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The Failure of the Market Economy Investor Principle

An Assessment of the Incompatibility between the MEIP and Environmental Protection in
Public Procurement Law

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Abbreviations

AG:	Advocate General
CJEU:	Court of Justice of the European Union, meaning the ECJ, the GC and the CST
CST:	Civil Service Tribunal
The 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 Text with EEA relevance
ECJ or the Court:	European Court of Justice
EU:	European Union
GC:	General Court
MEIP:	Market economy investor principle
MECP:	Market economy creditor principle
PMPT:	Private market purchaser test
TEU:	Treaty on the European Union
TFEU:	Treaty on the Functioning of the European Union

1. The Problematic Evolution of Environmental Protection in EU Law

A State has several responsibilities and functions. Some of the responsibilities have been framed by the State itself, and some have been imposed on the Member State by the European Union (hereinafter the EU). One responsibility that first began as something that the EU did not pay much attention to was environmental protection and sustainable development, and how public procurement procedures could be used in order to carry out environmentally friendly measures in practice. This changed over time and as the EU 2020 goals were introduced, it became clear that environmental protection, sustainable development and “green procurement” have evolved into one of the major focuses of EU. This can also be seen in the reform of the public procurement directives. In 2014, the EU adopted three new directives on public procurement.¹ The new directives imposes, amongst other things, a horizontal clause saying that in the performance of public contracts enterprises have to comply with the applicable environmental obligations stemming from EU, international and national law.² In other words, Member States are obliged to take environmental considerations into account when it is carrying out a public procurement procedure. However, this has forced the EU and its Member States to face many difficult questions. One of them is how green clauses, that is to say environmental requirements, could be used as award criteria in a public procurement procedure without this being regarded as state aid, as the use of such green clauses imposes additional costs on the tenderer,³ which means that the winning tenderer will be granted a benefit through the use of the environmental award criterion that

¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance, OJ L 94, 28.3.2014, p. 1–64; 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 Text with EEA relevance, OJ L 94, 28.3.2014, p. 65–242; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance, OJ L 94, 28.3.2014, p. 243–374.

² The obligation is found in point 91 in the preamble to Directive 2014/24/EU, as well as in Article 18.2 in the same Directive, which lists the principles of procurement and where it is stated that “Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X”.

³ Vedder, H. (2003). *Competition Law and Environmental Protection in Europe; Towards Sustainability?* Groningen: Europa Law Publishing. Pages 45-46.

should not have been used by a private market investor. Hence, the measure will not pass the market economy investor principle (further referred to as the MEIP).⁴

The MEIP is used in order to decide if a benefit or advantage in the meaning of Article 107 (1) TFEU is at hand. The principle states that if the Member State acts in the same way as a private investor would have done, the prohibition of state aid in Article 107 (1) TFEU is not applicable. In other words, the question is whether the benefit or advantage could have been obtained under normal market conditions, and if it could not, state aid is at hand. Hence, only a micro-economic approach is used in order to decide if a benefit or advantage is at hand, whilst macro-economic aspects, such as environmental protection, are not to be taken into consideration when carrying out the assessment under the MEIP. This creates a problem when it comes to green clauses in a public procurement procedure due to the fact that the Member State always has to consider aspects of macro-economic nature, such as environmental protection, in everything that they do, especially after the introduction of the new directives on public procurement. This applies specifically to the area of public procurement, as the aim of any purchase through a public procurement procedure is to satisfy public needs in one way or another.⁵ Thus, it is rather questionable if the MEIP actually is a suitable test that should be used in order to decide if a measure such as green clauses should be regarded as state aid, as the design of the MEIP that is used today automatically classifies measures as such as a benefit or advantage. In other words, the MEIP makes it hard (or even impossible) for the Member States to use environmental requirements as award criteria in a public tender procedure, because environmental considerations is a macro-economic aspect that will not be included in the MEIP. Hence, the use of green clauses will always fail the test, which is problematic as the bigger picture shows that environmental considerations have to be taken into account by the Member States as well as the EU itself. Thus, the MEIP has to be amended.

1.1 Aim

The aim is to examine the incompatibility of the use of green clauses in a public procurement procedure with the MEIP, and thereafter present a new solution that could perhaps be an alternative to the MEIP, as the green clauses cannot be used in a public procurement without

⁴ See also Doern, A. (2004). *The Interaction Between EC Rules on Public Procurement and State Aid*. Public Procurement Law Review. 3.97. Pages 10-14.

⁵ Hancher, L., Ottervanger, T., and Jan Slot, P. (2006). *EC State Aids*. (Third Edition). London: Sweet & Maxwell. Page 13.

being regarded as a benefit or advantage because of the design of the MEIP today. This will be done by firstly analysing how the MEIP works today, and secondly how the conflict between environmental protection and competition is handled in other areas, and levels, of EU law.

1.2 Thesis Statement

The MEIP is not a suitable test to apply on cases concerning green clauses used as award criteria in a public procurement procedure, as it is not compatible with the environmental obligations deriving from EU legislation. The MEIP is hence out of date and has to be replaced by an alternative method for deciding when a measure constitutes a benefit or advantage in the meaning of Article 107 (1) TFEU, in order to be able to achieve both the goals of free competition and environmental protection at the same time.

1.3 Theory and Method

The materials that have been used are acknowledged legal works such as relevant Treaties and directives, judgments from the CJEU, and recognised doctrines and articles by legal scholars. To begin with, as the thesis focuses on EU level, only sources that can be used for the EU in general have been processed. In order to acquire the background information needed, several textbooks within the fields of state aid, public procurement, environmental law as well as competition and EU law in general have been used. In addition, other relevant legal sources such as directives, communications, case law from the CJEU and other work provided from the different EU institutions for guidance purposes have also been used to collect necessary background information.

In order to present a new test for determining when a benefit or advantage is at hand, the incompatibility and difficulties between the MEIP and the use of green criteria in a public procurement procedure have to be analysed. Thus, a legal dogmatic method has been used in order to critically analyse the MEIP; by examining how the legal framework looks today, the flaws and problems in it will be easy to detect when putting it in relation to the environmental obligations. A legal dogmatic method in this context thus means a study of how the MEIP works in relation to environmental protection, which is done by looking at the legal framework consisting of Treaties, case law, communications, guidelines as well as legal literature. The legal dogmatic method is a common method used in order to analyse and interpret the legal sources. By using the legal dogmatic method, the problem (or differently put, the legal question) will disclose itself, and in this specific case it will also be clear that the

legal framework is dysfunctional and thereby how the question at hand is, or rather is not, handled in the legal sources. A free argumentation has been used throughout the whole thesis, meaning that depending on the matter that is being processed, an interpretation that is suitable for the matter has been used. For instance, when it has been necessary to look at the underlying aim of a certain provision or principle, a teleological interpretation has been used, or when there has been no guidance found on the question at hand, analogies from closely related areas of law have been done.

Throughout the analysing chapters, a *de lege ferenda* approach has also been used. This means, *inter alia*, that the analyses include other existing, yet not practiced, solutions to the problem with the MEIP. In addition, other areas of law have been looked upon in order to find guidance on how the problem should or could be handled; hence, various legal sources have been examined in order to see how the MEIP should be designed. From this, an assessment and a discussion of the suitability of those alternative solutions follows, where mostly a teleological interpretation has been applied due to the fact that it is through the objective and aim of the Union that environmental protection can be integrated to competition law.

In other words, from the examination of the legal system today, a result in the form of different problems and flaws with the MEIP was found. It has then been examined whether there are any other proposals or other areas of law that could provide guidance in the question at hand. Finally, a new test has been developed in a way so that it should remedy those problems, or in other words, the new test was designed in a way that it should be, thus a *de lege ferenda* approach was used here as well, taking into account the guidance found in the analyses done.

Due to the economical nature of the subject, economic analyses of the law were needed. Hence, the classical free market economic theory as well as microeconomic theory were applied where it was required, for instance when determining what the components of the MEIP actually are as well as when the new test was taken form. Here, the classical free market theory refers to the theory once formed by Adam Smith, and specifically regarding the questions that will be touched upon below, the classical free market economic theory has provided two important propositions that were held throughout the thesis. Firstly, a market functions best where it can regulate itself and hence the state should only intervene where

there is a public need or market failure.⁶ Secondly, the actors on the market that supply what the consumers demand will remain on the market whilst the uncompetitive actors will be removed from the market.⁷ As to what concerns the microeconomic theory, the statement stemming from the theory saying that companies will allocate their limited resources in a way that it will generate the maximum profit possible in return will also be used as an assumption in the following.⁸ Consequently, not all components in the mentioned theories have been used in the thesis, but instead only the factors necessary in order to solve the questions at hand have been included in the work done.

1.4 Delimitations

As mentioned, the thesis will only examine how the question is, or should be, handled at EU level and therefore there will not be any information that is linked to, or only relevant for, one specific Member State.

Due to the basic fact that none of the existing exceptions to the prohibition of state aid are applicable on the measure concerned in this thesis, the exceptions will neither be presented nor further analysed and discussed. This includes all exceptions there is, namely Article 106 (2) TFEU, Article 107 (2) and (3) TFEU, the De Minimis Regulation⁹ and the General Block Exemption Regulation (the GBER).¹⁰ Article 106 (2) TFEU is only an exemption from the state aid rules when the measure at hand constitutes a service of general economic interest (henceforth referred to as an SG EI), which the thesis does not touch upon. To be more specific, if the measure is an SG EI, it will be compatible with the internal market, hence with the state aid rules as well. Regarding Article 107 (2) TFEU, none of the situations listed in the provision concerns environmental protection and it is therefore not applicable. On the other hand, Article 107 (3) (c) TFEU actually covers aid for environmental protection, however the exemption does not cover the situation of the specific measure that shall be examined in the

⁶ See Hollander, S. (1987). *Classical Economics*. Oxford: Basil Blackwell. Pages 27-29; Hultkrantz, L and Söderström, H. T. (2011). *Marknad & Politik*. (Ninth Edition). Stockholm: SNS Förlag. Page 256.

⁷ *ibid*, Hollander, S. Pages 27-29 and 60f.

⁸ Perloff, J.M. (2008). *Microeconomics – Theory and Applications with Calculus*. (First Edition). Boston: Pearson/Addison Wesley. Page 1f.

⁹ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid Text with EEA relevance, OJ L 352, 24.12.2013, p. 1-8.

¹⁰ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, OJ L 187, 26.6.2014, p. 1-78.

following. Instead, the Article covers, *inter alia*, aid for waste management, aid involved in tradable permit schemes and aid for environmental protection beyond EU standards;¹¹ it could of course be the case that an award criterion actually aims to improve the environment to a greater extent than what is required by EU, however as the thesis shall cover environmental award criteria as such, it shall not be discussed or taken into account here. Thus, the starting point for the thesis is that Article 107 (3) (c) TFEU is not applicable, and shall therefore not be discussed further. As to what regards the De Minimis Regulation, the aid is only exempted from the state aid rules if it amounts to less than EUR 200 000 over three years or, if the aid has the form of a guarantee, EUR 1,5 million, and since there is no such limit in this thesis, the regulation will not be taken into consideration. It should also be mentioned that the abovementioned exemptions are not derogations from the notification requirement in Article 108 (3) TFEU, which states that all measures must be notified to the Commission before they are implemented. This also implies that the Member States cannot carry out the measure at hand because of the standstill obligation that also follows from Article 108 (3) TFEU. In addition, there is the GBER, which is an automatic exemption from Article 108 (3) TFEU. However, due to the requirement that the measure should have an incentive effect in Article 6 of the GBER, it is not applicable on the measure that is examined here.

The regime of public procurement covers a broad range of questions, hence everything will not, and should not, be touched upon in this thesis. The main point of interest regarding public procurement is the system of award criteria, thus only the relevant parts that cover the award criteria will be used. In addition, only Directive 2014/24/EU will be used, as this is the relevant directive in this respect; the old directives will not have any effect after April 2016 and it would therefore be of limited interest to include them in the thesis, hence they will not be discussed to a greater extent than to serve as a comparison to the new directives. In addition, the two other directives that are included in the 2014 public procurement reform, namely Directive 2014/23/EU and Directive 2014/25/EU, contain the same rules as Directive 2014/24/EU, however the rules are not as strict as in the Directive 2014/24/EU. Thus, if a measure is compatible with Directive 2014/24/EU, it will be compatible with the other two directives as well. As a result, only Directive 2014/24/EU shall be used (which from now on will be referred to as the Directive). As the awarding process for the open and the restricted

¹¹ For a full discussion on the matter, please see Bacon, K. (2009). *European Community Law of State Aid*. Oxford: Oxford University Press Inc.. Pages 182-190.

procedures looks the same, there is no need to separate the two. Thus, the benchmark will be both an open and a restricted procedure in the following.

1.5 Arrangement of the Material

As will be shown below, the CJEU has settled that the MEIP has to be used when assessing if state aid is at hand, at the same time as the EU has imposed an obligation for the Member States to take environmental aspects into consideration when carrying out a tender procedure. However, the two obligations are extremely hard to achieve at the same time, as the MEIP cannot include environmental aspects in the way that the principle is designed today. Hence, an amendment or perhaps a complete removal of the principle is required in order to integrate the two areas to the fullest. Due to the complexity of the question, relevant background information is needed, which will be presented in Chapter 2. Chapter 3 will then analyse what changes that have to be done, by looking at the actual problem of the MEIP today. Furthermore, in order to understand the width of the problem of environmental protection's incompatibility with the strong principle of free competition, an analysis of the two areas and the conflict between them will be done in Chapter 4, where it will also be examined if any guidance can be found from how the problem is handled within the areas of state aid and public procurement, within competition law in general as well as on Treaty level. Chapter 5 will then present the essential conclusions that can be drawn from the foregoing chapters, hence the chapter has partly a pedagogical aim, to summarise the conclusions that has been done throughout the chapters for the reader, and partly the aim of introducing the underlying reason to why the MEIP has to be replaced. The replacement of the MEIP will be presented in Chapter 6, which will also include an examination of what the potential problems may be with the new principle. Last but not least, Chapter 7 aims to string everything together in a final conclusion.

2. The Trilateral Problem – Background Information

As the thesis aims to propose a solution to the problems that derive from the use of the MEIP on green clauses in a public procurement procedure, it will touch upon two major regimes within EU competition law, namely state aid and public procurement. In addition, a third regime in the form of EU environmental law, or more specifically the principle of sustainable development, will have to be taken into account in order to settle the problem. The three regimes are complex when looked upon one by one; hence a problem that contains all three regimes will inevitably be confusing and ambiguous. It is therefore necessary to provide the reader with an overview of the three regimes, including the key aspects of each one, and finally to explain how they interact (or maybe in this specific case, do not interact) with each other.

2.1 State Aid

In 2012, the rules on state aid were modernised in order to focus the scope of the rules on the enforcement of the common interests of the EU, as well as to target market failures and to improve the procedures connected to state aid control.¹² The rules on state aid are found in Articles 107 to 109 TFEU, where the central prohibition is found in Article 107 (1) TFEU. As will be described further below, measures that constitute state aid can affect the cross-border trade to a great extent.

