the Specialisation Block Exemption Regulation also are fulfilled.[965] It is emphasized in the Horizontal Guidelines that: *"(…) Horizontal subcontracting agreements with a view to expanding production, in most cases it is unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 20 %. In any event, if the parties' combined market share does not exceed 20 % it is likely that the conditions of Article 101(3) are fulfilled.*[966] Thus, if the parties to the subcontracting agreement has a combined market share that exceeds 20 %, the restrictive effects have to be analysed as the agreement does not fall within the scope of the Specialisation Block Exemption Regulation.[967]

3.2.2 Assessment of Vertical Subcontracting Agreements

Article 101 TFEU provides a legal framework for the assessment of vertical subcontracting agreements, which takes the distinction between anti-competitive and pro-competitive effects into consideration. Vertical subcontracting agreements will fall within the scope of the Vertical Guidelines.[968] Furthermore, they may be covered by the Subcontracting Notice[969] and may benefit from the Block Exemption Regulation on Vertical Restraints.[970] Although possible competition concerns have been identified above in relation to vertical subcontracting agreements in public tenders, this has not given rise to any specific regulation, guidance or case law regarding the assessment of vertical subcontracting in public tenders.

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[964] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements Text with EEA relevance, OJ L 335.
[965] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Communication from the Commission, 2011/C 11/01, para 169.
[966] Ibid, para 169.
[967] Ibid, para 170.
[968] Guidelines on Vertical Restraints, OJ C 130.
[969] Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty, OJ C 1.
[970] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, *OJ L 335*.

3.3 Summary of Findings

Subcontracting in public tenders can lead to both horizontal subcontracting agreements and vertical subcontracting agreements. A horizontal subcontracting agreement between competitors may entail the same effects on competition as would occur with bidding consortia between competitors. Therefore, the question is whether these should be assessed the same way as bidding consortia participating in public tenders from a competition law perspective. In the Notice on Bid Rigging Exclusion, it is advocated to use a similar procedure for the assessment of subcontracting agreements to that of bidding consortia agreements. Furthermore, in the legal literature, it is indicated that a similar approach as seen in the assessment of bidding consortia may be required when it comes to subcontracting.

In case law, there has currently not been observed any examples of horizontal subcontracting agreements being assessed in the same way as bidding consortia participating in public tenders from a competition law perspective. Hence, it is very uncertain whether this will be the case when a potential case involving the use of subcontractors in public tender is being investigated by the EU Courts. Although possible competition concerns have been identified in relation to vertical subcontracting agreements in public tenders in the text above, this has not given rise to any specific regulation, guidance or case law regarding the assessment of vertical subcontracting in public tenders.

4 Assessment of Reliance on the Capacities of Other Entities Public Tenders

4.1 Why Reliance on the Capacities of Other Entities Can Constitute a Breach of Competition Law

As stated in Chapter 3, there has not been identified any economic theory that deals with the economic implications of relying on the capacities of other entities in public tenders. Furthermore, the EU Courts has not ruled on this type of collaboration under the competition rules and this type of collaboration has not caught the attention of researchers within competition law. Therefore, it can be questioned whether the application of relying on the capacities of other entities in public tenders is a conduct capable of contributing to a breach of the competition rules.

The content of a collaboration is the decisive factor for the need to make a competition law assessment. This type of collaboration consists of an economic operator that relies on the capacities of other entities, regardless of the legal nature of its links to those entities, in order to demonstrate that it has all the necessary resources to execute a desired public contract. The relationship between

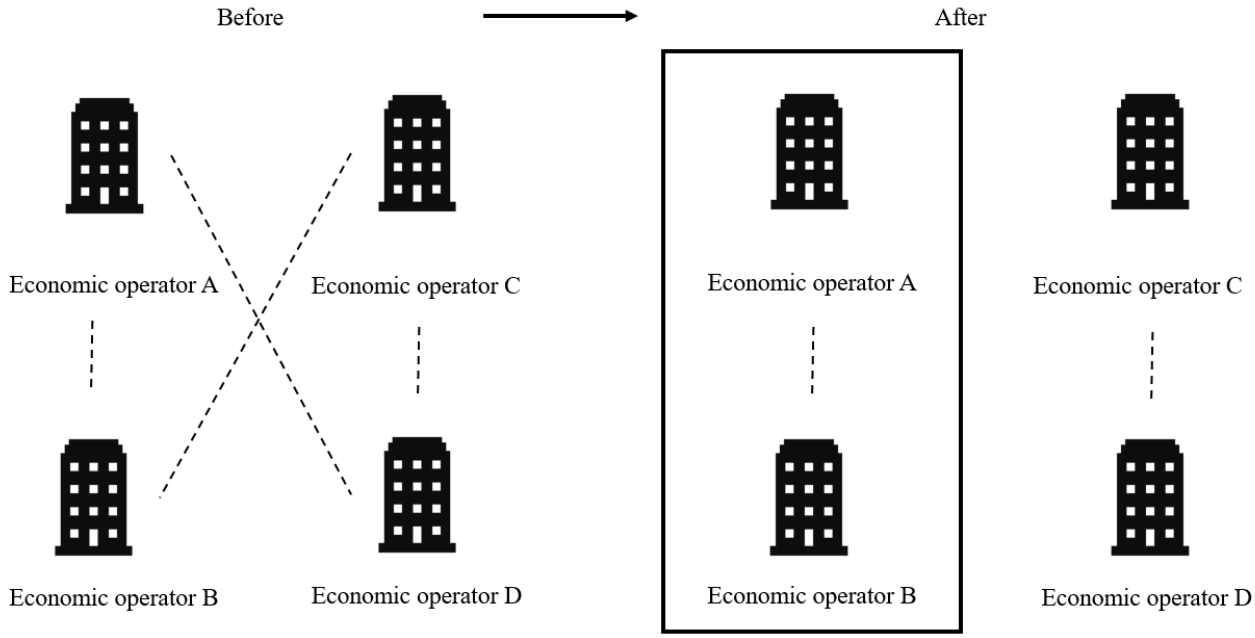
the economic operator and the third party to the public contract will expected to be regulated by an agreement between the parties and the content of this agreement, and the obligations that are set forth herein must be presumed to depend on the particular public tender and the relationship between these parties. Furthermore, there may be both horizontal and vertical agreements in connection with this type of collaboration.

As stated above, the possible competition concerns that can arise from collaboration agreements should be assessed based on the nature and content of the agreements where emphasis is placed on factors such as the objective of the collaboration, the competitive relationship between the parties and the extent to which they combine their activities.[971] In regard to relying on the capacities of other entities, it must be expected that the objective set for the collaboration is that the economic operator will be able to demonstrate that they have all the necessary resources for the execution of the public contract. However, there may also be other objectives of the collaboration.

The assessment of whether a collaboration agreement has restrictive effects on competition can be carried out by comparing the actual legal and economic context to that of a context absent of the agreement and all of its alleged restrictions.[972] In the case with an economic operator relying on the capacities of other entities in a public tender, the situation before and after an agreement between the economic operator and the third parties to the public contract can be compared. The figure below illustrates this particular approach.

[971] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 32.
[972] Ibid, para 29.

Figure 9 – *Before and After an Agreement Regarding Reliance on the Capacities of Other Entities*[973]



Before an agreement regarding reliance on the capacities of other entities, there may be a situation where the economic operator can trade with other economic operators without restrictions.

After an agreement regarding reliance on the capacities of other entities, the agreement may limit competition. The economic operator and the third party to the public contract may be exclusive in the sense that this collaboration limits the possibility for the parties in the agreement to compete against each other as independent economic operators or as parties to agreements with other economic operators.[974] Thus, the agreement may lead to anti-competitive input foreclosure in which an economic operator stops providing access to its products or services to the other economic operators in the market. However, a foreclosure problem may only arise in the context of a collaboration involving at least one player with a significant degree of market power.