2.1.1 Purpose of the EU state aid regime

The EU was once established primarily in order to create an internal market. Hence, the one single objective that the EU and almost all its activities are based upon is free competition. The rules on state aid found in the TFEU aim to remove the possibility of state interference, as this causes sometimes severe distortion of competition.¹³ The control and monitoring of state aid by the Commission and the CJEU has been alleged to only focus on the purpose of protecting the internal market and competition from measures that are against the common interest of the EU, however the purpose of the regulations is also to pursue different goals set by the EU. For example, this can be seen in the rules and regulations that the Commission uses in order to evaluate different types of state aid.¹⁴ Thus, the purpose of the regulation of

¹² Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions EU State Aid Modernisation (SAM) (COM/2012/0209 final of 8.5.2012).

¹³ Heidenhain, M. (2010). *European State Aid Law: A Handbook*. Munich: Beck. Page 1.

¹⁴ *ibid*, pages 4-5.

state aid is to control the Member States' interference with competition, in order to pursue common goals set by the EU.

2.1.2 Article 107 (1) TFEU

According to Article 107 (1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. The CJEU has not ruled upon a consistent definition of what the exact conditions for state aid under Article 107 (1) TFEU are, and the Court usually uses the actual wording of the Article.¹⁵ This has resulted in different interpretations in the legal literature. One of the most common usages of the conditions proposes that there are four cumulative conditions, which will also be used in the following:

1. The aid has to confer an economic advantage or benefit on the undertaking;
2. The aid has to be granted by the State or through State resources;
3. The aid has to be selective; and
4. The aid must distort or threaten to distort competition and affect intrastate trade.¹⁶

It should also be pointed out that the ECJ has established that the scope of Article 107 (1) TFEU does not only cover pure grants or subsidies, but all measures that are likely to directly or indirectly favour certain economic operators shall be regarded as state aid within the meaning of the Article.¹⁷ Thus, the assessment whether a measure constitutes state aid focuses on the effects of the measure at hand, and no regard is taken to whether the purpose or aim of the measure conducted by the Member State was to favour a certain undertaking or not.¹⁸

Even though it is only the first criterion that concerns the aim and purpose of this thesis due to the fact that the MEIP is used to determine if the first criterion is fulfilled or not, all four criteria will be explained and discussed further in order to provide a complete picture of the

¹⁵ Bacon, K. (2009). *European Community Law of State Aid*. Oxford: Oxford University Press Inc.. Page 24

¹⁶ *ibid.* See also the case *Altmark Trans GmbH*, C-280/00, ECLI:EU:C:2003:13 para. 74-75; *Belgium v Commission (Tubemeuse)*, C-142/87, ECLI:EU:C:1990:125, para. 25; *Spain v Commission*, Joined Cases C-278/92 to C-280/92, ECLI:EU:C:1994:325, para. 20; and *France v Commission*, C-482/99, ECLI:EU:2002:294, para. 68.

¹⁷ *Altmark Trans GmbH*, C-280/00, ECLI:EU:C:2003:13 para. 84.

¹⁸ *French Republic v European Commission*, C-559/12 P, ECLI:EU:C:2014:217, para. 95.

state aid scheme for the reader.

(i) “The aid has to confer an economic advantage or benefit on the undertaking”

Due to its complex assessment, the first criterion has been vividly discussed and has also given rise to an extensive case law from the CJEU. As all measures have to be analysed in terms of their effects, measures other than straightforward subsidies and grants sometimes cause major problems when determining if a benefit or advantage is at hand, or in other words if an undertaking has been favoured.¹⁹ However, it is clear that if an undertaking receives a benefit it would not have obtained under normal market conditions, the first criterion of the Article is fulfilled.²⁰ In order to determine if this is the case, the CJEU has developed a test called the market economy investor principle (the MEIP).²¹ The MEIP has been used by the CJEU since the 1980’s in order to determine whether an advantage or benefit has been conferred on an undertaking,²² however it was not until the recent case *European Commission vs Électricité de France (EDF)*²³ that the Court ruled that the MEIP is a test that is required to be used by the Commission when determining if the first criterion of Article 107 (1) TFEU is fulfilled. The Court stated:

*[...] contrary to the assertions made by the Commission and the EFTA Surveillance Authority, the private investor test is not an exception which applies only if a Member State so requests, in situations characterised by all the constituent elements of State aid incompatible with the common market, as laid down in [Article 107(1) TFEU] [...] where it is applicable, **that test is among the factors which the Commission is required to take into account for the purposes of establishing the existence of such aid**” (emphasis added).²⁴*

The test examines if the Member State acts in the same way as a private investor would have done, and if it has, state aid is not at hand and Article 107 (1) TFEU is not applicable. In other words, the test looks at whether the benefit or advantage received by an undertaking would

¹⁹ Bacon, K. (2009). *European Community Law of State Aid*. Oxford: Oxford University Press Inc.. Page 29.

²⁰ AG Jacobs in *Déménagements-Manutention Transport SA (DMT)*, C-256/97, ECLI:EU:C:1998:436, para. 31.

²¹ There are several names used to describe the test, however the name “MEIP” is used here.

²² *La Poste*, C-39/94, ECLI:EU:C:1996:285, para. 60; *Belgium v Commission*, Case 234/84, ECLI:EU:C:1986:302, para. 13; *Belgium v Commission*, Case 40/85, ECLI:EU:C:1986:305, para. 13; and *Van der Kooy*, Joined cases 67, 68 and 70/85, ECLI:EU:C:1988:38, para. 28.

²³ *European Commission v Électricité de France (EDF)*, C-124/10 P, ECLI:EU:C:2012:318, para. 103-104.

²⁴ *ibid*, para. 103.

have been obtained from a market investor at normal market conditions. It is therefore of great importance to separate when the State acts as a public authority, which it does for instance when it adopts new legislation, collect taxes or promotes social security in different forms, and when the State acts as an investor, because there will not be a ‘normal market’ where the State acts as a public authority.²⁵ Put differently, only micro-economic aspects are to be taken into account when applying the MEIP. Micro-economic aspects include commercial considerations only, where the primary objective is to make profit,²⁶ hence “leaving aside all social, regional-policy and sectorial considerations”.²⁷ Thus, the starting point is that a private investor would not consider environmental consideration when carrying out its business. On the contrary, macro-economic aspects take account to the economy as a whole, hence other policies such as social and environmental aspects are being included and prioritised. Thus, when the MEIP is applied, “the State may not rely on social costs such as the cost of redundancies and payment of unemployment benefits, which do not devolve on the State as a shareholder but are incurred by the State as a public authority”²⁸. The concept of micro- versus macro-economic aspects will be discussed further in Chapter 3 below.

(ii) “The aid has to be granted by the State or through State resources”

The ECJ has held that cases concerning aid that has been granted directly by the State and cases where the aid has been granted by public or private bodies that have been established in any way by the state should not be separated.²⁹ In other words, any regional or local authority that is directly or indirectly in connection with the State falls within the scope of the concept of “state”.³⁰ In addition, the aid has to be imputable to the State in order for the criterion to be fulfilled. This is a simple assessment when the aid derives from for example legislation, since it is only the State that has the legislative power; hence it is imputable to the State. However, when the measure has been granted through for instance a company, which is publically owned, the question is not as easy. The Court has established that decisions that are taken in

²⁵ Bacon, K. (2009). *European Community Law of State Aid*. Oxford: Oxford University Press Inc.. Page 30.

²⁶ *Linde*, T-98/00, ECLI:EU:T:2002:248, para. 49; *Westdeutsche Landesbank v Commission*, Joined cases T-228/99 and T-233/99, ECLI:EU:T:2003:57 para. 245.

²⁷ *Kingdom of Belgium v Commission of the European Communities*, C-234/84, ECLI:EU:C:1986:302, para. 14.

²⁸ Bacon, K. (2009). *European Community Law of State Aid*. Oxford: Oxford University Press Inc.. Page 45; *Commission v Italy*, Case 118/85, ECLI:EU:C:1987:283, para. 7.

²⁹ *Steinike & Weinlig*, Case 78/76, ECLI:EU:C:1977:52, para. 21; *Commission of the European Communities v French Republic*, Case 290/83, ECLI:EU:C:1985:37, para. 14.

³⁰ *Federal Republic of Germany v Commission of the European Communities*, Case 248/84, ECLI:EU:C:1987:436, para. 17.

the day-to-day business of a public undertaking cannot be regarded as state aid within the meaning of Article 107 (1) TFEU unless interference by the public authorities can be shown.³¹ Thus, the public authority has to be involved in the adoption of the measure in order for the criterion to be met. Due to the difficulties that the criterion has caused, the CJEU has presented extensive case law that discusses where the line should be drawn and how the assessment is carried out in different cases. Some factors that the CJEU has looked upon when examining if the aid is imputable to the State concerns the way the undertaking was established³² and its legal status,³³ if the measure was subject to the approval from the public authorities³⁴ and to what extent the undertaking is under supervision of a public authority.³⁵

(iii) “The aid has to be selective”

As regards the selectivity of the aid, it is found in the wording of Article 107 (1) TFEU, namely “favour certain undertakings”. In order for state aid to be at hand, the measure has to be selective in nature and only address one or a fixed group of undertakings. The selectivity criterion is probably the hardest one to apply in practice, as not all measures that favour certain undertakings will fall within the scope of Article 107 (1) TFEU.³⁶ Bacon suggests that this is caused by two different reasons. Firstly, he states that the fact that a measure will only favour certain undertakings may be *an incidental effect of a general measure* that is in fact applied on all undertakings. Secondly, the variety in treatment of an undertaking may be justified by *the nature and scheme of the system*.³⁷ This means that the nature of a measure will sometimes treat undertakings differently, simply because that is how the system works. For example, in a tax system, the taxpayers whom pay a higher rate due to their higher income cannot claim that the taxpayers whom are paying taxes at a lower rate are benefitting from state aid, as this is the nature of the system.³⁸

³¹ *France v Commission (“Stardust Marine”)*, C-482/99, ECLI:EU:C:2002:294; see also AG Jacobs opinion in the same case ECLI:EU:C:2001:685, para. 55.

³² See for example Decision 2006/513/EC *Berlin-Brandenburg DTT*, para. 53.

³³ *France v Commission (“Stardust Marine”)*, C-482/99, ECLI:EU:C:2002:294, para. 56.

³⁴ *ibid.*

³⁵ Decision 2006/513/EC *Berlin-Brandenburg DTT*, para. 53; Bacon, K. (2009). *European Community Law of State Aid*. Oxford: Oxford University Press Inc.. Page 78.

³⁶ *ibid.*, Bacon, K. Page 80.

³⁷ *ibid.*, Bacon, K. Page 90; *Italy v Commission*, Case 173/73, ECLI:EU:C:1974:71, para. 15.

³⁸ *ibid.*, Bacon, K. Page 90.

(iv) “The aid must distort or threaten to distort competition and affect intrastate trade”

The final criterion of Article 107 (1) TFEU is actually two conditions that are often considered to be related and should therefore be assessed together.³⁹ The key elements of the fourth criterion is firstly to determine whether the competition has been distorted and secondly if intrastate trade have been affected, which is done by assessing if the measure has strengthened the position of the recipient undertaking in relation to its competitors.⁴⁰ However, no regard is taken to the weakened position of the competitors, but instead it is enough to show that the position of the recipient undertaking has been strengthened in order for the criterion to be fulfilled.⁴¹ This is because, as can be understood by the wording of the criterion, it is enough that the distortion of competition is *potential*; no actual effect is required.

2.2 Public Procurement

More than 250 000 public entities in the EU spend approximately 18% of its GDP on purchasing services, goods and works each year.⁴² Hence, it is clear that the value of these contracts are high and if a public procurement procedure is not carried out in accordance with EU law, it may have devastating effects on the internal market. One of the core values of the EU is the internal market, and all businesses, no matter where in the EU they are established, have the right to participate in tender procedures in all Member States. In order to maintain a level playing field, the EU has introduced rules on public procurement in the form of directives. The directives cover a large spectrum of rules, which apply to different stages in a tender procedure, as well as objectives and principles that the Member States have to follow when a public procurement procedure is carried out. One of the most difficult things that are expected from the Member States in the directives is to determine what criteria that can be used in the different stages of the tender procedure without it violating for instance the state aid rules. As the EU institutions have not yet provided enough guidance on the matter, it has caused a lot of confusion and discussion among the Member States and the EU institutions. Thus, the following sections aim at clarifying the area of public procurement that concern the

³⁹ *ibid*, Bacon, K. Page 93; *Mauro Alzetta v Commission*, Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, ECLI:EU:T:151, para. 14.

⁴⁰ *Philip Morris*, Case 730/79, ECLI:EU:C:1980:209, para. 11; *Kingdom of Belgium and Forum 187 ASBL*, Joined cases C-182/03 and C-217/03, ECLI:EU:C:2006:416, para. 131.

⁴¹ AG Darmon in *Firma Sloman Neptun Schiffahrts*, Joined cases C-72/91 and C-73/91, ECLI:EU:C:1992:139, para. 61.

⁴² Europa.eu. *Rules and Procedures*. Accessed 21st September 2015.

<http://europa.eu/youreurope/business/public-tenders/rules-procedures/index_en.htm>.

three different categories of criteria that are used in a public procurement procedure, as well as the background information regarding the key principles used in public procurement procedures by the EU and its Member States.

2.2.1 The main purpose and principles of EU public procurement law

The main goal of regulating public procurement procedures is to remove obstacles to the free movement of goods and services, or in other words to enhance the internal market and fair competition.⁴³ All companies within the borders of the EU should be able to compete on the same conditions in order to win a public contract through a public procurement procedure. In order to achieve the main goal, the institutions of the EU have established five primary principles that have to be followed when conducting a public tender procedure, which are found in Article 36 in the Directive:

1. Equal treatment
2. Transparency
3. Non-discrimination
4. Proportionality
5. Mutual recognition

However, not all of the abovementioned objectives can be achieved at the same time, and not all of them are equally desirable.⁴⁴ When looking at the CJEU's case law as well as the dominant opinion in the doctrine, it is clear that equal treatment and transparency are the most important ones. However, Member States have used public procurement procedures as a tool to pursue non-economic goals, such as environmental, social, labour-keeping policies etc. (henceforth referred to as secondary criteria) in addition to the main goals stated above, which have given rise to different problems. The secondary criteria distort competition, and thereby the main objective of public procurement rules is jeopardised, due to the fact that in many cases the secondary criterion at hand is completely unrelated to the main goals of public procurement and decreases the effectiveness of the procedure. Hence, it has been submitted in the doctrines and articles that secondary criteria, such as environmental protection, should be

⁴³ Sánchez Graells, A. (2011). *Public Procurement and the EU Competition Rules*. United Kingdom: Hart Publishing. Page 81.

⁴⁴ *ibid*, page 98.

abandoned or separated from public procurement procedures and be left to other areas of law (such as tax, labour and environmental law).⁴⁵ As Albert Sánchez Graells puts it:

*“If it is correct to assume that both competition law and public procurement rules are primarily concerned with economic efficiency (as is understood here), and that undistorted competition is their shared and basic goal, competition criteria should be given preference when competition clashes with other objectives. Therefore, substantial revision of the pursuit of secondary policies in public procurement seems to be a must for a more competition-oriented procurement”.*⁴⁶

2.2.2 The new directives

It should also be mentioned that the EU has adopted new directives on public procurement in 2014, including the Directive together with two other directives, which replaces the old directives⁴⁷ when the implementation is complete.⁴⁸ Together with the launching of the new Directive, a new legal status has followed; the new Directive actually imposes a legal obligation for the Member States to take environmental aspects into consideration when carrying out a tender procedure.