On the other hand, the exclusivity by the agreement can be beneficial for the competitor, as this can entail a reduction in the competitive pressure. In this situation, the other economic operators may

[973] Author's own creation.
[974] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para 33.

therefore find it profitable to increase their prices, and the reduction in those competitive constraints may lead to increased prices in the relevant market.[975]

The scenario in the above illustrates a *possible competition concern* in a situation with an economic operator relying on the capacities of other entities in public tenders. Hence, it should be emphasized that there is no indication in the legal sources that these will be the competition concern that will be applied if this type of collaboration were to be investigated under the competition rules. However, it should be stated that, if this competition concern is applied to a situation with reliance on the capacities of other entities in public tenders, this type of collaboration could perhaps be capable of contributing to a breach of the competition rules. Accordingly, there is some uncertainty as to how this collaboration type should be assessed under the competition rules.

4.2 Summary of Findings

Relying on the capacities of other entities in public tenders has not given rise to much attention from a competition law perspective. Therefore, it can be questioned whether the application of this type of collaboration in public tenders is a conduct capable of contributing to a breach of the competition rules. A competition concern that may be associated with relying on the capacities of other entities in public tenders can be that the economic operator and the third party to the public contract may be exclusive in the sense that this collaboration limits the possibility for the parties in the agreement to compete against each other as independent economic operators or as parties to agreements with other economic operators. Thus, the agreement may lead to anti-competitive input foreclosure in which an economic operator stops providing access to its products or services to the other economic operators in the market. However, there is uncertainty as to how this collaboration type should be assessed under the competition rules.

5 Concluding Remarks

This chapter examined the legal framework set by the competition rules in situations of collaboration between economic operators participating in public tenders. A collaboration between economic operators participating in public tenders can potentially be prohibited by the competition rules. In the assessment of the collaborations, the form or designation of the collaboration is not decisive. Rather, it is the content of the collaboration that is the decisive factor for the competition law assessment.

[975] See Ibid, para 34.

In some situations, bidding consortia agreements may be classified as *commercialization agreements* or *joint selling agreements*, which will have an impact on the assessment of this type of collaboration. The decisive factor in assessing the legality of a bidding consortium is whether the economic operators to the agreement are competitors in relation to a particular procurement procedure. The competitor assessment must take the individual economic operator's ability to tender/bid on the public contract into account, and it needs to be clarified if there are more members of the bidding consortium than necessary. As part of the assessment under Article 101 TFEU, it needs to be clarified whether the bidding consortium agreement restricts competition by object or effect. Although, in national cases and in an Advisory Opinion of the EFTA Court, there has been seen a tendency towards an approach of joint tendering in public procurement procedures leading to price-fixing and market sharing between the members of a bidding consortium. There are no EU legal sources suggesting that the ECJ will apply the same approach.

Once the bidding consortium agreement falls under Article 101(1) TFEU, it can still escape that prohibition if the economic operators involved can prove that they meet the conditions set out in Article 101(3) TFEU. Furthermore, in some cases the consortium agreement can otherwise be exempted from the prohibition, for example, if the agreement can be covered by the de minimis rule. In the situation where the bidding consortium agreement is considered as a restrict competition by object, there is no need to take account of the concrete effect of the agreement. In this situation, the only possibility for the bidding consortium not to get caught by the prohibition in Article 101(1) TFEU is an exemption under Article 101(3) TFEU.

Subcontracting in public tenders can lead to both horizontal subcontracting agreements and vertical subcontracting agreements. A horizontal subcontracting agreement between competitors may entail the same effects on competition as would occur with bidding consortia between competitors. Therefore, the question is whether these should be assessed the same way as bidding consortia participating in public tenders from a competition law perspective. In the Notice on Bid Rigging Exclusion, it is advocated to use a similar procedure for the assessment of subcontracting agreements to that of bidding consortia agreements. Furthermore, in the legal literature, it is indicated that a similar approach as seen in the assessment of bidding consortia may be required when it comes to subcontracting. In case law, there has currently not been observed any examples of horizontal subcontracting agreements being assessed in the same way as bidding consortia participating in public tenders from a competition law perspective. Hence, it is very uncertain whether this will be the case when a potential case involving the use of subcontractors in public tender is being investigated by the

EU Courts. Although possible competition concerns have been identified in relation to vertical subcontracting agreements in public tenders in the text above, this has not given rise to any specific regulation, guidance or case law regarding the assessment of vertical subcontracting in public tenders.

Reliance on the capacities of other entities in public tenders has not given rise to attention from a competition law perspective. There is considerable uncertainty when it comes to whether this type of cooperation can be considered problematic from a competition law perspective. A competition concern that may be connected to this type of collaboration is that the agreement may limit competition. The economic operators may be exclusive in the sense that they limit the possibility of the economic operators in the agreement to compete against each other as independent economic operators or as parties to agreements with other economic operators and the agreement may lead to anti-competitive input foreclosure.

PART IV

GREY ZONES & CONCLUSIONS

CHAPTER 7

Grey Zones between Public Procurement Law and Competition law

1 Introduction

This chapter focuses on the grey zones between public procurement law and competition law with an exclusive focus on collaborations between economic operators bidding on public contracts. In situations where economic operators collaborate when they tender for a public contract, both the public procurement rules and the competition rules can provide the legal basis for an assessment of whether the collaboration is legal or not. The rules may overlap so that, during the tender procedure and in the interpretation of the rules, doubts may arise, as to whether there potentially could be a violation of one or both of the separate legal disciplines or potentially doubts as to which set of the rules that can be applied to the given situation. Thus, this chapter applies both public procurement law as well as competition law in order to identify and discuss the grey zones between the rules.

Furthermore, this chapter will also investigate how it is possible to reconcile a potential conflict between public procurement law and competition law. Accordingly, the focus will be on how to be able to ensure that each of the legal statuses reached under each set of rules is coherent and contributes to the interaction between the public procurement rules and the competition rules. This analysis will primarily be based on the results that have been deduced from the previous chapters in the thesis. Thus, this chapter takes an interdisciplinary approach and examines how it is possible to ensure that public procurement law and competition law are complementary in order to ensure the objectives of the rules.

1.1 Outline

In the following, there will be an analysis of the grey zones between public procurement law and competition law in which one potential outcome of each type of collaboration will be highlighted with regard to how they potentially could entail a conflict between the public procurement rules and the competition rules. This section will focus on the three different types of collaborations that economic operators can enter into when tendering for public contracts. These are as follows: (1) reliance on the capacities of other entities; (2) bidding consortia; and (3) subcontracting. Further,

there will be a discussion of why the legal status reached under each set of rules needs to be coherent. This is followed up by an analysis of the foundation for coherence between the public procurement rules and the competition rules.

2 Collaboration between Economic Operators and Grey Zones

In previous chapters, it has been emphasized that there are several uncertainties when it comes to the application of the three different types of collaborations that economic operators can enter into when tendering for public contracts. These uncertainties relate to both the procurement law and the competition law assessment of the collaborations.

Consequently, in many situations it can be difficult to clarify whether the collaborations are in compliance with the public procurement rules and the competition rules as well as whether there is a conflict between the rules. Hence, it can be difficult to come up with concrete situations where the collaborations between economic operator in the competition for public contracts are considered legal under public procurement law but not under competition law. Therefore, in the following there will be analysis of the grey zones between public procurement law and competition law in which one potential outcome of each type of collaboration will be highlighted with regard to how they potentially could entail a conflict between the public procurement rules and the competition rules.

2.1 Assessment of Reliance on the Capacities of Other Entities

In regard to public procurement law, the legal framework set by the Public Sector Directive can primarily be found in Article 63 of the directive, which facilitates a flexible approach to the reliance on third party capacities. An economic operator's possibility to rely on the capacities of other entities will differentiate from the use of subcontractors. This differentiation lies in the fact that a subcontractor always will perform a part of the contract, whereas a third party, on whose capacities a tenderer relied on, might not. However, according to Article 63(1) of the Public Sector Directive, an economic operator can rely on a third parties' capacities for educational and professional qualifications only when those parties will perform the works or services for which their capacities are required. In particular, this requirement in the Public Sector Directive can have an impact on the competition law assessment.

In regard to competition law, the assessment of reliance on the capacities of other entities is based on the content of the collaboration irrespective of the legal qualifications. The provisions on reliance on the capacities of other entities in the Public Sector Directive as well as previous legislation seem

to generate a substantial number of preliminary references from either national courts in the Member States. However, so far, none of these cases have addressed the competition law assessment of reliance on the capacities of other entities. Therefore, it is uncertain how this type of collaboration will be assessed in the light of competition law.