2.2.2.1 Effects of the new Directive

The Directive contains a great deal of novelties, including several provisions that aim at using public procurement procedures as an instrument to implement environmental policies. For instance, environmental aspects can be used as an award criterion since it, as long as it is linked to the subject matter of the contract,⁴⁹ falls within the meaning of “the most economically advantageous tender” in Article 67 (2) of the Directive.⁵⁰ In addition, Member States have to take appropriate measures when a procurement procedure is carried out in order to comply with the provisions and obligations that concern, *inter alia*, environmental

⁴⁵ Ibid, pages 97-100 and pages 110f.

⁴⁶ *ibid*, page 111.

⁴⁷ Directives 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1–113; and 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.

⁴⁸ The implementation is to be completed by the Member States in April 2016 at the latest, see Article 90 (1) in Directive 2014/24/EU.

⁴⁹ The subject matter of the contract refers to the performance specifications.

⁵⁰ Which has been ruled on by the ECJ in *Concordia*, C-513/99, ECLI:EU:C:2002:495, para. 64.

protection.⁵¹ In other words, the new Directive imposes a responsibility on the Member States to take environmental considerations into account when a public procurement procedure is executed, in comparison to the old directives, which only gave the possibility for Member States to use environmental considerations in the awarding process.⁵² The Commission has explained the impact of the new Directive in the environmental area through a published factsheet, where the following changes are the main ones:

- “In the performance of public contracts enterprises have to comply with the applicable environmental obligations stemming from EU, international and national law.
- An enterprise which does not respect these environmental obligations can be excluded from the tender procedure.
- The enterprise that has submitted the best tender may be not awarded the contract if the tender does not comply with these environmental obligations.
- A tender has to be rejected where it is abnormally low in relation to the works, supplies or services because it does not comply with these environmental obligations”.⁵³

2.2.3 The different criteria

As mentioned in the introduction to this section, one of the hardest things for the Member States is to determine what criteria that can be used at what stage of the procurement procedure. Also, there is confusion and therefore an on-going debate regarding what terms that should be used, in addition to the meanings of them. The terms are not used in a coherent way, and thus the following division and definitions of the different criteria can be discussed. Nevertheless, they will be used in following.

2.2.3.1 Qualification criteria

Firstly, there are criteria used at the qualification stage, which are criteria that determine which economic operator that may participate in the tender procedure and move on to the next stage. The contracting authority may only exclude an economic operator if any of the

⁵¹ See Article 18.2 in the Directive.

⁵² Europa.eu. *Environment – EU public procurement directives*. Accessed 29 September 2015. <http://ec.europa.eu/environment/gpp/eu_public_directives_en.htm>.

⁵³ Europa.eu. *Public Procurement Reform - Factsheet No. 7: Green Public Procurement*. Accessed 29 September 2015. <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/factsheets/fact-sheet-07-environmental_en.pdf>.

situations listed in Article 57 in the Directive is at hand, which includes for example a conviction for participation in a criminal organisation or where the economic operator is bankrupt. Article 57 includes both obligations for the Member States to exclude certain economic operators,⁵⁴ as well as cases where the Member States have the right to exclude an economic operator from participating at all.⁵⁵ Qualification criteria are not allowed to be used in order to exclude a group of undertakings; the purpose of qualification criteria is simply to exclude undertakings that the public authorities do not want to cooperate with, for example companies that are suspected of money laundering.

2.2.3.2 Award criteria

Secondly, there is award criteria, which are criteria that are used when assessing which tender that should be awarded the contract in the procurement procedure and are regulated in Article 67 in the Directive. Award criteria can be based on two different grounds, either the lowest price, or the most economically advantageous tender. The lowest price obviously only awards a tenderer based on the offered price, whilst the most economically advantageous tender considers various factors, such as price, running costs, product or work quality and cost-effectiveness. Award criteria are the relevant criteria that are to be examined in the light of the MEIP in the following, where the most economically advantageous tender will be focused upon.

In addition, award criteria may be divided into two different classes called primary criteria and secondary criteria. Primary criteria refer to the core objectives of the tender, which will always include the five primary goals of public procurement law stated above, but also those that are essential to perform and/or supply for the good or service that is being procured. On the contrary, secondary criteria are used to achieve certain goals pursued by the procuring entity, such as environmental or social goals.⁵⁶ Secondary criteria have to be linked to the subject matter of the contract, or in other words performance specifications, in order to be used, and do not have to be of purely economic factors.⁵⁷ Differently put, if the criterion used is considered to be a requirement that is necessary to perform the service/use the good in question, it is regarded as a normal market condition and will therefore be acceptable.

⁵⁴ The obligations are found in Article 57 (1) and (2) in the Directive.

⁵⁵ See Article 57 (4) in the Directive.

⁵⁶ Doern, A. (2004). *The Interaction Between EC Rules on Public Procurement and State Aid*. Public Procurement Law Review. 3.97. Pages 10-11.

⁵⁷ *Concordia*, C-513/99, ECLI:EU:C:2002:495 para. 59.

2.2.3.3 Contract conditions

Thirdly, the contracting authority can use contract conditions in order to pursue certain goals. Contracting conditions have to be published before the tender procedure begins in order for the potential participants to be aware of its existence.⁵⁸ Similarly to the other forms of criteria, secondary criteria used as contract conditions have to be used with caution, as they are not allowed to favour certain undertakings due to the fact that it will then fall within the scope of Article 107 (1) TFEU.⁵⁹

2.3 Environmental Protection

The EU has “positioned itself as the world leader in the field of international environmental policy”, and sustainable development is today on the top of the EU-agenda.⁶⁰ The focus on climate change and environmental protection within the EU has grown over the years. It has developed from the first stage in the early 1970’s when the environment was considered to be a task for each of the Member States separately and not for the EU as a whole. However, the topic entered the stage when the EU realised that the differences in environmental policies among the Member States could cause distortion of competition and thus the question evolved into what it is today, when the EU is the main force for improving the environment.⁶¹ What begun as a solution to another trade barrier has developed into one of the main objectives of the EU. Today, environmental protection is seen as an obligation, both for the EU as a whole and for the individual Member States, as the provisions in the Treaties, Article 3 (3) TEU and Article 11 TFEU, provide that environmental considerations have to be considered by the EU and therefore also by its Member States.⁶² One of the key concepts in EU environmental law is sustainable development, which the European Commission has defined as meeting the needs of present generations without jeopardizing the ability of future generations to meet

⁵⁸ *Gebroeders Beentjes BV v State of the Netherlands*, Case 31/87, ECLI:EU:C:1988:422, para. 36.

⁵⁹ *Commission v Kingdom of Denmark*, Joined cases C-72/91 and C-73/91, ECLI:EU:C:1993:97, para. 26.

⁶⁰ Kelemen, R.D. (2007). *Globalizing EU Environmental Regulation, Paper prepared for a conference on Europe and the Management of Globalization*. Princeton University. Page 1.

⁶¹ See Scott, J. (2012). *The Four Regimes of Environmental Policy in EU Environmental Protection – European Law and Governance*. United States: Oxford University Press for further information about the different stages of the development of the environmentally friendly EU that we have today. See also Hey, C. *EU Environmental Policies: A short history of the policy strategies*. Accessed 29 September 2015. <<http://home.cerge-ei.cz/richmanova/upces/Hey%20-%20EU%20Environmental%20Policies%20A%20Short%20History%20of%20the%20Policy%20Strategies.pdf>>; Johnson, S.P. and Corcelle, G. (1989). *The Environmental Policy of the European Communities*. London: Graham & Trotman.

⁶² For further information regarding the matter, please see section 4.1.

their own needs.⁶³ The concept is not limited to a desire to improve the environment, but instead Article 3 TEU lays down other factors that are considered to be a part of sustainable development as well, namely balanced economic growth and price stability, a highly competitive social market economy, employment and social progress as well as promotion of scientific and technological advance. Thus, in order to achieve sustainable development, factors of economical, social, environmental and technical nature have to be combined. This is important to understand, however as the thesis only concerns the use of *environmental* clauses, it will also be the one factor that will be focused on the most in the following.

The increasing interest and focus on environmental protection can easily be seen in for example the EU 2020 goals, where climate change is one out of the five headline targets that the EU as a whole has agreed to achieve,⁶⁴ but also in the way in which the EU is implementing the objective of environmental protection in other areas of law, such as in the new public procurement directives. In addition to what has been stated above regarding the environmental changes in the new Directive, the preamble to the same Directive states:

*“Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled ‘Europe 2020, a strategy for smart, sustainable and inclusive growth’ (‘Europe 2020 strategy for smart, sustainable and inclusive growth’), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds“.*⁶⁵

However, it can still be discussed how the obligation to take environmental considerations should be applied. Dhondt proposes that the concept of integration of the environmental protection requirement stemming from the Treaties can be argued to have two different approaches, namely a weak interpretation and a strong interpretation.⁶⁶ To begin with, the weak interpretation of the obligation suggests that the Member States as well as the EU itself have to make an assessment in the form of looking at the degree of compliance of the measure

⁶³ Ec.europa.eu. (17 September 2015). *Sustainable Development – Environment – European Commission..* Accessed 24 November 2015. <<http://ec.europa.eu/environment/eussd/>>.

⁶⁴ Europa.eu. *Europe 2020 Targets*. Accessed 29 September 2015. <http://ec.europa.eu/europe2020/targets/eu-targets/index_en.htm>.

⁶⁵ See point (2) in the preamble to Directive 2014/24/EU.

⁶⁶ Dhondt, N. (2003). *Integration of Environmental Protection into other EC Policies*. Groningen: Europa Law Publishing. Page 89f.

in relation to the environmental protection obligation. However, it is up to the institution that is carrying out the measure to decide what should be done with the result from the assessment. In other words, the institution would have a wide margin of discretion in the matter.⁶⁷ Secondly, it can be argued that a strong interpretation should be applied on the obligation to take environmental considerations into account. The strong interpretation would mean that environmental aspects are observed or complied with as other policies and activities are carried out. This means that other measures should be adopted in order to pursue the goal of environmental protection, which obviously leaves little or almost no margin of discretion for the institution that is carrying out the measure in comparison to if a weak interpretation is applied.⁶⁸ Dhondt means that it is the strong interpretation that is the most plausible one, as it corresponds to the aim of the principle of sustainable development, the case law of the CJEU as well as it follows how other secondary policies have been handled before.⁶⁹ However, it should be noted that a strong interpretation does not imply that environmental protection precedes all other objectives of the EU, which will be discussed further below.

2.4 The Conflict – When is this a Problem?

From the abovementioned, it is clear that the three regimes have different objectives and scopes. The regimes constantly overlap, and it is more or less inevitable that there will be tension and conflicts as they interact. The EU has decided to promote and work towards sustainable development and environmental protection, and has therefore implemented the objective in the different areas where they believe that the goal can be pursued and achieved. However, this causes a problem as the principle of the internal market and free competition is not purely compatible with the principle of environmental protection as the legal framework looks today.

It is clear that the areas of state aid and public procurement is characterised by protection of competition in the internal market, as the purpose of the rules is to maintain a level playing field in order for competition not to be distorted.⁷⁰ This can be seen, *inter alia*, when the MEIP is applied as it only embraces purely economic objectives. Environmental protection is

⁶⁷ *ibid.* page 90f.

⁶⁸ *ibid.* pages 93-98.

⁶⁹ Some of these reasons will be discussed further in section 4.2.3, however for a full examination and explanation, please see Dhondt, N. (2003). *Integration of Environmental Protection into other EC Policies*. Groningen: Europa Law Publishing. Pages 100-110.

⁷⁰ Heidenhain, M. (2010). *European State Aid Law: A Handbook*. Munich: Beck. Page 792.

not traditionally seen as an economic consideration, and it is therefore difficult (or perhaps impossible?) to integrate environmental policies within these areas. As has been provided for in the foregoing sections, the CJEU has settled that the MEIP has to be used when assessing if state aid is at hand, at the same time as the Union has imposed an obligation on the Member States to take environmental aspects into consideration when carrying out a tender procedure. The pursuit of environmental goals in a public procurement procedure may constitute state aid because the use of such will provide an advantage in the form of a higher compensation will be paid to the undertaking that meets the environmental criteria than what would have been paid to an undertaking that does not, which will distort competition and thereby fulfil all four criteria in Article 107 (1) TFEU.⁷¹ In other words, the use of green clauses in a public procurement procedure will constitute a benefit due to the fact that environmental aspects cannot be included in the MEIP. There has been several cases before the GC,⁷² covering situations as described, but there is not yet a ruling on the question of how secondary criteria in general should be handled in relation to the state aid rules. Thus, it is submitted that as environmental protection has evolved into an obligation that has to be considered, the MEIP is out of date and has to be amended in order for the Member States to be able to fulfil its environmental obligations.

The problem with the application of MEIP on cases concerning public procurement procedures can be demonstrated with a concrete, however somewhat simplistic, example. Suppose that a Member State decides to conduct a public tender for the purpose of purchasing 100.000 shirts that are to be used by the personnel working at the public hospital. The Member State further decides to use an award criterion with the weighting of 50%, relating to the total amount of recycled material used in the shirts, where 100% recycled material will give a total of 10 points. In addition, the Member State uses a price criterion weighting 50%, where the points awarded will be dependent on the price submitted by the other offers.⁷³ Thus, the tenderer that offers the lowest price will be given 10 points and the other tenderers

⁷¹ See Arrowsmith, S. and Kunzlik, P. (2009). *Social and Environmental Policies in EC Procurement Law*. Cambridge: Cambridge University Press. Page 249.

⁷² For example, see the case *BAI*, T-14/96, ECLI:EU:T:1999:12 (which is further discussed in section 3.1); *P&O*, Joined cases T-116/01 and T-118/01, ECLI:EU:T:2003:217; *Thermenhotel*, T-158/99, ECLI:EU:T2004:2.

⁷³ There are several problems to this method of awarding points of price which will not be discussed further here, however as it is the most common one it will be used in this example. See Practical Law. *PLC – Evaluation of tenders*. Accessed 10 November 2015.

<<http://uk.practicallaw.com/2-386-8761?service=publicsector#a406015>>.

will be given points in relation to that. Hence, the maximum points that can be awarded to an undertaking are 20 points.

When applying the MEIP, only commercial considerations can be regarded, hence no environmental aspects shall be included. In this case, it would mean that if the winning tenderer were awarded the most points based on the environmental criterion, this could be deemed to constitute state aid as the tenderer is given a benefit in the form of the award of the contract due to the use of the environmental award criterion. This can be exemplified with numbers; if there are two tenderers that both offer 100.000 shirts that have been produced from 100% recycled material, the price will be the decisive factor to which of the two that should be rewarded the contract because both of them will receive 10 points from the environmental criterion, thus the tenderer that offers the lowest price will receive the most points and therefore win the contract. On the other hand, if one of the offers comprises 100.000 shirts made of 100% recycled material to a price of 100.000 EUR, whilst the other tenderer can only offer shirts made of 20% recycled material, but to a price of 50.000 EUR, the first tenderer should be awarded the contract as it will get full points on the environmental criterion (100% = 10 points) and 5 points for the price (50.000 = 10 points, hence the doubled price equals to 5 points), whilst the second tenderer will only receive 2 points for the environmental criterion (20% out of 100% equals to one fifth, $10/5 = 2$) and 10 points for the price, due to the fact that it was the lowest tender. Up to this point, it might seem like everything is in order.