In the situation where an economic operator relies on a third party´s capacity for educational and professional qualifications, and it is thus required to use the third party in question for the performance of the public contact by the Public Sector Directive, which can entail that the content of the collaboration may have many similarities to a bidding consortium. Consequently, from a competition law perspective, when an economic operator relies on a third party´s educational and professional qualification capacities, it can be argued that the assessment hereto should be based on an approach similar to that of the assessment of bidding consortia. In some situations, this collaboration may be classified as a commercialisation agreement or a joint selling agreement both in which the economic operators agree on the commercial aspects related to the sale of the product, including the price. Hence, the question that arises is whether the third party is an actual or potential competitor for the specific public contract. If the economic operator and the third party can be considered competitors, it should be assessed whether the economic operator and the third party would be able to undertake the task individually. In the situation where the parties are able to undertake individually, it must be assessed whether the agreement has, as its object or effect, the restriction of the competition and in some cases whether the agreement has an appreciable impact on the competition.

However, although the third party is neither an actual competitor nor a potential competitor for the specific public contract, it is still necessary to assess whether there are other anti-competitive issues at play in relation to the collaboration. Furthermore, it can also be discussed whether this should be the case with economic operators relying on the capacities of other entities with criteria relating to the technical and professional abilities of the third party entities.

As stated in Chapter 6, a possible competition concern that may be associated with an economic operator relying on the capacities of other entities in public tenders can be that the economic operator and the third parties to the public contract may be exclusive in the sense that this collaboration limits the possibility for the parties in the agreement to compete against each other as independent economic operators or as parties to agreements with other economic operators. Accordingly, the agreement may lead to anti-competitive input foreclosure in which one economic operator stops providing access to its products or services to the other economic operators in a particular market.

Therefore, it is conceivable that a competition law assessment also may be relevant in other situations regarding economic operators relying on the capacities of other entities.

In sum, when economic operators rely on the capacities of other entities when they bid on public contracts, there may be situations where the collaborations between the economic operators and third parties to the public contracts are not considered problematic under procurement law, however, from a competition law perspective, there may also be competition concerns in this regard. As stated above, when economic operators rely on the capacities of other entities, this may result in anti-competitive agreements, which are prohibited by Article 101(1) TFEU.

2.2 Assessment of Bidding Consortia

In regard to public procurement law, the legal framework set by the Public Sector Directive are Articles 19(2) and (3), the last sentence of Article 63(1) and Article 63(2). The Public Sector Directive does not provide any clear instructions on how to assess the qualifications of a group of economic operators seeking to participate in a public tender as a bidding consortium, and it does not lay down any rules that specifically relate to the composition of groups of economic operators.

The starting point is that the contracting authority must assess the qualifications of the bidding consortium as a whole.[976] In practice, this entails that in the assessment of whether the minimum requirements regarding economic and financial standing and/or technical and professional ability is met, there are no expectations as to whether the individual members of the consortium must meet the minimum requirements alone but rather expectations to the capacities of the bidding consortium as a whole.

In case law, a more detailed position has been taken to the procedure for an assessment of the composition of a bidding consortium. In *MT Højgaard and Züblin,*[977] the EJC ruled on whether it should be possible for the remaining economic operator of a two-party bidding consortium to continue a tender in their own name when the other economic operator has dropped out of the bidding consortium.[978] The EJC decided to take the approach of allowing the change in the bidding

[976] Arrowsmith S. (2014), The Law of Public and Utilities Procurement Regulation in the EU and UK, vol. 1 (third ed.), Sweet & Maxwell, p. 1322.
[977] C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347.
[978] This case will be used to deduce some general focus points of the assessment of the composition of a bidding consortium from a public procurement perspective. It must be borne in mind that this case has its own unique facts, and each situation will need to be considered on its own merits. Therefore, it is recognized that there may be a number of problems associated with basing the analysis solely on only this case.

consortium as long as the two cumulative conditions, that are aimed at ensuring respect for the principle of equal treatment, were to be met. The first condition is that the remaining economic operator must individually meet the requirements set by the contracting authority. The second condition is that the continuation of the economic operator's participation in the procedure does not mean that other tenderers find themselves in a competitive disadvantage.[979]

In the light of the competition rules, the first condition is particularly interesting. In connection with the delivery of the judgement, it is indicated by the EJC that it seemed to be the case that Aarsleff had been pre-selected if it had sought an invitation to take part in its own name instead of doing so through the intermediary of the Aarsleff and Pihl group.[980] This presumption, which is indicated by the EJC, is based on an assessment by the Danish Public Procurement Complaints Board in the national case.

Hence, if Aarsleff was able to meet the qualitative selection criteria on its own, this would lead to a questioning of whether Aarsleff had been able to undertake individually. Furthermore, it is uncertain how Aarsleff simultaneously was able to be qualified with E. Pihl og Søn without them having to take over the contracts of 50 salaried staff members of E. Pihl og Søn, including individuals who were key to the implementation of the construction project concerned.[981] Nevertheless, if it is found that Aarsleff had the capacity to carry out the project independently, this could potentially be considered problematic from a competition law perspective.

In regard to competition law, the starting point is that a collaboration is normally unlikely to give rise to any competition concerns if it is objectively necessary to allow one party to enter a market that it could not have entered individually otherwise. In section 2.2. in Chapter 6, it was deduced that it needs to be clarified whether the economic operators in bidding consortia can be considered competitors. In the situation where the members of a bidding consortium can be considered competitors, it should be assessed whether those members would be able to undertake individually and whether there are more members of the bidding consortium than necessary. In the situations where the economic operators in the consortium are able to undertake individually or there are more members than necessary, it must be assessed whether the bidding consortium agreement has, as its object or effect, the restricting of the competition as well as whether the bidding consortium agreement has an appreciable impact on the competition.

[979] Ibid, para. 48.
[980] Ibid, paras 18-19.
[981] Ibid, para 47.

In the competition law assessment of bidding consortia, the competitor assessment must take the individual economic operators' ability to bid on the public contract into account with the benchmark of whether these potentially could meet the tender requirements. However, as stated in Chapter 6, it is uncertain which tender requirements that can be included in the assessment of whether the economic operators can be considered competitors for a particular procurement procedure.

However, the public procurement approach to assessing bidding consortia does not address potential issues in relation to whether the parties in the bidding consortium possibly were able to bid individually for the public contract. The public procurement rules and the competition rules are enforced through two separate enforcement systems and the strictly separate enforcement systems for public procurement law and competition law entail that competition law aspects of public procurement procedures are rarely being assessed.[982]

In the literature, this issue has been highlighted in which Sanchez-Graells and De Koninck state:[983]

> *"In this specific case, and on the basis of the limited information available in the MT Højgaard and Züblin Judgment,* ***there seems to be a prima facie case to consider that Aarsleff could have participated in the tender on its own and, consequently, there was no justification for it to team up with Pihl if it was a potential competitor, or to prevent the creation of valuable subcontracting relationships between Pihl and third parties.*** *At the very least, Aarsleff should be required to demonstrate and justify the advantages that it intended to achieve with its collaboration with Pihl and how these would have (or indeed have) been passed on to the contracting authority.* ***Thus, a more detailed assessment would be necessary to determine whether the formation of the Aarsleff and Pihl group was in itself restrictive of competition****—e.g. by allowing Aarsleff to 'grab' the specialist technical capabilities of Pihl in order to prevent it from teaming up with a potential competitor or to compete for the contract on its (if it had the necessary capacities)-or not."*[984]

According to Sanchez-Graells and De Koninck, it is worth considering whether Aarsleff could have participated in the tender on its own. Furthermore, they emphasize that a more detailed assessment would be necessary to determine whether the formation of the Aarsleff and Pihl group was, in itself, restrictive of competition.

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[982] Ølykke, G. S. (2011), How Does the European Court of Justice Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), 179-192, p. 179.
[983] See Sanchez-Graells, A. and Koninck, D. C. (2018). Shaping EU Public Procurement Law. A Critical Analysis of the CJEU Case Law, 2015-2017. Kluwer Law International.
[984] Emphasis added.