However, when looking at if the winning undertaking has been granted a benefit, it is clear that the measure cannot be seen as a normal commercial transaction due to the simple fact that it is based on environmental, or non-commercial, macro-economic factors that will result in the measure constituting a benefit or advantage in the meaning of Article 107 (1) TFEU.⁷⁴ This is because the MEIP does not allow other aspects than of micro-economic nature to be considered when assessing if a benefit or advantage is at hand. Thus, because it is the use of the environmental clause in the tender that is the reason to why tenderer number one is awarded the contract, the MEIP is failed and a benefit has been conferred upon the undertaking, meaning that the measure falls within the scope of Article 107 (1) TFEU (provided that the other three criteria are fulfilled as well). After looking at this example, it is

⁷⁴ *European Commission v Électricité de France (EDF)*, C-124/10 P, ECLI:EU:C:2012:318, para. 78-83.

not hard to understand that there is an actual problem with how the MEIP is designed today, which will also be relevant for every single tender procedure after the entry into force of the new Directive where there is an obligation to take environmental considerations. This is why the MEIP has to be amended.

3. The Dysfunctional Principle – a Closer Analysis of the MEIP

The MEIP is claimed to be the most suitable solution to use in order to decide whether a benefit or advantage has been conferred upon an undertaking in the legal literature, which is also the reason to why it is the test used by the CJEU. However, as mentioned above, the principle is not suitable on all cases that may arise within the area of state aid, which will be further discussed below. In addition, there are several problems with the MEIP in its current design, due to the simple fact that it was introduced at a time when the market and its objectives looked different than it does today.

3.1 The MEIP's (In)applicability on Public Procurement Cases

3.1.1 The role of the State in a public procurement procedure

The MEIP focuses on the cases where the State acts as an *investor*, which can be seen in the extensive case law from the Court. By the term investor, it is implied that only profit-seeking objectives can be regarded.⁷⁵ However, in a public procurement procedure, the State is not to be considered to be an investor, but rather a *purchaser*. A purchaser does not act in the same way as an investor does, due to the fact that the underlying reason for the activity will never be the same. An investor will offer an investment to the undertaking, meaning that they will *supply* something to the undertaking. In contrast, a purchaser will instead buy, or *demand*, something from the undertaking.⁷⁶ Thus, it is clear that the situations are not the same. Even though the main purpose of the public procurement rules is to protect competition from being distorted, it also has to be remembered that the different roles of the State in a public procurement procedures are more than one. Firstly, the State acts as an Agent, as the relationship between the State and its citizens can be seen as an agency relationship where the State have to purchase goods or services in order to satisfy the public interest, hence to pursue macro-economic goals.⁷⁷ Secondly, the State acts as a Market-Maker in the sense that each tender procedure can be seen as a creation of a new market platform where competition is created.⁷⁸ In other words, micro-economic aspects are also present when a public procurement procedure is being conducted. Hence, a comparison to a market investor is wrong due to the

⁷⁵ As to what concerns the micro-economic aspects in relation to macro-economic aspects, please see section 3.2 below.

⁷⁶ Doern, A. (2004). *The Interaction Between EC Rules on Public Procurement and State Aid*. Public Procurement Law Review. 3.97. Page 13.

⁷⁷ Sánchez Graells, A. (2011). *Public Procurement and the EU Competition Rules*. United Kingdom: Hart Publishing. Pages 52-55.

⁷⁸ *ibid.* pages 48 and 54.

fact that a market investor does not take upon itself the same role as the State does, therefore it is not an equivalent subject to be compared to.

3.1.2 The MEIP, the MECP or something completely different?

The MEIP is designed in order to settle cases where the State, in different ways, supplies something and it can therefore be argued that the differences between the two situations are big enough in order for the MEIP to be inapplicable on cases concerning public procurement procedures. This can be supported by the mere fact that the Court has presented another principle in cases where the State acts as a creditor, the market economy creditor principle (henceforth referred to as MECP). Even though the differences are minor between a case where the State is investing money in an undertaking and a case where the undertaking is supported by the State in form of a favourable loan in various ways, the Court has ruled that the differences are still big enough in order for two different assessments to be used. This can be illustrated with a comparison of the case *Selecto*⁷⁹, where the State aided an undertaking in difficulty through an investment, and the case *HAMSA*⁸⁰, where the aid was constituted by a debt cancellation, and the Court applied the MEIP in the *Selecto* case, whilst the MECP was applied in the latter.⁸¹ Thus, a major difference in circumstances is not needed for the Court to apply a different test that considers different aspects of the measure. On the contrary, it is true that the Court always looks at the ‘normal market conditions’ of the specific type of measure; it is always the normal market conditions that will be compared, however the subject to which the State is compared to varies depending on if the State acts as an investor or as a creditor.

In relation to the abovementioned, it is submitted that a different test is needed when the situation concerns a purchase through a public procurement procedure due to the fact that the cases regarding purchases differ more than the cases where the MEIP is applied and cases where the MECP is applied. It has been submitted in the literature that there already is a third version of the test, namely the private market purchaser test (henceforth referred to as the PMPT). However, the Union Courts have ruled in a few cases concerning public procurement procedures, where it is debatable whether it was the PMPT or actually the MEIP that was

⁷⁹ *Selecto*, Joined cases C-328/99 and C-399/00, ECLI:EU:C:2003:252.

⁸⁰ *HAMSA*, T-152/99, ECLI:EU:T:2002:188.

⁸¹ Doern, A. (2004). *The Interaction Between EC Rules on Public Procurement and State Aid*. Public Procurement Law Review. 3.97. Page 13; Hancher, L., Ottervanger, T., and Jan Slot, P. (2006). *EC State Aids*. (Third Edition). London: Sweet & Maxwell. Page 79.

applied. For example, in the case *BAI v Commission*,⁸² it can be argued that the GC actually applied the same assessment as in cases concerning measures conducted by the state in the form of an investor. In other words, in the *BAI* case, the GC did not use a *different* test; it was actually the same principle, the MEIP, which was applied. The circumstances of the case were the following: the Spanish authorities concluded a contract with an undertaking regarding a purchase of a large number of travel vouchers, which were supposed to be given to, among others, low-income groups. Hence, there was a social aim of the purchase. The Commission found the contract to constitute state aid in accordance with Article 107 (1) TFEU as the Spanish authorities paid a higher price in comparison to what other, private, purchasers did. The parties then concluded a new contract, where the same price was paid but where the amount of travel vouchers almost doubled. However, the GC found that the purchase was not to be seen as a normal transaction, and the measure hence failed the MEIP.⁸³ The GC found that state aid was at hand in the scope of Article 107 (1) TFEU, as the undertaking was given a benefit in the form of that more travel vouchers were sold (thus, more profit) than it would have been if a normal market investor had purchased the goods; the purchase was not motivated from a commercial point of view.

Nevertheless, no emphasis was added to the fact that the situation differed from cases where the MEIP normally is applied, namely where the State is acting as an investor. When looking at the GC's reasoning, it is clear that the assessment was actually done from the perspective that the Spanish state acted as an investor. The GC began by looking at the price of the purchase, where it was stated that it was higher than the published commercial price, which resulted in higher profit for the undertaking and did therefore not constitute a normal commercial transaction. The GC continued by examining the actual need of the purchase, however the 'actual need' assessment that was discussed in the judgment served as an exemption to when the MEIP has to be applied; the GC ruled that if a State has no actual need for a procured good or service, there is a presumption that a market investor would not have executed the purchase in the first place, and therefore there is no need to examine whether the purchase itself was made at normal market conditions.⁸⁴ Hence, the specific assessment done in the case only comprised the price of the purchase, which is how the test is carried out in

⁸² *BAI v Commission*, T-14/96, ECLI:EU:T:1999:12.

⁸³ *ibid*, para. 80.

⁸⁴ Arrowsmith, S. and Kunzlik, P. (2009). *Social and Environmental Policies in EC Procurement Law*. Cambridge: Cambridge University Press. Page 258.

cases concerning investments by the State as well, however no further aspects in relation to the fact that the case concerned a public procurement procedure was added. Hence, the GC used the MEIP, and *not* the PMPT. Even though the GC had the chance to introduce a test that could have been the beginning of the development of a test that could be applied on cases where the State acts as a purchaser, it did not.

In addition, the judgment did not include a discussion regarding the use of secondary criteria in a tender, which could have provided guidance for how to handle environmental criteria in a public tender due to the fact that the social aims was simply used as an argument to prove if there was an actual need of the travel vouchers. It was only stated that social or cultural aims play no part in the assessment of whether the measure constitutes state aid or not.⁸⁵ This is important to point out, due to the fact that an amendment of the MEIP, or rather an introduction to a new principle, should not contradict old case law since that would create an uncertain jurisprudence and thereby contradict one of the major aims of introducing an alternative to the MEIP.⁸⁶ Thus, an amendment of the MEIP in the form of including secondary criteria such as environmental protection will therefore not contradict earlier case law settled by the Court and will therefore not cause any problems as mentioned above.

3.1.3 Conclusion

As a result from the abovementioned, it is argued that the MEIP is not suitable to apply in cases where the State acts as a purchaser, because of the simple fact that the MEIP is not designed to do so. The differences between the cases concerning investors versus the cases that concerns purchaser are too many; the activities itself (the investments/purchases) as well as the objectives of the activities (supply/demand) differ to the extent that the MEIP cannot cover both cases, but instead a development of the MEIP is needed.

3.2 Micro-Economic vs. Macro-Economic Objectives

The distinction between what is to be considered as a pure business, micro-economic,⁸⁷ objective and what is to be seen as a public, macro-economic, objective may seem quite easy

⁸⁵ *BAI v Commission*, T-14/96, ECLI:EU:T:1999:12, para. 81.

⁸⁶ Due to the fact that it would contradict the aim of removing or amending the MEIP, which is to reduce the difficulties that exists today.

⁸⁷ The CJEU uses terms such as 'commercial' or 'normal market conditions' when referring to what factors that should be included in the MEIP, yet the term 'micro-economic aspect' will be used here in order to demonstrate and emphasise the differences to macro-economic aspects. However the meaning of the term will be the same as the CJEU uses it.

at first sight, however there are many considerations which fall within the grey zone, out of which environmental protection is one. Micro-economic objectives are those that aim at maximize profit for the business, including for instance efficiency and productivity, due to the simple reason that generation of profit is crucial for the maintenance of the business.⁸⁸ Microeconomics looks at the market mechanisms that affects the decisions of the business, or the consumer, thus a narrow perspective is used when looking at the market. On the other hand, macro-economic objectives aim at providing services that are needed in the community, or in other words the welfare of the citizens and therefore all factors that affect the economy as a whole are focused upon.⁸⁹ As mentioned earlier, one has to separate the measures that are conducted by the State when it acts as an investor and when it acts as a public authority, and obviously it is when the State acts as a public authority it can, and is perfectly allowed to, pursue its macro-economic objectives and policies,⁹⁰ whilst it is the micro-economic aspect of maximizing profit when it acts as an investor. When the State uses its powers as a public authority to pursue its macro-economic goals when acting as an investor, it gets complicated.

3.2.1 Micro-economic aspects

There is not a clear-cut of what aspects that are micro-economical and macro-economical, and even though it is important to be able to separate micro- and macro-economic aspects, there will of course be interaction between the two as these are dependent on each other; if the employment rate decreases drastically, this will have an effect on the business in the form of the supply of workers that will then have an effect on the price etc. The CJEU has held that the assessment done under the MEIP looks at whether the investment done by the State is generating any return⁹¹, or in other words *profit*.⁹² It has also been settled that it does not have to be a short-term aim of profit that is pursued, but it might as well be profitability in the long-term.⁹³ Differently put, losses in the short-term are actually allowed as long as it generates profit in the long run. In addition, it is not enough for the State to claim that it has carried out

⁸⁸ See for instance the reasoning by the GC in the cases *Linde*, T-98/00, ECLI:EU:T:2002:248, para. 49; *Westdeutsche Landesbank v Commission*, Joined cases T-228/99 and T-233/99, ECLI:EU:T:2003:57 para. 245.

⁸⁹ *Investopedia*. Search word: "Macroeconomics". Accessed 19 October 2015. <<http://www.investopedia.com/terms/m/macroeconomics.asp>>.

⁹⁰ For instance environmental protection, combatting unemployment or similar objectives.

⁹¹ *SFEI*, C-39/94, ECLI:EU:C:1996:285, para. 57-62; *French Republic v Commission of the European Communities*, C-482/99, ECLI:EU:C:2002:294, para. 69-70; *Italy v Commission*, C-303/88, ECLI:EU:C:1991:136, para. 20-22.

⁹² *West LB*, Joined cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, para. 255.

⁹³ *Italian Republic v Commission*, C-305/89, ECLI:EU:C:1991:142, para. 20.

a measure with the aim to generate profit but that the final result did not turn out to be as expected. Instead, objective and verifiable proof is needed in order for the measure to not constitute a benefit under the MEIP assessment. This has been emphasised by the Commission in the case *France Télécom*:

*“Affirming one's intention to behave like a prudent investor is not enough when it comes to complying with the rules on state aid, and in particular with the prudent private investor principle. Otherwise, all Member States would have to do in order to comply with the rules is maintain that they have complied with them, and the Commission's monitoring activity would be entirely superfluous. Moreover, it is not for the Member States to judge whether the prudent investor test has been met, but for the Commission under the watchful eye of the Community courts”.*⁹⁴

However, the fact that the assessment circles around profit and compares the State's action to an ideal, prudent investor's activities makes the MEIP static. As the market changes, the objectives of the business will also change due to the fact that the business has to satisfy the market in order to generate profit, and it is because of that simple reason that the MEIP has caused problems over the years. The market has developed into something different than what it was in the 1980's, when the MEIP was first established. In theory, the MEIP is the most suitable test to evaluate if a benefit or advantage is at hand, as it will have a pure commercial, micro-economic perspective when analysing the measure at hand. However, this is not how it works in reality. Due to the fact that private investors have to change their commercial considerations to match what the market demands in order to gain profit, there will not be one single definition as to what those considerations actually are. In addition, as the MEIP looks at how an “ideal investor” would have operated in theory⁹⁵ and not at the development of the real market, the institutions of the EU have not developed the MEIP to reflect the current market. Today, this has resulted in an MEIP that is applied in cases concerning the “real market”, but which will not pass the MEIP assessment. In other words, the measure carried out by the State does actually in some cases corresponds to a measure that a market investor would have considered today, but it will fail the MEIP test as this has not been developed in

⁹⁴ 2006/621/EC: Commission Decision of 2 August 2004 on the State Aid implemented by France for France Télécom, OJ L 257, 20.9.2006, pp. 11-67, para. 210. In the case, the Commission uses the term “prudent private investor test” and “prudent investor test”, however it has the same meaning as the MEIP.