In sum, the composition of bidding consortia can give rise to some tricky situations that must be considered carefully in order to ensure compliance with both the public procurement rules and the competition rules. The Public Sector Directive does not lay down any rules that specifically relate to the composition of groups of economic operators, and, consequently, the rules that apply on the matter are the ones laid down by the Member States. However, in case law, an approach to the assessment of a bidding consortium participating in a public tender has been seen that potentially would not facilitate compliance with the competition rules. The approach taken in *MT Højgaard and Züblin* did not address the potential issues in relation to how the parties in a two-party bidding consortium possibly would be able to bid for a given public contract individually.

2.3 Assessment of Subcontracting

In regard to public procurement law, the provisions that are particularly relevant to subcontracting can be found in Article 71 of the Public Sector Directive. The concept of a subcontractor from a public procurement perspective will be considered to include both economic operators which are at the same level as well as those further down in the supply chain. The Public Sector Directive does not regulate which economic operators there may enter into a subcontracting agreement for the purpose of bidding on public contracts.

In regard to competition law, there is much indication that horizontal subcontracting agreements should be assessed with a similar approach to that applied when assessing bidding consortia. Hence, this can entail that it must be assessed whether the members of the subcontracting agreement are competitors and whether the members of the subcontracting agreement are able to undertake individually. If this is the case, it should be investigated whether the subcontracting agreement restricts competition by object or effect and, in some cases, whether the subcontracting agreement has an appreciable impact on the competition. The proposed approach to assessing horizontal subcontracting agreements in public tenders can be found in Chapter 6.

Additionally, possible competition concerns have been identified above in relation to vertical subcontracting agreements in public tenders. Therefore, it can also be argued whether these should be subject to a competition law assessment. Vertical subcontracting in public tenders may result in anti-competitive agreements, which are prohibited by Article 101(1) TFEU.

In sum, there is a number of uncertainties when it comes to the application of subcontractors in public tenders. This is due to that Public Sector Directive does not regulate which economic operators there may enter into a subcontracting agreement for the purpose of bidding on public contracts. Furthermore, it is also uncertain how to assess subcontracting agreement in public tenders from a competition law perspective.

3 How to Reconcile a Potential Conflict Between Public Procurement Law and Competition Law

Based on the sections above, it can be deduced that there may be situations with potential conflicts between public procurement law and competition law. In addition, several situations have been identified in this thesis where it is uncertain how the collaboration should be assessed.

A main assumption behind the problem statement is that there is no coherence between the legal positions under public procurement law and competition law. This has, in some cases, been confirmed by analysis of the legal framework set by the Public Sector Directive and the competition rules. Hence, this leads to the last research question in the problem statement which asks how to reconcile a potential conflict between public procurement law and competition law.

The first thing that needs to be address is why we need to reconcile a potential conflict between public procurement law and competition law. The reason why this question is considered relevant is that legal systems must be coherent in order to be recognised as legal systems.[985] One of the main legal philosophers of coherence is MacCormick, who has said that *"[t]he basic idea is of the legal system as a consistent and coherent body of norms whose observance secures certain valued goals which can intelligibly be pursued all together".*[986] Hence, there should be coherence between the norms in a legal system, where the enforcement of one norm does not lead to the violation of other norms in the legal system. As a result, coherence governs the view of the legal system as a system.[987]

Legal systems will typically derive their authority from the fact that they function in the context of a state, however, the EU cannot be considered to be a state. [988] Thus, the legal system of the EU needs

[985] Leczykiewicz, D. (2008), Why Do the European Court of Justice Judges Need Legal Concepts. European Law Journal, 14(6), 773-782, p. 785.
[986] MacCormick, N. (1994). Legal Reasoning and Legal Theory (first ed.). Clarendon Press, p. 106.
[987] Bengoetxea, J., MacCormick, N. and Moral, L., S. (2001). Integration and Integrity in the Legal Reasoning of the European Court of Justice in Burca, G. D., and Weiler, J. H. (eds.) The European Court of Justice, (first ed.) Oxford University Press, 43-85, p. 47.
[988] Leczykiewicz, D. (2008), Why Do the European Court of Justice Judges Need Legal Concepts. European Law Journal, 14(6), 773-782, p. 784.

to appear as a coherent system in order to be regarded as a legal system, and the coherence of EU law will therefore be seen as a premise for the legal system of the EU.[989]

Especially, the need for coherence between the rules on public procurement and the competition rules have been highlighted in the legal literature. In a paper on the interaction between the public procurement rules and the competition rules, Ølykke has stated the following:

> "*The circumstance of possible parallel applicability of the rules on public procurement and competition and distinct (procedural) enforcement systems at both national level and EU level poses the risk that the choice of legal basis/enforcement system could be crucial for the complainant. To remedy this situation, coherence between the rules on public procurement and competition is highly relevant to ensure legal certainty and in order to justify the conception of EU law as a legal system".*[990]

According to Ølykke, coherence between the public procurement rules and the competition rules is highly relevant to ensure legal certainty and in order to justify the conception of EU law as a legal system. Furthermore, it is emphasized that the lack of coherence poses the risk that the choice of legal basis could be crucial for the complainant.

Hence, it can be crucial for establishing coherence between the rules that enforcement of one norm does not lead to the violation of other norms in the legal system.[991] Therefore, the legal position under the public procurement rules should not be in conflict with the competition rules and the other way around.

In the following, there will be a discussion of how to ensure coherence between the public procurement rules and competition law.

[989] For more on the role of coherence and MacCormick's theory, see Amaya, A. (2015). The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument (first ed.). Hart Publishing; and Soriano, L., M (2003). A Modest Notion of Coherence in Legal Reasoning. A Model for the European Court of Justice. Ratio Juris 16(3), 296 – 323.

[990] Ølykke, G. S. (2011), How Does the European Court of Justice Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), 179-192, p. 184.

[991] See Bertea, S. (2005). The Arguments from Coherence: Analysis and Evaluation. Oxford Journal of Legal Studies, 25(3), 369–391, p. 372.

3.1 Foundations for Coherence Between the Public Procurement Rules and the Competition Rules

As stated in Chapter 1, the public procurement rules and the competition rules can be considered to be separate legal disciplines.[992] These rules regulate two different sides of public procurement procedures, which are those of the contracting authorities and the economic operators respectively.[993] However, to a limited extent, the public procurement rules directly regulate the behaviour of economic operators in public procurement procedures, and this behaviour will mainly be regulated by the competition rules.[994] Furthermore, in some cases, the competition rules may apply to the actions performed by the contracting authorities. Therefore, there cannot be a strict division of the rules.[995]

In this thesis, the internal market is considered to be an objective of the competition rules. Furthermore, it has also been discussed whether effective competition should be seen as an objective of the competition rules, as it has been found that the objective of the competition rules is to protect the competition process rather than its outcome. Thus, effective competition should be considered the means to an objective and not the objective itself. When it comes to the public procurement rules, it has been found that the Public Procurement Directives all share the same objective of promoting the internal market. Furthermore, in the thesis, it has been deduced that effective competition must be regarded as an objective of the public procurement rules and not just as a means for achieving the internal market objective. Thus, the competition rules and the public procurement rules both share the objective of promoting the internal market. Since both sets of rules share an internal market objective, this can facilitate coherence between public procurement law and competition law. The reason for this is that the ECJ applies the method of teleological interpretation in which the text of the provisions this is being interpreted according to its purpose of the EU law and the purposes of the EU Treaties.

However, it is conceivable that different approaches to competition may be contributing to conflicts between the public procurement rules and the competition rules. The role of legal concepts can have

[992] Drijber, B. J. and Stergiou, H. (2009). Public procurement law and internal market law. Common Market Law Review 46(3), 805–846, pp. 805-806.
[993] Ølykke, G. S. (2011). How does the Court of Justice of the European Union Pursue Competition Concerns in a Public Procurement Context? Public Procurement Law Review, (6), pp. 179-192, p. 180.
[994] Munro, C. (2006). Competition law and public procurement: two sides of the same coin? Public Procurement Law Review, 6, 2006, 352-361, p. 360.
[995] See Chapter 4 for the discussion of when the competition rules apply.

an important role in ensuring coherence in a legal system.[996] From a public procurement law perspective, the concept of effective competition should be understood as a way of ensuring the widest possible participation by tenderers in the call for tenders, and the centre of the assessment of effective competition is the competition in a specific public tender and not the competition in a specific or relevant market. Furthermore, it is deduced that effective competition can be considered in line with the static view of competition in which competition is used to refer to the structural situation of many firms competing in a market and where competition is highly centred on the number of sellers.