⁹⁵ *West LB*, Joined cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, para. 255; *Linde*, T-98/00, ECLI:EU:T:2002:248, para. 149; *France v Commission*, C-482/99, ECLI:EU:C:2002:294, para. 72-77.

the same pace as the market has done. This can be seen in the case law from the CJEU, for instance in the abovementioned case *BAI*⁹⁶ as well as in the case *Comitato*.⁹⁷ When the MEIP was applied in those cases, the Court ruled that only commercial considerations should be regarded, but as Arrowsmith argues, private investors do sometimes take for instance environmental or social aspects into consideration when operating on the market.⁹⁸ This proves that the MEIP does not actually correspond to the actions of a prudent investor, but instead it selects what aspects that should be included in the assessment, which might be one of the reasons why the MEIP is considered to be problematic and inadequate.

Hence, the economic analysis done by the Court in the assessment of whether the State has acted in the same way as a market economy investor would have done covers a broad spectrum of factors which can be divided into different categories, but it will always come down to one thing; profit.⁹⁹ Profit is the primary, superior micro-economic objective, whilst there are other secondary, or depending, sub-objectives of micro-economic aspects. These are objectives that the market investor will only pursue as long as it generates profit; they are dependent on what is demanded by the market at that time, because when the market investor supplies what is demanded, profit will be generated. This has been affirmed by the GC, which has stated that all measures taken should be motivated primarily by commercial considerations.¹⁰⁰ To illustrate an example, suppose that there is an economic operator whom supplies shoes. The main objective of the business will be to generate *profit* in order to maintain the business. Thus, if the market demands pink shoes, the economic operator will supply pink shoes in order to generate profit. The *investment* in pink shoes can therefore be seen as a secondary, depending objective because the investment in itself is not the primary objective. Instead, it is done in order to acquire profit. The economic operator will also make sure that his or her business is as *efficient* and *productive* as possible, in order to produce as many shoes as possible to the lowest price due to the fact that it will generate the highest

⁹⁶ *BAI v Commission*, T-14/96, ECLI:EU:T:1999:12, para. 81. See section 3.1.2 for further information.

⁹⁷ *Comitato ("Venezia vuole vivere") v Commission*, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, ECLI:EU:C:2011:368, para. 90-102.

⁹⁸ See Arrowsmith, S. and Kunzlik, P. (2009). *Social and Environmental Policies in EC Procurement Law*. Cambridge: Cambridge University Press. Pages 15-16, 260 and 436. This does however not mean that environmental protection falls under the definition of a micro-economic aspect, which will be explained further under section 3.3.

⁹⁹ *West LB*, Joined cases T-228/99 and T-233/99, ECLI:EU:T:2003:57, para. 255; *Linde*, T-98/00, ECLI:EU:T:2002:248, para. 49.

¹⁰⁰ *ibid. Linde*, para. 49.

profit by doing so. Thus, efficiency and productivity may also be seen as a depending micro-economic objective because it is done in order to generate profit. As to what regards environmental protection, this will be discussed further under section 3.3.

As a consequence of the foregoing, it can be stated that the MEIP, in spite of it being theoretically the best assessment to use when determining if a measure constitutes a benefit or advantage, has caused the legal situation to be complicated. The business objectives will always depend on what the market demands and therefore the assessment done with the MEIP will also change over time, but since the Court has not amended the MEIP to correlate with the market, we have now reached a point in time when this has become problematic. Thus, the MEIP includes petrified business considerations that cannot be used in a way that will provide a fair answer to what a benefit or advantage in the sense of Article 107 (1) TFEU actually is.

3.2.2 Macro-economic aspects

In contrast to micro-economic aspects, macro-economic aspects are easier to identify. Macro-economic objectives are of non-economic nature¹⁰¹ and looks at trends and movements of the economy as a whole, and what can be problematic with this category is to actually know what those trends and movements are. However, as has been described in section 2.3, there is no doubt that the environment is one of the things that can be found at the top of the agendas not only in the different Member States, but also for the EU as a whole, and thereby it can be concluded that environmental protection is definitely one of the trends that is included in macro-economic aspects. This has also been confirmed in case law from the CJEU. For example, in the case *SEPG* it was stated that the exercise of powers relating to the protection of the environment are typically those of a public authority, which is thereby not of an economic nature and justifies the application of the competition rules in the Treaties (more specifically Article 102 TFEU).¹⁰² Thus, environmental protection is typically classified as a macro-economic objective.

3.3 Can Environmental Protection be seen as a Micro-Economic Objective?

The awareness of climate change has increased among the people in the world during the last decade, and the demand for environmentally friendly products and services has never been

¹⁰¹ Arrowsmith, S. and Kunzlik, P. (2009). *Social and Environmental Policies in EC Procurement Law*. Cambridge: Cambridge University Press. Page 257f.

¹⁰² See *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)*, C-343/95, ECLI:EU:C:1997:160, para. 23; *Fluggesellschaft v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7, para. 30.

bigger than what it is today. Hence, some of the world's leading companies, such as Toyota, Unilever and GE, are working towards satisfying the consumers' needs and are becoming more environmentally friendly in various ways.¹⁰³ For instance, the Corporate Sustainability movement has grown tremendously only within a few years.¹⁰⁴ Thus, it can be contended that it is not even questionable anymore whether companies do take environmental aspects into considerations when performing its activities or not, because we can see this movement towards Corporate Sustainability includes a great number of actors on the market.

On the other hand, it can be argued that the underlying objectives and reasons why the environmental considerations are taken are not the same when comparing a public authority and a private company. The State has an obligation and a responsibility towards its citizens as a public authority to ensure, for example, environmental protection and working towards a better future for the next generations. In other words, the State considers environmental aspects because of the climate change and the need to improve the environment in itself, even in cases where the costs are substantial. Hence, a macro-economic (and genuine environmentally friendly) approach is used by the State. On the contrary, private companies will adopt the environmental objectives because the market demands environmentally friendly products. By 'caring' about the environment in the production of the good or service that the company supplies, it will generate goodwill or be more attractive on the market and people will therefore buy that specific product or service. Thus, the reason as to why companies take environmental aspects when carrying out their activities is mainly because that will generate profit. Private operators on the market will not do anything unless it, either in the short- or the long-term, will increase the profitability of the company. The use of environmental aspects is a 'trend' that the companies adopt in order to gain profit. Even though the market is asking for environmentally friendly products, it is still an unquestionable fact that being environmentally friendly increases the costs for the companies and thereby generates less profit.¹⁰⁵ The companies would not have worked towards being environmental friendly unless the market

¹⁰³ Benn, S., Dunphy, D. and Griffiths, A. (2014). *Organizational change for corporate Sustainability*. (Third Edition). New York: Routledge. Page 4.

¹⁰⁴ *ibid.*; Arrowsmith, S. and Kunzlik, P. (2009). *Social and Environmental Policies in EC Procurement Law*. Cambridge: Cambridge University Press. Page 436.

¹⁰⁵ This will also result in the companies trying to incorporate these extra costs in the price of the good or service that they are offering, and it can therefore be argued that it is actually the consumers whom are paying for the environment. However, a higher price will result in less sale for the company, thus also less profit. See Vedder, H. (2003). *Competition Law and Environmental Protection in Europe; Towards Sustainability?* Groningen: Europa Law Publishing. Page 45.

encouraged them to do so. In addition, companies cannot adopt environmental objectives where the costs are substantial and exceed future profit, as this would result in the company being removed from the market. As a result of the foregoing and in relation to what has been argued in section 3.2, it can be concluded that environmental aspects cannot be regarded as a pure business objective in the sense of the micro-economic approach that is used in the MEIP today. From a pure micro-economic perspective, a private economic operator cannot pursue environmental aspects if the costs for the measures are too substantial in relation to the profit it will generate in the near future, which differs from a public authority that can operate on a loss-basis in order to improve the environment without having its entire economic situation jeopardised.

Arrowsmith, as many others, proposes that environmental aspects are actually taken into consideration by private market participants as well, due to the fact that the market is demanding environmentally friendly products, therefore the private investors will supply environmentally friendly products. She supports her argument with Adam Smith's theory about the Invisible Hand, stating that the pursuit of macro-economic objectives such as environmental protection is normal market behaviour.¹⁰⁶ However, it can still be argued that environmental protection is a macro-economic aspect; private investors will only supply the environmental friendly goods because the market demands it, hence in order to maximize profit. Once again, the market investors would not carry out the measure or investment if the market did not demand it. Even if Arrowsmith wants to reach the same conclusion, that is to say that environmental protection should be considered in public procurement procedures as well as be included in the MEIP, it is important to separate the two arguments due to the fact that it is in my view unsustainable to allow the MEIP to take in different values just because the market's demand changes. The market will always change, hence allowing different secondary, macro-economic criteria depending on what the market asks for today may have severe legal consequences that will make the use of different measures even harder for the Member States than what it already is today. And how do we decide which of all the different demands that the market asks for that should be taken into account in the application of the MEIP, and which we should not consider? Thus, we need to find another way to be able to use environmental clauses in a public procurement without it constituting state aid.

¹⁰⁶ Arrowsmith, S. and Kunzlik, P. (2009). *Social and Environmental Policies in EC Procurement Law*. Cambridge: Cambridge University Press. Pages 15-16, 260 and 436.

3.4 Conclusion

In conclusion, it can be understood that there are elements of the State acting both as an investor and as a public authority when a public tender is conducted. The fact that a public procurement procedure aims at ensuring fair competition and that the State has to select the tenderer that offers the most economically advantageous tender proves that components of micro-economic nature is at hand. In addition, it can be contended that a purchase made through public procurement is done in order for the State to achieve objectives of public policy, hence to satisfy public interests and pursue macro-economic objectives. It is based on this simple fact that the MEIP is not a suitable test to examine if state aid is at hand. It cannot be required by the State to only pursue micro-economic goals in the form of profitability when a purchase is done, as the purchase itself aims to accomplish both micro- and macro-economic goals. The State cannot use environmental award criteria in a public tender as long as the MEIP is designed in the way it is today, based on the fact that only *commercial* considerations are to be taken into account when carrying out the assessment of whether an economic advantage is conferred on the undertaking or not.¹⁰⁷ According to the Court, if a private purchaser was to organise a tender, all “social, regional-policy and sectorial considerations” should have been left aside,¹⁰⁸ as such factors are not motivated primarily by commercial considerations. In other words, the contract awarded in a public procurement procedure due to compliance with environmental requirements would not have been awarded on a private market because it does not generate the highest profit, thus making the use of green clauses in a public tender procedure impossible for the Member States.

In addition, micro-economic objectives can consist of various factors, however they are all focusing on generating profit. On the other hand, macro-economic aspects concern factors that affect the economy and welfare as a whole. A prudent, private investor cannot pursue macro-economic objectives, as macro-economic objectives by definition are of non-economic nature. Hence, it can be stated that the use of secondary, macro-economic policies in a public procurement procedure creates a presumption that state aid is at hand due to the fact that the current version of the MEIP will be failed when policies of non-economic nature are being used in a public procurement procedure. Also, if environmental aspects were to be included in the current MEIP (that is to say without actually amending it, but only to start including

¹⁰⁷ *Linde*, T-98/00, ECLI:EU:T:2002:248, para. 49.

¹⁰⁸ *Belgium v Commission*, Case 40/85, ECLI:EU:C:1986:305, para. 14.

environmental policies in the assessment that is used today), the problems that have already been caused by the principle would increase even more due to the fact that the trends of the market, such as environmental protection still is considered to be today, will change over time and including such trends would make the assessment under the MEIP inconsistent and would only cause legal uncertainty.

4. The Shift of the Main Objective of EU – an Analysis of the Conflict Between Competition and Environmental Protection

As described above, the core of the problem with the MEIP is that it is now shaped in a way that it cannot fully pursue environmental goals in addition to purely economical goals. The MEIP is designed in a way that it shall secure the free competition on the market, thus if competition should precede environmental protection the principle shall remain the same as that objective can be pursued with the MEIP as it looks today. Consequently, it all comes down to the question of how the two objectives can interact; which, if any, objective precedes the other? This question is important to answer as it has a crucial impact on, firstly, if the MEIP should change at all, and secondly if it should be amended, how the new principle should be shaped instead. In order to carry out an analysis in this respect, the following sections will look at how the conflict of the two objectives is handled on different levels, starting with the areas of state aid and public procurement, then looking at the bigger picture of competition in general, and last but not least how the clash between the objectives is managed on Treaty level.

4.1 *Environment contra Competition – an Insolvable Problem?*

4.1.1 State aid and public procurement

The areas of state aid and public procurement are pervaded by the principle of an internal market and free competition, which is why these two legal areas may be some of the hardest to implement environmental policies to. On the other hand, there have been several attempts to do so, one of them being the new Directives and the introduction to green procurement, which have forced the EU to face the question of in what way and to what extent environmental aspects can be heeded within the two areas.

To begin with, the GC proved in one of its recent cases, *Castelnuo Energía, SL v European Commission*,¹⁰⁹ that free competition and thus the maintenance of the internal market is still the main objective for the state aid rules. The case concerned state aid from the Spanish authority to undertakings in the form of subsidies; the Spanish legislator had adopted a decree that stated that 10 power plants had to use indigenous coal (that is to say coal of Spanish origin), which was more expensive than other fuels. Because of that, another decree was adopted, stating that the owners of the power plants were to receive compensation for the

¹⁰⁹ *Castelnuo Energía, SL v European Commission*, T-57/11, ECLI:EU:T:2014:1021.

additional production costs, due to the fact that the activity of the undertakings was classified as an SGEI. This was notified to the Commission, which held that the fourth Altmark criterion¹¹⁰ was not fulfilled and therefore the measure constituted state aid. Nonetheless, since the measure was an SGEI, the Commission found that it was compatible with the internal market in accordance with Article 106 (2) TFEU.¹¹¹ In the ruling, the GC stated that:

*“If aid for the protection of the environment can be declared compatible with the internal market under Article 107(3)(b) or (c) TFEU, aid which has harmful effects on the environment does not, by that fact alone, adversely affect the establishment of the internal market. Although it must be integrated into the definition and implementation of EU policies, particularly those which have the aim of establishing the internal market [...], **protection of the environment does not constitute, per se, one of the components of that internal market, defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured**” (emphasis added).*¹¹²

The same view characterises other judgments from the Court, where it for instance has been ruled that even though environmental protection constitutes one of the essential objectives of the EU, the need to take that objective into account does not justify the exclusion of selective measures from the scope of Article 107 (1) TFEU.¹¹³ Accordingly, it is still the view of the EU institutions that competition precedes environmental protection in the area of state aid. As to what concerns public procurement, the internal market, transparency and competition is constantly referred and argued to be the most important objectives to be achieved in the case law.¹¹⁴

¹¹⁰ A method used by the Court to determine the level of compensation in order to discharge public service obligations (SGEI's) from being state aid, established by the Court in the case *Altmark*, C-280/00, ECLI:EU:2003:415, para. 89-93.

¹¹¹ Article 106 (2) TFEU is an 'exemption' from a measure constituting state aid, by deeming it compatible with the internal market.