From a competition law perspective, the concept of effective competition is not clear. It was found in the above that the concept of effective competition might be interpreted as the appropriate degree of competition for the realization of the objective of the competition rules and that the objective of competition law is to protect the competition process, market, and, in so doing, competition as such. Furthermore, it is deduced that effective competition can be considered in line with the dynamic view of competition that considers competition as a result of a dynamic process.

Thus, there are different perceptions of the concept of competition depending on the set of rules applied. As stated above, it has been deduced that effective competition must be regarded as an objective of the public procurement rules and not just as a means for achieving the internal market objective, whereas the objective of the competition rules is to protect the competition process rather than an outcome. Thus, effective competition should be considered as the means to an objective and not the objective itself. However, both sets of rules will have effective competition as a central focal point of the rules.

Because there are differences in the concepts of effective competition, this can affect the interpretation and application of the rules. The public procurement rules have, to a large degree, ignored the dynamic view of competition by embracing static microeconomic theory in the assessment of competition. As stated above, the competition rules have already begun to apply the dynamic view of competition. Therefore, it can be argued that coherence could be facilitated by a common understanding of the concept of effective competition.

A paradigm shift that favours the dynamic competition over the static competition in the application of the public procurement rules could entail that less emphasis will be placed on ensuring the widest possible participation of tenderers in a call for tenders and more weight on the process of competition

[996] See Leczykiewicz, D. (2008), Why Do the European Court of Justice Judges Need Legal Concepts. European Law Journal, 14(6), 773-782, p. 784.

or more generally to protect the competitive structure of the market. If the public procurement rules apply the dynamic view of competition, this may be contributing to the fact that the public procurement rules go from promoting competition within the procurement process to focus on promoting competition in the market where the procurement process takes place. In practice, this may entail that the legal positions reached under the public procurement rules may be different in the future.

An example of this can based on the situation in *MT Højgaard and Züblin.*[997] In this case, the ECJ drew particular attention to the obligation of the contracting authority to ensure the development of healthy and effective competition between the economic operators taking part in the public procurement procedure.[998] Thus, the ECJ focused on the fact that the contracting authority had determined that, for there to be effective competition in that specific tender, it should include at least four candidates.[999] The effective competition was ensured as the four candidates to submit tenders still were remaining after Aarsleff was allowed to take part in the procurement procedure individually. With this, weight was placed on the number of tenderers in the call for tenders. However, if focus was on the dynamic view of competition, this could result in that weight would switch to the process of competition. As a consequence, the element from the competition law approach to consider whether the parties to the bidding consortium agreement are competitors, and the individual economic operators' ability to bid on the public contract could perhaps be the approach under the public procurement rules. Thus, in this situation, the dynamic view of competition could lead to a different legal position, and this could perhaps facilitate coherence between the public procurement rules and the competition rules.

However, a paradigm shift to the dynamic view of competition in the application of the public procurement rules will require a persistent effort by the Commission and the EU Courts to review public procurement law. Furthermore, a potential shift may also entail a similar modernisation of the public procurement rules as seen with the competition rules, which can facilitate are more economic approach to the public procurement rules. As seen with the competition rules, the modernization process has been stretched out over a long period of time, and it can be discussed whether the Commission yet has completed its mission of the more economic approach in the field of competition law. Therefore, a paradigm shift to the dynamic view of competition in the application of the public procurement rules can be considered to be a more difficult mission to follow.

[997] C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347.
[998] C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347, para 38.
[999] C-396/14, MT Højgaard A/S and Züblin A/S v Banedanmark, EU:C:2016:347, para 42.

Furthermore, another way of ensuring coherence may already be found in the Public Sector Directive. The directive has introduced provisions that can help to facilitate that public procurement ensures development of effective competition and to combat anti-competitive behaviour and collusive practices in public procurement.[1000] One of the most important changes in this respect was the introduction of Article 57(4)(d) in the Public Sector Directive, which indicates that a contracting authority may exclude or be required by a Member State to exclude any economic operator from participating in a procurement procedure if the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. The principles that arise from competition law are not directly applicable when the contracting authorities apply the collusion-related exclusion ground in Article 57(4)(d) of the Public Sector Directive.[1001] However, in the assessment of whether there is an agreement aimed at distorting competition, the competition rules will still play a role. The legal position must in principle reflect a coherent interpretation in order to avoid that the decision of a specific dispute is dependent on the chosen legal basis. Hence, it must be assumed that, in connection with the interpretation and application of Article 57(4)(d) of the Public Sector Directive, it would make sense to conduct the assessment in the light of Article 101 TFEU.[1002] This may contribute to the fact that even if the competition rules do not apply in a given situation, the public procurement rules will be able to facilitate compliance with the competition rules.

4 Concluding Remarks

This chapter examined the grey zones between public procurement law and competition law with an exclusive focus on the collaborations between economic operators bidding on public contracts. Based on the sections above, it can be deduced that there may be situations where it can be difficult to clarify whether the collaborations are in compliance with the public procurement rules and the competition rules as well as whether there is a conflict between the rules. Hence, it can be challenging to come up with concrete situations where the collaborations between economic operator in the competition for public contracts are considered legal under public procurement law but not under competition law.

[1000] See section 1 in Chapter 1.
[1001] This is acknowledged by Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 39.
[1002] Concerning this matter, see Kuźma, K. & Hartung, W. (2020). Combating Collusion in Public Procurement: Legal Limitations on Joint Bidding. Elgar European Law and Practice, p. 39.

However, following situations have been identified in this thesis in which it is uncertain how the collaborations should be assessed.

Firstly, when economic operators rely on the capacities of other entities when they bid on public contracts, there may be situations where the collaborations between the economic operators and third parties to the public contracts are not considered problematic under procurement law, however, from a competition law perspective, there may be competition concerns, and when economic operators rely upon the capacities of other entities, this may result in anti-competitive agreements, which are prohibited by Article 101(1) TFEU.

Secondly, the composition of bidding consortia can give rise to some tricky situations that must be considered carefully in order to ensure compliance with the public procurement rules and the competition rules. The Public Sector Directive does not lay down any rules that specifically relate to the composition of groups of economic operators, and, consequently, the rules that apply on the matter are the ones laid down by the Member States. However, in case law, an approach to assess a bidding consortium participating in a public tender has been seen, which potentially will not facilitate compliance with the competition rules.

Thirdly, there is a number of uncertainties when it comes to the application of subcontractors in public tenders. The Public Sector Directive does not regulate the composition of the parties entering into subcontracting agreements, and it is also uncertain how to assess subcontracting in public tenders under the competition rules.

Furthermore, this chapter has also examined how it is possible to reconcile a potential conflict between public procurement law and competition law. In this regard, it has been found that the need to reconcile a potential conflict between public procurement law and competition law can be found in the fact that legal systems must be coherent in order to be recognised as legal systems. Hence, it can be crucial for coherence between the rules that enforcement of one norm does not lead to the violation of other norms in the legal system. Therefore, the legal position under the public procurement rules should not be in conflict with the competition rules as well as the other way around. In this analysis, it is highlighted that the competition rules and the public procurement rules both share the objective of promoting the internal market. Since both sets of rules share an internal market objective, this can facilitate a coherence between public procurement law and competition law. However, it is conceivable that different approaches to competition may be contributing to conflicts between the public procurement rules and the competition rules. Thus, the ensuring of

coherence can be a paradigm shift that favours dynamic competition over static competition in the application of the public procurement rules.

Furthermore, another way of ensuring coherence may already be found in the Public Sector Directive in Article 57(4)(d). It must be assumed that, in connection with the interpretation and application of the collusion-related ground, it would make sense to conduct the assessment in the light of Article 101 TFEU. This may contribute to the fact that even if the competition rules do not apply in a given situation, the public procurement rules will be able to facilitate compliance with the competition rules.

CHAPTER 8

Conclusions and Final Remarks

1 Introduction

This chapter contains an overview of the results of the analysis and contains an answer to the problem statement. This PhD thesis investigates the interaction between the public procurement rules and the competition rules with a focus on the legal framework of collaboration between economic operators tendering in public procurement procedures. The purpose of the thesis is to clarify, analyze and discuss the current state of law on collaborations between economic operators competing for public contracts. The thesis applies economic theory to the specific public procurement contexts in order to explain the different forms of collaborations between economic operators, as well as examine what effects collaborations between economic operators in the competition for public contracts can have on competition in the internal market. Hence, the thesis applies an interdisciplinary approach to illuminate the topic. The problem statement is divided into three research questions in order to address the research purpose of the thesis. Accordingly, the research questions are as follows:

> 1) What effects can collaborations between economic operators in the competition for public contracts have on competition in the internal market?
>
> 2) When are collaborations between economic operator in the competition for public contracts considered legal under public procurement law but not under competition law?
>
> 3) How is it possible to reconcile a potential conflict between public procurement law and competition law?

Throughout the thesis, there has been focus on three different types of collaborations. First, when an economic operator relies on the capacity of one or more other economic operators in order to document whether they are capable of fulfilling the tendered contract (referred to as reliance on the capacities of other entities). Second, when economic operators form a bidding consortium for the purpose of tendering for and eventually fulfilling a public contract (referred to as bidding consortia). Third and last, when economic operators use subcontractors to fulfil a public contract (referred to as subcontracting). In a situation where economic operators collaborate when they tender for a public contract, the public procurement rules and the competition rules can both provide the legal basis for

an assessment of whether the collaboration is legal or not. Therefore, the thesis has focused on the legal framework set by the public procurement rules and the competition rules.

1.1 Outline

In the following, there will be a presentation of the general results of the analyses and the answers to the problem statement. This will be structured in such a way that they will chronologically go through all the chapters in the thesis.

2 Presentation of the General Results of the Analysis and Answers to the Problem Statement

2.1 Competition and Collaboration from an Economic Perspective – Chapter 3

In Chapter 3, it was examined what effects collaboration between economic operators in the competition for public contracts can have on competition in the internal market. In this chapter, various effects of competition have been identified. The collaborations between economic operators can both entail anti-competitive and pro-competitive effects on the competition. The public procurement market constitutes a significant proportion of the economy in the EU and, hence, can be important instrument to ensure the competition on the internal market. Therefore, collaborations between economic operators in the competition for public tenders can play a central role when it comes to ensuring competition on the internal market.

The first thing which should be highlighted in this context is that there are different views on competition. The static view of competition focuses on the structural situation of multiple firms competing in a market, where the presence of competition affects both the quantity produced as well as the price of the products and services. Hence, the static view of competition emphasizes the importance of competition between the economic operators because competition affects the prices of the goods and services paid by the contracting authorities. Furthermore, the individual actions of the economic operators concerning price and output is likely to influence reactions from competitors and economic operators because they know that their own current and past actions will be treated by rivals as signals of its costs and intentions. Price competition among economic operators may therefore be used as a strategic tool to either eliminate other economic operators from the competition for the public tender or to signal a lack of interest in the public contract in question. Thus, the offered prices by the economic operators to the contracting authorities in the public tenders

will not always be a reflection of the degree of competition, but be used as tools to influence competition between the economic operators.

In addition, there is also the dynamic view of competition which considers competition as a result of a dynamic process. The analysis of dynamic competition shows that competition may also be of importance for innovation, because economic operators who are under competitive pressure will have more incentive to innovate and thereby gain market share from competitors. Hence, the presence of competition in public tenders can ensure innovation for the benefit of both the economic operators and the contracting authorities.

In the analysis of the expected effects on competition from collaborations between economic operators bidding on public contracts, there has been exclusive focus on the effects of bidding consortia and subcontracting, why there has not been focus on reliance on the capacities of other entities. The background for this has been that no economic theory has been identified in which this form of collaboration is analysed.

Bidding consortia in public tenders can lead to both positive and negative effects on competition. The traditional objection to joint bidding is that it may suppress competition by reducing the total number of bids tendered. Another negative effect of bidding consortia are the coordinated effect, which facilitates the operation of an existing cartel or favours the emergence of a new one. Hence, the presence of cartels can restrict competition and thus increase the prices paid by contracting authorities. Furthermore, bidding consortia can also lead to positive effects on competition. Bidding consortia may entail tender procedures with the same or even a higher number of bids than those bidding procedures with no bidding consortia. Thus, this can result in bids with better quality or lower prices than the situation with no bidding consortia participating in public tenders. Also, bidding consortia may also enhance the competition if the firms can exploit the synergies from combining the resources of individual economic operators in the consortium to which it then becomes possible to tender more aggressively. Another positive effect of bidding consortia are that the reduction in the number of total bidders mitigates the effects of the winner's curse.

Subcontracting in public tenders can lead to both positive and negative effects on competition. The use of subcontracting can lead to some of the same anti-competitive effects as seen with bidding consortia. Hence, subcontracting in public tender may lead to a lower number of competitors, higher

market power for the economic operators, which are members of the subcontracting agreement, and thus higher prices for the contracting authority. Furthermore, subcontracting can also favour the exchange of information between the economic operator and the subcontractor where the scope of information provided can extend beyond the minimum amount necessary to establish the subcontracting agreement. Moreover, subcontracting can also improve efficiency by decreasing the procurement costs, stimulating participation, and technological capacity. Vertical subcontracting may entail a decrease transactions costs of the parties and reduce the double marginalization problem and the hold-up problem. Finally, the effects of subcontracting on competition can also be affected by the timing of the subcontracting. It is found that ex ante subcontracting softens the bidding competition while the ex post subcontracting intensifies the bidding competition. This will entail that the effects of subcontracting depend on the timing of subcontracting, and it will be in interest of contracting authority that there is ex post subcontracting.

2.2 Objectives, Means and Scope of the Rules – Chapter 4

In Chapter 4, the foundation for the legal analysis regarding the legal framework for collaborations between economic operators in the competition for public contracts were established. This chapter has analysed the objectives of the rules, as well as the personal scope of the public procurement rules and the competition rules.

The competition rules have multiple objectives, and one of the objectives is the promotion of the internal market. Furthermore, it is found that the objective of the competition rules is to protect the competition process, rather than an outcome of the process and, in doing so, competition as such. Thus, effective competition from a competition law perspective should be considered the means to an objective, not the objective itself.

The Public Sector Directive also has the objective to promote the internal market. Furthermore, it is uncertain whether effective competition should also be considered an objective of the public procurement rules. However, many factors speak in favour of effective competition to be seen as an objective and therefore, in the present thesis, the starting point will be that effective competition must be regarded as an objective of public procurement rules and not just as a mean to achieve the internal market objective. The concept of effective competition from a public procurement perspective should be understood as to ensure the widest possible participation by tenderers in a call for tenders.

Furthermore, this chapter has also discussed whether a principle of competition can be found in the Public Sector Directive. This thesis will be based on the finding that there is no competition principle

in the Public Sector Directive. It is found that elevating competition to a principle does not seem to have legal effects, because the two-folded objective of the public procurement rules is both to promote the internal market objective and to ensure development of effective competition.

The personal scope of the Public Sector Directive is the contracting authorities, whereas the competition rules are addressed to undertakings and decisions by associations of undertakings. As well as applying to contracting authorities, the Public Sector Directive also impose some obligations on other bodies. As stated above, the parties to the public contract are contracting authorities and economic operators. Economic operators participating in tenders are subject to the application of rules in the Public Sector Directive by contracting authorities. The starting point is that activities that fall within the exercise of public powers are omitted from the scope of the competition rules. However, contracting authorities may act either by exercising public powers or by carrying out economic activities of an industrial or commercial nature by offering goods and services on the market and therefore, in some cases, they will be bound by the competition rules. The assessment of whether the competition rules will apply to the actions of the contracting authorities will depend on the distinguishing between exercise of public authority and economic activity. There is, however, uncertainty when it comes to the assessment of whether purchasing activities constitute economic activities, and thereby the applicability of the competition rules to contracting authorities.