¹¹² *Castelnou Energía, SL v European Commission*, T-57/11, ECLI:EU:T:2014:1021, para. 189.

¹¹³ *European Commission v Kingdom of Netherlands*, C-278/08, ECLI:EU:C:2011:551, para. 75; *British Aggregates v Commission*, C-487/06 P, ECLI:EU:C:2008:757, para. 92; *Spain v Commission*, C-409/00, ECLI:EU:C:2003:92, para. 46-54.

¹¹⁴ For example, see cases *Commission v CAS Succhi di Frutta*, C-496/99 P, ECLI:EU:C:2004:236, para. 111; *Lombardini and Mantovan*, Joined Cases C-285/99 and C-286/99, ECLI:EU:C:2001:640, para. 38 and; *Commission v Cyprus*, C-251/09, ECLI:EU:C:2011:84, para. 38.

On the contrary, the institutions of the EU have shown a tendency towards giving environmental protection, perhaps not the same, but at least increased dignity in relation to competition within both the area of state aid and public procurement. This can be demonstrated by for instance the *Concordia* case.¹¹⁵ The ECJ allowed the Finnish public authority to use environmental standards as an award criterion in a public procurement procedure regarding buses. The Court stated that a contracting authority may use environmental criteria as award criteria in a public tender in order to decide which tender that is the economically most advantageous one, “provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Union law, in particular the principle of non-discrimination”.¹¹⁶ Member States can only use award criteria in order to determine which offer that constitutes the ‘most economically advantageous tender’ in accordance with Article 67 (1) in the Directive, and award criteria do not necessarily have to be of purely economic nature.¹¹⁷ This view was later confirmed by the Court in the case *Wienstroem*, where this approach was taken one step further by deeming that a weighting of 45% for an environmental award criterion was not incompatible with the public procurement rules on finding the most economically advantageous tender.¹¹⁸ The fact that the Court recognised the use of environmental clauses as award criteria in the public procurement procedure opened up for the possibility of environmental protection to be a part of the assessment regarding the concept of most economically advantageous tender. In other words, the Court adopted an approach towards environmental aspects being regarded as economic, hence a component of the internal market. However, it will probably take a long time before environmental protection is completely included in what can be seen as a criterion of purely economic nature.

Thus, it can be contended that within the state aid and public procurement regimes, the environmental protection is on the move towards becoming a criterion of purely economic nature that is to be regarded in the assessment of a measure’s compatibility with the internal market. However, the Court has not yet provided completely clear guidelines on how to

¹¹⁵ *Concordia*, C-513/99, ECLI:EU:C:2002:495.

¹¹⁶ *ibid.* para. 69.

¹¹⁷ *ibid.* para. 55.

¹¹⁸ *Wienstroem*, C-448/01, ECLI:EU:C:2003:651, para. 42.

handle environmental protection in relation to competition in the respect of state aid and public procurement.

4.1.2 Competition law

In other areas of EU competition law, it can be seen that the Court has started to reconsider its established case law of how to handle environmental aspects' interaction with competition law. For instance, the CJEU has produced coherent case law stating that a Member State could not justify restraining measures that were only applied on imported products without distinction with imperative requirements.¹¹⁹ The concept of imperative requirements was first ruled upon in the case *Cassis de Dijon*, where the ECJ stated that trade barriers must be accepted in so far as it is necessary to satisfy imperative requirements, if they are applied in a non-discriminatory way, in other words measures that are indistinctly applicable.¹²⁰ The list of what imperative requirements are provided by in *Cassis de Dijon* is open-ended, and the Court has over the years developed the doctrine of imperative requirements to comprehend several measures, where environmental protection is one of them.¹²¹ However, as stated above, imperative requirements will only justify a measure that is indistinctly applied. That means that the Court has until recently focused on the removal of trade barriers in different forms instead of giving other objectives, such as environmental protection, precedence. This might be the case due to the fact that it is easier to identify trade barriers than to interfere with the environmental politics.

However, as AG Jacobs has pointed out in its opinion in the case *PreussenElektra*, the Court has actually justified, even though it is debatable, trade-restraining measures with just imperative requirements in cases where the measure was applied with discretion. AG Jacobs then proposed a “more flexible approach in respect of the imperative requirement of environmental protection”,¹²² where he stated that together with the introduction to the new Treaties, the concern for the environmental aspects was heightened even though the relevant

¹¹⁹ See for instance *Commission v Ireland*, Case 113/80, ECLI:EU:C:1981:139, para. 11; AG Jacobs in *PreussenElektra*, C-379/98, ECLI:EU:C:2000:585 para. 220; *Aragonesa de Publicidad Exterior*, Joined cases C-1/90 and C-176/90, ECLI:EU:C:1991:327, para. 13; and *Reinhard Gebhard*, C-55/94, ECLI:EU:C:1995:411, para. 37.

¹²⁰ *Cassis de Dijon*, Case 120/78, ECLI:EU:C:1979:42, para. 8. The term “imperative requirements” refers to the same meaning as the Court’s “mandatory requirement” used in *Cassis de Dijon*. For further information, see Bernard, C. (2013). *The Substantial Law of the EU – The Four Freedoms*. (Fourth Edition). Oxford: Oxford University Press. Page 171.

¹²¹ *ibid*, Bernard, C. Page 172.

¹²² AG Jacobs in *PreussenElektra*, C-379/98, ECLI:EU:C:2000:585 para. 230.

Article for the case was not amended. By that, AG Jacob means that the justification for giving the environment less protection than what has been given to trade or similar interests recognised decades ago would be hard as the harm to the environment is a great threat to humanity.¹²³ In addition, the mere fact that the Court has ruled in several cases that environmental protection is an imperative requirement implies that environmental protection is given priority even in cases that concerns pure competition matters. From the abovementioned, it is understood that the CJEU takes environmental protection into account when looking at a measure's compatibility with the internal market, meaning that environmental protection is being strengthened. However, it is still clear that competition is the dominating objective within competition law, obviously.

4.1.3 Treaty principles

In order to assess how the conflict between environmental protection and competition is handled at Treaty level, it first has to be examined what impact the obligations deriving from the Treaties have on the Member States. This is due to the fact that it is the Member States that carries out the tender procedures, and thus it is the Member States that have to comply with the environmental obligation.

4.1.3.1 *What impact does the objectives regarding environmental protection in the Treaties have on the Member States?*

There is no easy answer to the question of what the exact aims of the EU are, and it might be even harder to answer the question of what legal impact the fundamental goals in Article 3 TEU as well as Articles 7-17 TFEU has on the Member States. In the case *Zaera*, the Court ruled that the fundamental aims and objectives of the Union cannot impose legal obligations on Member States when looked upon in isolation.¹²⁴

Regarding Article 3 TEU, it can be understood from the wording of the Article that it is addressed to the EU and not to the Member States, as it states “the Union’s aim” and “the Union shall”, and does not mention the Member States at all. When looking at the objectives listed in the TFEU, it cannot be given a general answer to the question of whom the Articles are addressing, but instead each Article has to be read on its own. As to what concerns Article 11 TFEU, if a pure textual interpretation is applied, it is also addressed to the EU and not to

¹²³ *ibid*, para. 230-232.

¹²⁴ *Zaera*, Case 126/86, ECLI:EU:C:1987:395, para. 10-11; *Firma Sloman Neptun Schiffahrts*, Joined cases C-72/91 and C-73/91, ECLI:EU:C:1993:97, para. 25-28.

the Member States. Thus, when analysing the specific objective on its own, an obligation to integrate the fundamental aims and objectives found in Article 3 (3) TEU and Article 11 TFEU lies only on the EU itself.

On the other hand, it is important to remember that the EU has established the general principle of loyalty and sincere cooperation, which can be found in Article 4 (3) TEU (which will henceforth be referred to as the principle of loyalty). The principle aims at ensuring that the Member States fulfil the obligations that derive from the Treaties.¹²⁵ This can be understood from the mere fact that the Article entails that the Union and the Member States shall assist each other when carrying out the tasks that flow from the Treaties. In other words, failure from one of the parties does not justify a failure from the other party. The Court has ruled upon the principle in Article 4 (3) TEU several times, and from the case law it can be understood that the obligation for the Member States to remain loyal and cooperate with the EU is extensive.¹²⁶ Hence, it has a large scope of application and as the Treaties are the core legislation of the EU, it would be peculiar if the principle of loyalty did not cover the fundamental objectives stated there as well.

Hence, as the relevant Articles should be interpreted in the light of the principle of loyalty, it can be concluded that the Member States do have a responsibility and a duty to pursue the same aims as the Union set forth in the Treaties. Consequently, the Member States do have an obligation to fulfil the environmental policy in Article 3 (3) TEU and Article 11 TFEU to the same extent as the Union does.

4.1.3.2 How is the conflict between competition and environmental protection managed on Treaty level?

It is often, and probably rightly, argued that the main objective as well as one of the main reasons for founding the EU was to create an internal market and promote free trade.¹²⁷ It has

¹²⁵ Kjellgren, A. and Bernitz, U. (2010). *Europarättens grunder*. (Fourth Edition). Stockholm: Norstedts Juridik. Page 110f.

¹²⁶ For example, the principle has been applied in cases concerning various legal areas. See for instance *Grand Duchy of Luxembourg v European Parliament*, Case 230/81, ECLI:EU:C:1983:32, para. 37 concerning the competence of the European Parliament; *Pupino*, C-105/03, ECLI:EU:C:2005:386, para. 42 regarding cooperation between the EU and the Member States in criminal matters, which applies to the whole Union, and; *Commission v Kingdom of Belgium*, C-374/89, ECLI:EU:C:1991:60 for breach of directive.

¹²⁷ See for instance Geradin, D. and Layne-Farrar, A. (2012). *EU Competition Law and Economics*. Oxford: Oxford University Press. Page 19f; and Jones, A. and Sufrin, B. (2014). *EU Competition Law*. (Fifth Edition). Oxford: Oxford University Press. Pages 34-36.

even been stated by the Court in the case *Consten and Grundig v Commission* that a measure that tend to distort the internal market and the trade between Member States “might be such as to frustrate **the most fundamental objectives** of the Community” (emphasis added).¹²⁸ However, recent events have indicated that the abovementioned might not be the case anymore; as the economic and political environment have changed, so has the competition policy of the EU as well.

It should first be stressed that the predecessors of the current Treaties held Article 3 (1) (g) EC,¹²⁹ which stated that the activities of the Union should include “a system ensuring that competition in the internal market is not distorted”. In other words, the provision held the competition policy of the Union. However, as the Treaty of Lisbon came into force in 2007, there was no equivalent provision inserted in the text of the Treaty, but instead the new Protocol No. 27 was introduced. In accordance with Article 51 TEU, the protocols are an integral part of the Treaties, however by moving the competition policy to a protocol indicated that it is not as important as it once was; it was a downgrading of the legal status of the competition policy.¹³⁰ This is supported by the fact that the Court has ruled in several cases, before the repeal of Article 3 (1) (g) EC, that the Article indicated a true objective of the Union,¹³¹ but as the competition policy was moved, it has been claimed that it is today rather a tool or a means used by the EU and not an objective in the sense as it once was.¹³² After the introduction to Protocol No 27, it has also been argued that the competition policy in Article 3 (1) (g) EC was just a simple ‘means’ from the beginning as well, hence the transfer of the competition policy from the Treaty to the Protocol did not change anything as “an objective that does not exist cannot be lost”.¹³³ It is clear that clarification and guidance is needed from the Court, however as of today no case law can be found on the matter. From the foregoing, it can be concluded that we are witnessing a weakening, or perhaps a more diversified version, of competition law within the legal framework of the Treaties.

¹²⁸ *Consten and Grundig v Commission*, Joined cases 56 and 58-64, ECLI:EU:C:1966:41, para. 8.

¹²⁹ First introduced in the Treaty establishing the European Community (the Treaty of Rome) in 1957.

¹³⁰ Geradin, D. and Layne-Farrar, A. (2012). *EU Competition Law and Economics*. Oxford: Oxford University Press. Page 29; and Jones, A. and Sufrin, B. (2014). *EU Competition Law*. (Fifth Edition). Oxford: Oxford University Press. Page 37.

¹³¹ See for instance *Showa Denko KK*, C-289/04 P, ECLI:EU:C:2006:431, para. 55; AG Kokott in *British Airways plc v Commission*, C-95/04, ECLI:EU:C:2006:133, para. 68-69; *Instituto Chemioterapico Italiano and Commercial Solvents v Commission*, Joined cases 6/73 and 7/73, ECLI:EU:C:1974:18, para. 25.

¹³² Geradin, D. and Layne-Farrar, A. (2012). *EU Competition Law and Economics*. Oxford: Oxford University Press. Page 29.

¹³³ *ibid.*

Secondly, the EU has over the passed years worked towards becoming the leader and the role model for sustainable development and environmental protection. This is an argument for a weakening of the focus on competition within EU in itself; the focus of the EU has shifted towards *inter alia* environmental protection rather than competition and the internal market. This can be understood from the fact that the current Treaties hold stricter provisions relating to environmental protection than any other Treaty has had before. In addition, as the case law presented in the sections 4.2.1 and 4.2.2 above showed, the Court has shown a tendency of prioritising the environment at the cost of free competition on the internal market in certain areas of law which indicates a shift of the main focus of the EU. However, the Court alongside the other institutions of the EU have not yet provided an answer for how the question of how environmental policies found in the Treaties shall be merged together with the competition policy, but instead a case-by-case basis is applied. This method is quite problematic for those whom wish for the legal framework to be coherent and predictable, as it can never be certain when environmental protection will precede competition and vice versa.

Due to that reason, the integration concept of environmental policies should to be considered. The integration of the environmental protection can be given a weak or a strong interpretation, where the weak interpretation simply implies that the institution carrying out the measure has to do an assessment of whether the measure is compatible with the environmental goals in the Treaties, but decides on its own what to do with the result of that assessment.¹³⁴ On the other hand, a strong interpretation means the other measure should be adopted in order to pursue the goal of environmental protection, thus that environmental aspects are observed or complied with.¹³⁵ Dhondt argues that the strong interpretation is the most suitable one to be applied in cases concerning environmental protection due to, *inter alia*, the underlying aim of the policy. He states that through the environmental provisions of the Treaties, an overall goal in the form of sustainable development is set out. This means that not only environmental protection in itself is the aim of the Articles, but also other EU policies such as social goals and the internal market have to be combined with environmental protection in order to pursue the underlying aim of sustainable development. This is due to the mere fact that without a functioning internal market, there is no market where environmental protection can be integrated. However, this does not answer the question of *how* the conflict

¹³⁴ Dhondt, N. (2003). *Integration of Environmental Protection into other EC Policies*. Groningen: Europa Law Publishing. Page 90.

¹³⁵ *ibid.* page 93.

between competition and environmental protection should be solved, which is why Dhondt's discussion regarding how objectives at the same level should be handled has to be enlightened here as well.