2.3 Collaboration between Economic Operators from a Procurement Law Perspective – Chapter 5

In Chapter 5, the legal framework set by the Public Sector Directive in situations of collaboration between economic operators participating in public tenders has been examined. The Public Sector Directive allows economic operators to collaborate in a variety of ways, and the general principle of the directive is that the contracting authority must respect the right of the economic operators to jointly submit a tender. In this chapter, uncertainties have been identified when it comes to the legal framework which is set by the public procurement rules.

The Public Sector Directive facilitates a flexible approach to the reliance on third party capacities. The starting point is that an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of its links to those entities. However, there are limits when it comes to the application of relying on third party capacities, and the following limitations have been identified: First, when an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the

contracting authority may require that the economic operator and those third party entities involved are jointly liable for the execution of the contract. Second, the Public Sector Directive explicitly allows for limitations to the economic operators' right to rely on third party capacities. In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks are performed directly by the tenderer itself. Third, an economic operator can only rely on a third party´s capacity for educational and professional qualifications when the latter will be performing the works or services for which these capacities are required.

When it comes to the application of bidding consortia in public tenders, a very general framework has been set by the Public Sector Directive. Bidding consortia cannot be required by contracting authorities to have a specific legal form in order to submit a tender or a request to participate in a procurement procedure. Furthermore, the general rule is that a contracting authority cannot impose any conditions that are different from those imposed on individual participants for the performance of a contract when dealing with a group of economic operators. The Public Sector Directive does not provide clear instructions for how to assess the qualification of groups of economic operators seeking to participate in a public tender as a bidding consortium. However, it can be deduced that the contracting authority must assess the qualifications of the bidding consortium as a whole, and the composition of consortia must be assessed with regard to the general principles of EU law in particular, the principles of equal treatment and transparency. Additionally, there is uncertainty when it comes to a change of consortium membership in a bidding consortium. A change of consortium membership does not, per se, provide a basis for removing an economic operator, and, therefore, it can be argued that there should be an assessment of the nature of this change.

Subcontracting in public tenders is also covered by the Public Sector Directive, however, the directive does not provide significant rules on the application of subcontractors. The Directive does not define the concept of a subcontractor, even though it uses the concept. The contracting authority may ask, or may be required by a Member State to ask, the economic operator to indicate, in its tender, any share of the contract that it may intend to subcontract to subcontractors as well as any proposed subcontractors. The Public Sector Directive imposes the obligation to disclose the name, contact details and legal representatives of all subcontractors providing works or services at a facility under the direct supervision of the contracting authority. However, the request for information will only be applicable if the information is known at this point in time. The contracting authority cannot impose a general prohibition on subcontracting. However, subcontracting may be limited in some cases and

the Public Sector Directive clearly allows that, in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, contracting authorities may require certain critical tasks to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators by a participant in that group. Additionally, in some cases, the contracting authority can require the substitution of a subcontractor. The Public Sector Directive does not mention in which situations and under which procedures this substitution may take place. In the analysis of the assessment of a substitution of members in a bidding consortium, it was highlighted that the assessment of the nature of the change in the composition of a bidding consortium can presumably be based on an analogy application of the rules governing the changes to the tender specification, conditions, and the procedure during the award procedure, and this may also be the case in the substitution of a subcontractor.

Furthermore, this chapter has also examined the discretionary exclusion grounds in Article 57(4)(d) of the Public Sector Directive and discussed what significance these exclusion grounds may have for collaborations between economic operators when they participate in public tenders. It has been found that there is uncertainty as to how to make the assessment of the application of the collusion-related exclusion grounds in relation to collaborations between economic operators, when they jointly submit a tender.

2.4 Collaboration between Economic Operators from a Competition Law Perspective – Chapter 6

In Chapter 6, the legal framework set by the competition rules in situations of collaboration between economic operators participating in public tenders has been examined.

It has been found that in some situations, bidding consortia agreements may be classified as commercialization agreements or joint selling agreements, which will have an impact on the assessment of this type of collaboration. The decisive factor in assessing the legality of a bidding consortium is whether the economic operators to the agreement are competitors in relation to a particular procurement procedure. The competitor assessment must take the individual economic operator's ability to tender/bid on the public contract into account, and it needs to be clarified if there are more members of the bidding consortium than necessary. As part of the assessment under Article 101 TFEU, it needs to be clarified whether the bidding consortium agreement restricts competition by object or effect. Although, in national cases and in an Advisory Opinion of the EFTA Court, there has been seen a tendency towards an approach of joint tendering in public procurement

procedures leading to price-fixing and market sharing between the members of a bidding consortium. There are no EU legal sources suggesting that the ECJ will apply the same approach.

Once the bidding consortium agreement falls under Article 101(1) TFEU, it can still escape that prohibition if the economic operators involved can prove that they meet the conditions set out in Article 101(3) TFEU. Furthermore, in some cases, the consortium agreement can otherwise be exempted from the prohibition, for example, if the agreement can be covered by the de minimis rule. In the situation where the bidding consortium agreement is considered as a restrict competition by object, there is no need to take account of the concrete effect of the agreement. In this situation, the only possibility for the bidding consortium not to get caught by the prohibition in Article 101(1) TFEU is an exemption under Article 101(3) TFEU.

Subcontracting in public tenders can lead to both horizontal subcontracting agreements and vertical subcontracting agreements. A horizontal subcontracting agreement between competitors may entail the same effects on competition as would occur with bidding consortia between competitors. Therefore, the question is whether these should be assessed the same way as bidding consortia participating in public tenders from a competition law perspective. In the Notice on Bid Rigging Exclusion, it is advocated to use a similar procedure for the assessment of subcontracting agreements to that of bidding consortia agreements. Furthermore, in the legal literature, it is indicated that a similar approach as seen in the assessment of bidding consortia may be required when it comes to subcontracting. In case law, there has currently not been observed any examples of horizontal subcontracting agreements being assessed in the same way as bidding consortia participating in public tenders from a competition law perspective. Hence, it is very uncertain whether this will be the case when a potential case involving the use of subcontractors in public tender is being investigated by the EU Courts. Although possible competition concerns have been identified in relation to vertical subcontracting agreements in public tenders in the text above. This has not given rise to any specific regulation, guidance or case law regarding the assessment of vertical subcontracting in public tenders.

Reliance on the capacities of other entities in public tenders has not given rise to attention from a competition law perspective. There is considerable uncertainty when it comes to whether this type of cooperation can be considered problematic from a competition law perspective. A competition concern which may be connected to this type of collaboration is that the agreement may limit competition. The economic operators may be exclusive in the sense that they limit the possibility of the economic operators in the agreement to compete against each other as independent economic

operators, or as parties to agreements with other economic operators and the agreement may lead to anti-competitive input foreclosure.

2.5 Grey Zones between Public Procurement Law and Competition Law – Chapter 7

In Chapter 7, the grey zones between public procurement law and competition law with an exclusive focus upon the collaborations between economic operators bidding on public contracts have been identified. Furthermore, it was also been investigated how it is possible to reconcile a potential conflict between public procurement law and competition law.

On the basis of the findings in previous chapters, it can be deduced that that there are several uncertainties when it comes to the application of the three different types of collaborations that economic operators can enter into when tendering for public contracts. These uncertainties relate to both the procurement law and the competition law assessment of the collaborations. Consequently, in many situations it can be difficult to clarify whether the collaborations are in compliance with the public procurement rules and the competition rules as well as whether there is a conflict between the rules. Hence, it can be difficult to come up with concrete situations where the collaborations between economic operator in the competition for public contracts are considered legal under public procurement law but not under competition law. However, following situations have been identified in this thesis in which it is uncertain how the collaborations should be assessed.

Firstly, when economic operators rely on the capacities of other entities when they bid on public contracts, there may be situations where the collaborations between the economic operators and third parties to the public contracts are not considered problematic under procurement law, however, from a competition law perspective, there may be competition concerns, and when economic operators rely upon the capacities of other entities, this may result in anti-competitive agreements, which are prohibited by Article 101(1) TFEU.

Secondly, the composition of bidding consortia can give rise to some tricky situations that must be considered carefully in order to ensure compliance with the public procurement rules and the competition rules. The Public Sector Directive does not lay down any rules that specifically relate to the composition of groups of economic operators, and, consequently, the rules that apply on the matter are the ones laid down by the Member States. However, in case law, an approach to assess a bidding consortium participating in a public tender has been seen, which potentially will not facilitate compliance with the competition rules.

Thirdly, there is a number of uncertainties when it comes to the application of subcontractors in public tenders. The Public Sector Directive does not regulate the composition of the parties entering into subcontracting agreements, and it is also uncertain how to assess subcontracting in public tenders under the competition rules.

Furthermore, this chapter has also examined how it is possible to reconcile a potential conflict between public procurement law and competition law. In this regard, it has been found that the need to reconcile a potential conflict between public procurement law and competition law can be found in the fact that legal systems must be coherent in order to be recognized as legal systems. Therefore, the legal position under the public procurement rules should not be in conflict with the competition rules and the other way around.

In this analysis, it is highlighted that the competition rules and the public procurement rules both share the objective of promoting the internal market. Since both set of rules share an internal market objective, this can facilitate coherence between public procurement law and competition law.

However, it is likely that what may be contributing to conflicts between the public procurement rules and the competition rules are the different approaches to competition. The role of legal concepts can have an important role in ensuring coherence in a legal system. Therefore, it can be argued that coherence could be facilitated by a common understanding of the concept of effective competition.

Furthermore, another way of ensuring coherence may already be found in the Public Sector Directive in Article 57(4)(d). It must be assumed that, in connection with the interpretation and application of the collusion-related ground, it would make sense to conduct the assessment in the light of Article 101 TFEU. This may contribute to the fact that even if the competition rules do not apply in a given situation, the public procurement rules will be able to facilitate compliance with the competition rules.

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RESUMÈ (ABSTRACT IN DANISH)

Denne ph.d.-afhandling undersøger samspillet mellem reglerne for offentlige udbud og konkurrencereglerne med fokus på de juridiske rammer for samarbejde mellem de økonomiske aktører, der afgiver tilbud i offentlige udbudsprocedurer. Formålet med specialet er at klarlægge, analysere og diskutere den nuværende retstilstand om samarbejde mellem økonomiske aktører, der konkurrerer om offentlige kontrakter. Igennem specialet vil der være fokus på tre forskellige typer samarbejder. Den første type værende, når en økonomisk aktør gør sig afhængig af en eller flere andre økonomiske aktørers kapacitet for at kunne dokumentere, om de er i stand til at opfylde den udbudte kontrakt. Det andet fokus er økonomiske aktører, som danner et tilbudskonsortium med det formål at afgive bud på og i sidste ende opfylde en offentlig kontrakt. Tredje og sidste fokus vil være på økonomiske aktører, der bruger underleverandører til at opfylde en offentlig kontrakt. Denne afhandling søger at besvare følgende spørgsmål (1) Under hvilke omstændigheder er samarbejdet skadeligt for konkurrencen på det indre marked; (2) hvornår er samarbejder i de førnævnte former (afhængighed af kapacitet, konsortier og brug af underleverandører) lovlige under lov om offentlige indkøb, men ikke under konkurrencelovgivning; (3) hvordan man kan forlige en potentiel konflikt mellem lov om offentlige indkøb og konkurrencelovgivning.

De to første kapitler indeholder specialets teoretiske ramme. Kapitel 1 giver rammen og en introduktion til specialet. Kapitel 2 skitserer specialets metodiske tilgange, som indeholder en oversigt over de anvendte juridiske og økonomiske metoder og teorier. Specialet anvender den juridiske retsdogmatiske metode til at afklare, analysere og diskutere den nuværende retstilstand om samarbejder mellem økonomiske aktører, der konkurrerer om offentlige kontrakter. Endvidere anvendes økonomiske teorier som et supplement til den juridiske analyse. Afslutningsvis vil der blive anvendt teorier om mikroøkonomi og industri økonomi, som hører til såvel neoklassisk teori som auktionsteori og spilteori.

Kapitel 3 og kapitel 4 indeholder grundlaget for afhandlingens analyser. Kapitel 3 indeholder en analyse baseret på økonomisk teori, hvor det undersøges, hvornår økonomiske aktører har incitamenter til at samarbejde i konkurrencen om offentlige kontrakter, samt under hvilke omstændigheder dette samarbejde kan være skadeligt for konkurrencen på det indre marked. Analysen vil i høj grad fokusere på, hvad konkurrence er, og hvordan samarbejde mellem økonomiske aktører kan påvirke konkurrencen, når der bydes på offentlige kontrakter. Det konstateres, at der er forskelle i synet på konkurrence og samarbejder mellem økonomiske aktører, der afgiver udbud i

offentlige indkøb, hvilket både kan bidrage til positive og negative effekter på konkurrencen. Kapitel 4 analyserer udbudsreglernes og konkurrencereglernes mål, midler og anvendelsesområde. Forståelsen af formålene er vigtig for fortolkningen af reglerne, og analysen af, hvordan man kan afværge en potentiel konflikt mellem udbudsreglerne og konkurrencereglerne, vil finde støtte i reglernes målsætninger. Det konstateres, at reglerne om offentlige indkøb og konkurrencereglerne deler formålet med at fremme det indre marked.

De retlige rammer for samarbejde er afdækket i kapitel 5 og kapitel 6. Kapitel 5 indeholder en analyse af de retlige rammer for de tre samarbejdstyper ud fra et udbudsperspektiv. Derudover er der også en drøftelse af den hemmelige udelukkelsesgrund i Udbudsdirektivets artikel 57, stk. 4, litra d. Det konstateres, at det overordnede princip er, at ordregiver skal respektere de økonomiske aktørers ret til at samarbejde med henblik på at afgive tilbud. Samlet set giver udbudsdirektivet en fleksibel tilgang til samarbejde mellem økonomiske aktører, men alligevel er der begrænsninger for anvendelsen af de tre samarbejdstyper. Desuden er der identificeret en række usikkerheder med hensyn til de rammer, der er fastsat af udbudsdirektivet, når det kommer til anvendelsen af de tre samarbejdstyper. I kapitlet omtales endvidere en vurdering af anvendelsen af den samarbejdsrelaterede udelukkelsesgrund, hvor det konstateres, at ordregiveren har en bred skønsmargin med hensyn til, om en tilbudsgiver skal udelukkes fra udbudsproceduren. Selvom den samarbejdsrelaterede udelukkelse er formuleret anderledes end artikel 101, stk. 1, TEUF, findes det i forbindelse med fortolkningen og anvendelsen af de samarbejdsrelaterede udelukkelsesgrunde, at det er rimeligt at foretage vurderingen i lyset af forbuddet af konkurrencebegrænsende aftaler.

Afslutningsvis giver kapitel 7 og kapitel 8 en analyse af de identificerede gråzoner mellem udbudsretten og konkurrenceretten, efterfulgt af afhandlingens konklusion. Kapitel 7 identificerer og diskuterer, om der er situationer med uoverensstemmelse i lovligheden mellem de tre udbudsretlige og konkurrenceretlige samarbejdstyper. For hver type samarbejde fremhæves én situation, hvor samarbejdet er lovlige i henhold til udbudsretten, men potentielt ikke under konkurrenceretten. Det gøres gældende, at EU's retssystem skal fremstå sammenhængende for at kunne betragtes som et retssystem, og at sammenhæng i EU-retten derfor vil blive betragtet som en forudsætning for EU's retssystem. Derfor er der behov for sammenhæng mellem EU-reglerne om offentlige udbud, som afhandlingen identificerer et fundament for mellem de to regelsæt. Derudover fremsættes der tre forslag til, hvordan man kan forene en potentiel konflikt mellem udbudsretten og konkurrenceretten. Kapitel 8 omhandler afhandlingens resultater, forslag og endelige konklusioner. Derfor vil det være et resumé af alle afhandlingens konklusioner og resultater sammen med de endelige bemærkninger.

Hovedkonklusionen er, at den nuværende retstilstand vedrørende samarbejde mellem økonomiske aktører, der konkurrerer om offentlige kontrakter, indeholder situationer, hvor det ikke er klart, om et samarbejde er lovligt eller ej. For at sikre retssikkerheden er der behov for en forbedret og mere sammenhængende vejledning om de retlige rammer for samarbejdet mellem økonomiske aktører, når de afgiver tilbud i forbindelse med offentlige udbud. Formålet med denne PhD afhandling er at give hjælp i denne retning.

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