It has been argued that when two objectives are in conflict, one can either choose to recognise a specific hierarchy between the policies, or decide to give the implementing institutions power of discretion to decide when an objective prevails the other.¹³⁶ As has already been stated in the foregoing, the ECJ uses a case-by-case method where it is balancing the conflicting objectives against each other and, based on the specific circumstances in the case at hand, decide which objective that should overrule the other. Hence, a test of proportionality and non-discrimination is applied. In addition, it can easily be seen from the case law that a margin of discretion has been admitted to the institutions, as no hierarchy between the objectives has been ruled upon. Dhondt means that when using a strong interpretation on the environmental protection policy, a case-by-case basis can be used and environmental protection does not in any way constitute an absolute, prevailing objective in all instances. Instead, a balance has to be found between the conflicting objectives as all of the main objectives of the EU, such as competition and sustainable development, are equally important. As a consequence, it can thus be agreed upon that a strong interpretation is to be applied when looking at the environmental protection policy of the EU, which means that other policies should not be set aside, however they should be adjusted in a way that they can pursue environmental protection.¹³⁷ This does not entail that environmental protection should prevail at all times; as the aim of sustainable development requires more than the environmental objective to be pursued, environmental policies do sometimes have to be set aside in order for the overall aim to be achieved. Hence, as a strong interpretation should be applied, measures aiming to enhance competition have to observe or comply with the environmental standards as well, which thereby shows that environmental protection has been strengthened as a main objective of the EU.

In brief, it is clear that the competition policy of the EU has been weakened in comparison to how it has been, whilst environmental protection is being given increased priority. In other words, the way of interaction of the two principles is being reviewed and developed within the legal system of the EU, but it is still an unsolved matter.

¹³⁶ *ibid.* page 95.

¹³⁷ *ibid.* page 96.

4.2 Conclusion

From the discussions in the foregoing sections, it can be concluded that there is not only one main objective of the EU (which we on the other hand already knew), and it is certainly not only the internal market and competition that fall in the scope of what are to be seen as the main objectives. One explanation as to why the focus seems to be shifting may be the mere fact that the internal market and the competition policy have already been fully developed, or at least to the extent that the EU finds itself to be contented with, in contrast to the work that has to be done within the environmental area. Thus, it might be the case that the EU is working harder on the areas where the need for improvement is greater, hence the reason to why it might seem that the main objective in the form of the internal market has been downgraded. Another reason to why competition has been prioritised up to this point might be because competition falls in the exclusive competence of the EU in accordance with Article 3 (1) (b) TFEU, whilst environmental protection is a shared competence between the EU and its Member States in accordance with Article 4 (2) (e) TFEU. It is not hard to imagine that the interests within the exclusive competence of the EU are given precedence over the interest that fall within the shared competence. Nonetheless, the most important observation from the analysis above is that environmental protection is no longer a subordinated goal to competition. In addition, it has been proven that the most suitable method to handle the conflict between different objectives is to apply a test of proportionality, where environmental aspects have to be observed and complied with as long as it does not make it impossible to pursue the other objectives of the Union.

5. Interim Conclusion

From the analyses above, several conclusions can be drawn that are crucial for two reasons; firstly, it is important for the understanding of why the MEIP has to be amended, and secondly how the alternative to the MEIP should be designed.

To begin with, it can be stated that the current MEIP is not designed to be applied in cases where the State acts as a purchaser. The State cannot, and should not, take only micro-economic aspects into consideration when carrying out public procurement procedures. The situations regarding public tender procedures differ to such a great extent that it cannot be compared to cases where the State acts as an investor. When the State acts as an investor, it is understandable that there is a requirement of the State should act in the same way as a private investor would have done, due to the impact on the market in the form of distorted competition. When the State acts as an investor, it is not operating in its function as a State but instead investments and similar measures are taken in order to generate profit. However, when the State acts as a purchaser, there are elements demonstrating that the role of a State in a public procurement procedure is of both an investor and a public authority. This makes a pure comparison to a private investor deceptive, and thereby providing a (to some extent) ‘false’ result in the form of the MEIP being failed. In other words, the comparison to a market investor in cases where the State acts as a purchaser will be unfair as the comparison is not made with an equivalent subject. Thus, the MEIP has to be amended.

Secondly, the MEIP will only accept measures that are based upon commercial, micro-economic considerations, which makes the test static due to the fact that it does not adapt to the development of the market. Environmental protection has begun to find its way within the scope of the private investors’ objectives, however that is only done due to the fact that pursuing environmental goals as a private investor today will generate profit. As the demand of the market varies over time, it would create legal uncertainty if environmental aspects were deemed to be included in the concept of micro-economic aspects and therefore in the assessment of the MEIP, as this would open up for other trends to be included in the MEIP as well; hence, making the outcome of the MEIP assessment unforeseeable and unpredictable. However, environmental protection is still an obligation that the Member States have to consider, but environmental protection is not of micro-economic nature and cannot be pursued with the current MEIP. Thus, the MEIP has to be amended.

Thirdly, a shift of what, or which, objective that is the main one of the EU has been observed. This is based on the fact that competition and the internal market have been set aside by the EU in favour of environmental protection on different levels of EU law; not only within the areas of state aid and public procurement, but also within competition law in general as well as on Treaty level. Even though it has been pointed out that a case-by-case basis is being used when determining which of the two objectives that should precede the other, it is undoubtedly a fact that environmental protection has been given much higher priority nowadays than what was the case a few years ago. In other words, environmental protection is definitely an objective that can challenge, and sometimes prevail over, the strong objective of free competition. But in order for it to do so, certain tools that are designed in a way to only preserve competition, and the internal market has to be altered in order for them to reflect how the objectives *de facto* looks today. Thus, the MEIP has to be amended.

If the MEIP does not change, the environmental obligations in the Treaties and in the Directive will be hampered as to what regards award criteria; by deeming the use of green clauses in a public procurement procedure as to be state aid in the meaning of Article 107 (1) TFEU would have several negative, and unwanted, effects. To begin with, it would mean that the Member States would have to notify the Commission every single time a public procurement procedure is carried out, which in itself is understandable to have negative effects as this would place a double burden on the procuring entities in the form of the notification requirement, as well as complying with the rules stemming from the Directive. Also, it would probably be practically impossible, or at least extremely hard, for the Commission to handle the amount of work that the notification requirement of each public procurement procedure carried out would result in, due to the large amount of public procurement procedures that are being conducted each year in all Member States. This could then result in either limiting the liberalisation of the public service sector within the EU, or impeding Member States from using green clauses at all, as the procedures that would follow from the use of environmental criteria would be too extensive and time-consuming for the procuring entities. Thus, the MEIP has to be amended.

6. The Alternative: Replace the MEIP with the Purchaser Principle

In order to do a correct assessment of whether a benefit or advantage has been conferred on an undertaking from the State in a case concerning the use of environmental award criteria in a public procurement procedure, it should first be stated that the assessment has to include aspects of both micro- and macro-economic nature. In contrast to how the MEIP is applied today, it is submitted that the assessment should not be done simply through a comparison to a private economic operator due to the mere fact that there is no private subject that can be used as a fair comparison. Hence, the proposal below differs from other suggestions to how public procurement cases should be assessed under the state aid rules, where the majority tries to modify the existing MEIP to suit cases concerning public procurement and secondary criteria.¹³⁸ After the analyses carried out above, it has been concluded that the MEIP has to be amended, however this chapter will take that conclusion one step further by suggesting that the MEIP should be removed in cases concerning tender procedures and instead be replaced with a completely new test which will assess if a benefit or advantage is at hand in a different way than how this is done in cases concerning other measures; the Purchaser Principle. This is due to the mere fact that, as has been provided for several times before, a situation regarding public tender procedure is different to such a great extent that it cannot be handled in the same way as for instance a case where a loan is given from the State, or when the case concerns a pure investment from the State to the undertaking.

6.1 The Purchaser Principle

The Purchaser Principle that will be explained below contains a three-step assessment, where factors that are conformed for purchase situations are embraced. Thus, it is submitted that the new test should include the following assessments:

- 1. Is there a need for the purchase?**
- 2. What is the most economically advantageous tender?**
- 3. Is the measure proportional?**

¹³⁸ See for instance Arrowsmith, S. and Kunzlik, P. (2009). *Social and Environmental Policies in EC Procurement Law*. Cambridge: Cambridge University Press. Pages 249-270; Doern, A. (2004). *The Interaction Between EC Rules on Public Procurement and State Aid*. Public Procurement Law Review. 3.97. Pages 10-12 and; Steiniche, M. (2012). *Competitive Neutrality – Critical Remarks*. Copenhagen: Jurist- og Økonomforbundets Forlag. Pages 453-468 in *Festskrift til Jens Fejø*, whom argues that a market economy purchaser principle should be introduced in order to handle cases as such.

Firstly, it should be pointed out that the Purchaser Principle should only replace the MEIP in cases concerning public procurement procedures; thus the new test is not designed to be used in any other case than when a public tender has been conducted. It should also be stressed that the Purchaser Principle is meant to be used in the same way as the MEIP is today, namely that it should be used as a test that is introduced through case law by the ECJ. *Ergo*, it should not be codified through legislation, as a principle as such should be easy to amend or remove, which stands in relation to the fact that the test should be flexible and shaped after how the market *de facto* looks like. A codification of a test as such could result in the same problems as we are facing with the MEIP today, *viz.* that it would not reflect how the market actually looks like as well as it would be static and compelled to what aspects that can be included in the assessment in a different way than it would be if it is implemented through case law. Thus, rulings in cases before the Court will form the most suitable test because judgments from the Court reflect *de facto* markets and actions taken by market participants as the judgments derive from the circumstances in the case, which will therefore result in a test that will provide a fair, true result, *i.e.* if a benefit or advantage has been conferred on the undertaking or not. It is also important to point out that this has to be done by the ECJ due to reasons regarding harmonisation of the application of the test in the different Member States, as well as this falls within the exclusive competence of the EU as it concerns competition rules necessary for the functioning of the internal market in accordance with Article 3 (1) (b) TFEU mentioned above.

The question above concerns how the Purchaser Principle should be introduced, designed and where it should have its legal basis. However, it should also be pointed out that the new test will, in the same way as the MEIP, be applied not only by the Union Courts, but also by the Commission as well as the national courts when it is necessary. The question regarding whether the national courts, or the courts in general, are competent and/or suitable for this assessment will be discussed in section 6.5, where also other problems that may derive from the new principle will be touched upon. In the following, each element of the Purchaser Principle will be explained and examined further.

6.1.1 Is there an actual need for the purchase?

By examining the actual need for the purchase, it will be easy to determine whether the purchase is motivated from a purely economic perspective, which will therefore satisfy the need of an assessment including micro-economic aspects. Also, it will show whether the State

has operated to carry out its function or business, or if it is done in order to give an advantage or benefit to an undertaking. As has been discussed in section 3.1.1, the GC actually looked at the ‘actual need’ of the purchase in the case *BAI*, however they did not use it in a way that changed the assessment done under the MEIP of whether a benefit or advantage was at hand. Nevertheless, it is submitted that the ‘actual need’ test is a component that is necessary in order for the assessment to be complete.

When looking at if the purchase was motivated from an economical point of view, a comparison can be made to how a private purchaser should have done. In relation to the foregoing, regarding the fact that there is no equivalent subject that can serve as a suitable comparison to a purchasing State, it should be noted that the comparison is only one component out of many others, hence it is not decisive to the extent that it would rule out the possibility of taking environmental aspects into consideration in the assessment. In addition, the comparison should only examine the ‘actual need’, which would therefore not cover all aspects of a private purchaser (as is done in the current MEIP). For example, a prudent private purchaser would only buy as many shirts as was needed in order to carry out the business. If the State operates in the same way, hence purchasing shirts that will serve a purpose for the business of the State, the first part of the test will be passed. Yet, it should be stressed that when assessing if there is an actual need of the purchase, it is only the economic factors that should be regarded. This means that the assessment should only include the commercial nature of the purchase, for instance if the quantity purchased corresponds to the actual need of the public authority. Hence, what the specific good or service purchased is should not be given too much weighing in the assessment. However, this is only one out of three components of the test, and because the State can prove that an actual need for the purchased good or service does not in itself mean that no benefit or advantage has been conferred on an undertaking. It also has to be examined if the selected undertaking is the correct one. Hence, this part of the new test focuses on components concerning the purchased object, whereas the next part of the test looks at the subject from which the purchase has been done.

6.1.2 What is the most economically advantageous tender?

The second aspect that should be assessed in order to determine if the undertaking receives an advantage or benefit from the State is to determine if the chosen tenderer is the most economically advantageous one. By doing so, an objective assessment of the choice of undertaking will be done, which will serve as a presumption that a benefit has not been

conferred on the undertaking because the award criteria has been applied to all submitted tenderers, thus proving that none has been given a benefit. The assessment would be done in the same way as it is carried out under Article 67 of the Directive, which means that the State can choose to award a tenderer on various criteria, as long as the criteria is linked to the subject matter of the contract. It is clear that the price will be a determining factor in the assessment, as the most economically advantageous offer naturally includes the lowest price. However, the Court has stated that the concept of the most economically advantageous tender does not only include aspects of purely economic nature such as price, but environmental aspects falls into the scope of the concept as well.¹³⁹ This will once again satisfy the need of taking both micro-economic as well as macro-economic aspects into account, as the price paid for a good or service is a micro-economic aspect that is in direct correlation to the profit of the business of the State, whilst the environmental aspects are of macro-economic nature.

In addition, it should be recalled that it is the effect of the measure that is the crucial component of whether a measure is regarded as state aid or not. By evaluating the different tenderers from a ‘most economically advantageous’ perspective, the effect will be easier to detect. For example, if a green clause is used as an award criterion in a public procurement procedure, it is easy to find out what the effect of the green clause will be as a comparison can be made between the points that have been awarded to the undertakings that do comply with the green clause and the points of the undertakings that do not. The result from the comparison will then be evaluated by means of a proportionality test, which leads us to the final component of the new test.

6.1.3 Is the measure proportional?

It should first be pointed out that the need of a new test is not based on the fact that environmental aspects should always precede competition. Competition is an important tool to enhance environmental protection as well. If the market demands environmental friendly goods, free competition will make sure that only the economic operators whom supply that will remain on the market. In addition, competition is such an important objective as well as a cornerstone of the EU that it would be practically impossible to even argue that competition should always be set aside for environmental protection; neither the competition nor the

¹³⁹ *Concordia* C-513/99, ECLI:EU:C:2002:495 para. 57. This also includes other criteria such as quality, delivery date, technical merit and cost-effectiveness. See Sánchez Graells, A. (2011). *Public Procurement and the EU Competition Rules*. United Kingdom: Hart Publishing. Page 310f.

environment would gain on that approach. However, environmental considerations have to be taken due to all the foregoing reasons that have been presented above. Thus, a proportionality test is the most suitable way in order to determine to what extent one of the objectives may interfere with the other. The test should examine if the ‘cost’ of the distortion of competition is in proportion to the environmental ‘profit’ gained. The practical application of the test would be divided into two parts, suitability and necessity, which is based on the classical proportionality test used by the EU.¹⁴⁰

First, a suitability test should be carried out, where the measure at hand is examined in relation to the outcome of the measure. The measure will in this case be the use of secondary criteria, and these can only be used to the extent that it reflects the actual improvement of the protection of the environment. For example, the green clause cannot be a requirement that is not relevant, or in other words that is not a suitable or legitimate aim for what the public procurement concerns, as well as it cannot be given a too high weighting if the environmental effects are low. This should then be assessed in relation to what the damage on the competition has been. In other words, it must be reasonable. For instance, is the award criterion in the form of a zero-pollution requirement with a weighting of 75% in a tender regarding a purchase of one car legitimate? Probably not, due to the fact that there are not as many undertakings that can supply that type of car to a reasonable price and will therefore distort competition to a greater extent than what other alternatives that will have a higher, yet not devastating, effect on the environment would have. Secondly, the proportionality assessment should look at the actual necessity of the measure. Is the use of the secondary criteria in form of environmental protection necessary in order for environmental protection to be achieved, or is there another way to accomplish the same goal?

By using a proportionality test where competition is considered in relation to the environment, it is easier to see what the actual impact on both the competition on the internal market as well as on the environment will be with the specific measure. It is a hard assessment to do, however it is necessary to include a proportionality test as the two objectives cannot be achieved at the same time, and a test as such is the only way to weigh the two against each other. As mentioned earlier, the current MEIP is static in the sense that it can only pursue

¹⁴⁰ Bernard, C. (2013). *The Substantial Law of the EU – The Four Freedoms*. (Fourth Edition). Oxford: Oxford University Press. Page 177f.

purely micro-economic goals, however due to the great need of environmental improvement the test has to be more dynamic, which a proportionality assessment will provide.

6.2 How Would the Purchaser Principle Work in Practice?

In order to provide a full understanding of the Purchaser Principle, the following section will illustrate an example, which is the same example used in the introductory section 2.4 but for the sake of convenience for the reader, the circumstances will be presented in this section as well.

Suppose that the State decides to conduct a public tender for the purpose of purchasing 100.000 shirts that are to be used by the personnel working at the public hospitals. The State further decides to impose an award criterion with the weighting of 50% relating to the total amount of recycled material used in the shirts, where 100% recycled material will give a total of 10 points. In addition, the State uses a price criterion weighting 50% where the points awarded will be dependent on the price submitted by the other offers.¹⁴¹ Thus, the tenderer that offers the lowest price will be given 10 points and the other tenderers will be given points in relation to that. Hence, the maximum points that can be awarded to an undertaking are 20 points.

First, the actual need of the purchase should be assessed. In this case, the actual need is examined by looking at how many people that are working at the hospitals. If there are 100.000 workers, there is an actual need for the purchase. Consequently, the purchase is motivated from a commercial standpoint due to the fact that a private purchaser would have bought the shirts as well since it is needed in order for the business to be carried out.

Secondly, it has to be assessed whether the chosen tenderer is the most economically advantageous one. It should first be established that the environmental award criterion should be deemed to be linked to the subject matter of the contract as the criterion is posed in a way that it relates to the quality of the product as well as the specific process of production.¹⁴²

When carrying out the assessment at hand, the different prices that the tenderers offer should

¹⁴¹ There are several problems to this method of awarding points of price which will not be discussed further here, however as it is the most common one it will be used in this example. See Practical Law. *PLC – Evaluation of tenders*. Accessed 10 November 2015.

<<http://uk.practicallaw.com/2-386-8761?service=publicsector#a406015>>.

¹⁴² In accordance with Article 67.2 and 3 of the Directive.

be compared, in addition to if the shirts actually are produced from recycled material. If there are two tenderers that offer the right amount of shirts that has been produced from 100% recycled material, the price will be the decisive factor to which of the two that constitutes the most economically advantageous tender. However, if one of the offers comprises 100.000 shirts made of 100% recycled material to a price of 100.000 EUR, whilst the other tenderer can only offer shirts made of 20% recycled material, but to a price of 50.000 EUR, the depending factor will be the weighting of the green clause in relation to the weighting of the price. In this example, the tender that can supply 100.000 shirts of recycled material would be awarded with most points, as it will get full points on the environmental criterion (100% = 10 points) and 5 points for the price (50.000 = 10 points, hence the doubled price equals to 5 points), whilst the second tenderer will only receive 2 points for the environmental criterion (20% out of 100% equals to one fifth, $10/5 = 2$) and 10 points for the price, due to the fact that it was the lowest tender. To summarise, tenderer number one would be awarded 15 points and tenderer number two would be given 12 points, hence tenderer number one will be awarded the contract since it is the most economically advantageous tender. Consequently, if tenderer number one is chosen, the second criterion of the Purchaser Principle will be passed as well.

Thirdly, the proportionality test should be applied to the example. In this case, it should first be determined if the environmental award criterion is a suitable measure to be used in order to achieve the environmental goals set forth in the Directive and the Treaties, by looking at what the actual criterion consists of and how much weighting it has been given. The actual criterion used should be deemed suitable, as it is legitimate for a public authority to require that the materials should be environmentally friendly. In addition, a weighting of 50% should also be deemed suitable, based on the case law from the Court,¹⁴³ as well as looking at the specific circumstances in the case where the material used in the production of the shirts is of great relevance from an environmental point of view. Thus, the impact on the environment would be greater than what the damage on the competition would be, as the requirement is not posed in an excessive way in addition to the fact that the harmful effect on the environment if the 100.000 shirts were not environmentally friendly could be huge. Thus, the measure is in this case suitable. Moving on to the necessity of the green clause in the example, the question regarding if the environmental obligation could be fulfilled in any other way has to be answered. As has already been mentioned, the requirement in this case is closely connected to

¹⁴³ See section 4.2.1.

the subject-matter of the contract, as well as it has a measurable effect in the form of the harm of the environment caused by non-recycled material in the production in contrast to the effect of the recycled material. As a result, it can be stated that the measure chosen in order to achieve the environmental obligation imposed on the Member States is necessary; there is no other way that would be more suitable than the chosen one. From this, it can be concluded that the environmental advantages deriving from the use of the environmental award criterion is proportional to the distortion caused on the competition.

In conclusion, the green clauses used in the example passes the Purchaser Principle and hence no benefit or advantage is at hand, and therefore state aid is ruled out as the four criteria in Article 107 (1) TFEU are cumulative.

6.3 Potential Problems with the Purchaser Principle

In the analysing chapters, some of the many problems of the MEIP have been clarified and discussed, and even though the Purchaser Principle contains different solutions to the majority of these problems, there are also some problems with the new test. Thus, some of the major risks shall be examined in the following section.

6.3.1 The Purchaser Principle contains a more extensive assessment

The new test proposes a three-step assessment in order to decide whether a benefit or advantage is at hand, which in comparison to the one assessment done under the MEIP is considered to be far more extensive. A more extensive assessment implies that more time will have to be spent on carrying out the assessment, which in the context of EU law is a negative factor as the procedures already are considered to be too long. In addition, a more extensive assessment also involves a *de facto* harder assessment in comparison to the MEIP; there are more factors that should be taken into account, which increases the potential risk of mistakes being made in the assessment, thereby increasing the risk of reaching different results. However, it has to be remembered that a more extensive assessment also carries the benefit of being more flexible, which is crucial in order to obtain a fair result of the assessment.

6.3.2 The risks following from the application of the Purchaser Principle

As the test is required to be flexible it has to look at various factors, hence several assessments has to be done in order to provide a fair result. This might entail a risk that the test will be applied differently in the different legal orders, especially as to what regards the proportionality assessment. This is due to the fact that if there is no guidance on the matter, or

if the Member States are given a wide margin of discretion, the assessment may easily become arbitrary, as it is possible that the goal of integrating environmental protection into the areas of state aid and public procurement might be seen as a burden for the Member States as it also carries costs. This leads us to the next problem in the scope of application of the Purchaser Principle, namely that it will be hard to determine what margin of discretion that should be given to the Member States. The balance between harmonisation on one side, and the need of flexibility on other side, is a hard assessment to do. This is an extremely important issue to remember when implementing the Purchaser Principle, as one of the aims of removing the MEIP is to create a coherent, foreseeable legal environment in relation to the state aid rules. In addition, it will be hard for the EU to control how these assessments will be carried out in the different Member States. Thus, it is my suggestion that the CJEU leaves some margin of discretion to the institutions that are to apply the Purchaser Principle in order to satisfy the need of flexibility, however that it should be limited to the extent that harmonisation in the application of the principle can still be accomplished.

6.3.3 The Courts are not a suitable tool to use when shaping the principle

The next problem, regarding the fact that the assessment might be too complex for the Courts to carry out, goes hand in hand with the earlier statement that the principle should be introduced through case law and not through legislation. It could be the case that because the Purchaser Principle contains an extensive assessment, as well as there will be some margin of discretion for the institutions to decide exactly what factors that should be included Purchaser Principle, the new test is actually too complex for the Courts to carry out and that the assessments should be codified instead of being carried out by the Courts in order for the assessment to be legally certain and harmonised. However, as has been argued for in the introductory part to this chapter, it is in my view clear that the Courts are competent as well as the most suitable tool to implement the new test as that will result in a flexible and desirable test as the cases before the Courts reflect the real market, hence resulting in a realistic, substantial test. However, it is still a potential risk to demand the Courts to form the principle.

6.3.4 The question has not been settled for political reasons

Another potential problem with the new test is that the reason to why the EU has not amended the MEIP is due to environmental political reasons; it might be the fact that questions as such should not be settled on the legal arena, but instead it should be handled by the politicians as a legal solution to the matter might have undesirable consequences. For instance, by making environmental protection a legal matter to the extent that the new solution proposes, it (to

some extent) codifies a political view which exists today but that might not exist, or perhaps will not look the same, tomorrow. Thus, a potential problem with the introduction of the Purchaser Principle is that it implies a codification of an objective in a legal area that, from a political standpoint, might be undesirable.

6.3.5 Potential problems with the three criteria of the Purchaser Principle

Last but not least, the assessments that should be done under the different criteria may involve problems as well. To begin with, the ‘actual need’ assessment done under the first step of the Purchaser Principle is due to the nature of the test hard to measure and therefore to control and assess for the Courts. This might cause problems relating to harmonisation¹⁴⁴ as well as the applicability of the test in itself; if the assessment cannot be carried out in a way that is quantifiable, the result from it will thereby not be the fair, true outcome that the new test is striving to achieve. Thus, a requirement to provide evidence in order to support the actual need of the purchase might have to be set high. However, this can also result in a negative outcome; if there really is an actual need but it is not measurable in any way it might be deemed to constitute a benefit or advantage, hence not being a true picture of reality, which is one of the aims of the Purchaser Principle. Moreover, when it comes to deciding which one is the most economically advantageous tenderer, it is still uncertain how far the environmental criteria can be used in a public tender, which might cause problem for the Purchaser Principle. For example, it has not been ruled upon how much weighting an environmental criterion can be given in order to comply with the Articles in the public procurement Directive, which would of course be a potential problem with the new test as this makes the assessment hard to make for the Courts. As to what regards the proportionality test, it has already been mentioned that some of the difficulties may be to determine how wide the margin of discretion should be for the administering institutions that shall apply the test, in addition to the problem relating to harmonisation. In relation to the foregoing risks, it should however be pointed out that it is a three-step assessment, thus failing one of the criteria does not automatically result in the measure constituting a benefit or advantage in the meaning of Article 107 (1) TFEU. Hence, the potential risks of each criterion should be observed in isolation.

¹⁴⁴ Please see section 6.5.2.

6.4 Final Remarks

In conclusion, it should be stated that even though the new test might have some difficulties and potential risks, it is important that the new principle is shaped in a way that objectives such as environmental protection can be integrated in the assessment. When looking at the MEIP, it is clear that it is unsuitable to only assess one component of the measure (meaning the micro-economic aspect of the measure in this regard). Instead, it is necessary to introduce a test that allows the Courts to weigh different objectives against each other, both of micro- and macro-economic nature, in order for the test to provide a fair result of whether the measure actually confers a benefit or advantage on the undertaking. An assessment as such will naturally have its disadvantages and potential problems as well, however those problems will not be problematic to the same extent as the problems found when looking at the MEIP. Thus, the Purchaser Principle should replace the current MEIP in cases where the State has acted as a purchaser.

7. Conclusion

Through the introduction of environmental obligations in the Treaties and in the Directive, a new legal landscape has emerged; Member States as well as the EU are today obliged to take environmental considerations into account when a public procurement procedure is conducted. Environmental protection is still considered to be a macro-economic objective, and as the MEIP only includes aspects of micro-economic nature, the use of secondary criteria in the form of environmental protection as award criteria will automatically classify the criteria as a benefit or advantage, thus deeming the measure to be state aid in the scope of Article 107 (1) TFEU. As a result, it has been concluded that the MEIP is no longer a suitable test to use when carrying out the assessment of whether a measure constitutes a benefit or advantage, and frankly it has actually never been an adequate test to apply on cases concerning public procurement procedures. This is due to the fact that it was designed to compare the action of the State to an investor, and not a purchaser, which in itself has been problematic throughout the years as different elements are assessed when the case concerns an investment than in a situation that regards a purchase. In addition, there are several negative effects of deeming the use of green clauses in a public procurement to be state aid, for instance it would place a double procedural burden on the procuring Member States as they would have to notify the Commission before carrying out a tender procedure, as well as they have to comply with the rules set forth in the Directive, which could result in the Member States not using environmental criteria at all.

Ultimately, it is clear that a change is needed when it comes to assessing the first criterion of Article 107 (1) TFEU; a principle that was introduced 30 years ago can possibly be the most suitable principle due to the fact that the market, the goals and objectives of the EU and its Member States, and the world as a whole have changed tremendously during these years. This requires the test to change as well, especially as it is of great importance for the environment that it does. The regime of state aid covers a broad range of measures, as well as the contracts distributed through public procurement procedures amount to almost one fifth of the Member States' GDP, thus it is not hard to understand how the integration of environmental concerns is one of the key factors that should be regarded in order for the environmental obligations to be fulfilled. Hence, the change has to be substantial in order for it to have any effect, which motivates a replacement of the current MEIP with a completely new test. An alteration of the already existing principle would probably create new problems

rather than solving the old ones, due to the fact that the MEIP cannot pursue other goals than those of purely micro-economic nature. Thus, a test that is flexible and that can include both micro- and macro-economic considerations is needed; where *inter alia* profit, efficiency, environmental aspects and other desirable objectives can be achieved at the same time. The Purchaser Principle allows objectives of both micro- and macro-economic aspects to be regarded, in addition to the fact that it is designed to be applied in cases where the State acts as a purchaser and not as an investor. It also allows the Courts to assess the measure on a case-by-case basis, where the proportionality aspect of the test satisfies the need of Courts to weigh the different objectives against each other, thus being able to consider both the competition on the internal market as well as environmental protection aspects, hence complying with the principle of sustainable development. In other words, the Purchaser Principle allows the regimes of state aid and public procurement to be *de facto* measures that can be used in order to accomplish the goals for a sustainable development, as the new test removes some of the major problems with the implementation of environmental protection in the legal frameworks caused by the MEIP.

The Member States of the EU, in addition to the EU itself, have an obligation to ensure that the environment is considered and protected. In contrast to the responsibility to maintain a level playing field on the internal market, the environmental obligation has a more complex purpose and scope, as it is a concern for the current generation as well as future generations in the whole world. It is therefore of great importance that environmental protection is integrated in, among other areas, state aid and public procurement. Indeed, the MEIP has served its purpose well, however it is now time for the introduction of a new test that corresponds to present circumstances.

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