

When are universities bound by EU public procurement rules as buyers and providers? - English universities as a case study

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ABSTRACT

In this study we provide an up-to-date assessment of situations in which universities are bound by public procurement rules, as well as the combined changes that market-based university financing mechanisms can bring about in relation to the regulation of university procurement and to the treatment of the financial support they receive under the EU State aid rules. National differences in funding schemes are likely to trigger different answers in different EU jurisdictions. This study uses the situation of English universities as a case study.

The first part focuses on the role of universities as buyers. The traditional position has been to consider universities bound by EU public procurement rules either as state authorities, or because they receive more than 50% public funding. In the latter case, recent changes in the funding structure can create opportunities for universities to free themselves from compliance with EU public procurement rules.

In the second part, we assess the position of universities as providers. Here the traditional position has been that the State can directly mandate universities to conduct teaching and research activities. However, new EU legislation contains specific provisions about how and when teaching and research need to be procured if they are of an economic nature. Thus, accepting the exclusion of university services from procurement requirements as a rule of thumb is increasingly open to legal challenge.

Finally, the study assesses if and in how far universities can benefit from exemptions for public-public cooperation or in-house arrangements either as sellers or buyers.

KEYWORDS

Public procurement, State aid, higher education, universities, teaching, research, funding, governance, England, HEFCE, BIS.

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1. Introduction

This paper assesses the situations in which universities are currently bound by public procurement rules, as well as the combined changes that market-based university financing mechanisms can bring about in relation to the regulation of university procurement and to the treatment of the financial support they receive under the EU State aid rules. The paper looks at the interaction between universities and EU public procurement and State aid rules from the double perspective of universities as buyers (§2) and universities as suppliers or providers of services to other public entities (§3). The paper also focuses on the increased scope for universities to escape compliance with those rules in specific circumstances that may enable them to have recourse to the so called in-house and public-public cooperation exceptions under the 2014 EU public procurement rules (§4).

The first part of the paper focuses on the role of universities as buyers (§2). Universities' continued obligation to comply with EU public procurement rules when they purchase derives from their status as 'contracting authorities' under Directive 2014/24. The traditional position has been to consider universities bound by EU public procurement rules either because they are state authorities, or because they receive more than 50% of their funding from the State; either on a structural basis (making them bodies governed by public law) or regarding specific projects. Where universities are not public authorities *in nature*, changes in the way they are funded can create opportunities for universities to free themselves from compliance with EU public procurement rules when they acquire goods or commission services or works (§2.A). National differences in funding schemes are likely to trigger different answers in different EU jurisdictions. This paper uses the UK situation and, more specifically, the case of English universities as a case study to discuss the position of universities as contracting authorities. In doing so it aims to assess whether, as has already been suggested by the UK's Department of Business, Innovation and Skills (BIS),³ on-going changes in funding for English universities can actually allow them to lose their condition of 'contracting authorities' and, ultimately, stop being bound by EU public procurement rules—particularly due to the increasing importance of tuition fees, the lift in student number controls and the pressure for universities to raise other sorts of commercial revenue. This is an issue open to discussion because the latest analysis of the universities' condition of contracting authorities by the Court of Justice of the European Union (CJEU) in *University of Cambridge*⁴ did not take into account any of these recent trends in university financing in England. It will be clear that the analysis ultimately relies on an

³ See J Beresford-Jones, "Removal of cap on student numbers - will this affect universities' status as "contracting authorities"?", 1 July 2015, *Procurement Portal*, available at http://www.procurementportal.com/blog/blog.aspx?entry=464&utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+procurementportal%2Fblogfeed+%28Mills+%26+Reeve%3A+Procurement+Portal+blog%29 (last accessed July 3, 2015). This issue has been in the political agenda for quite some time now. See A Albert, "Universities to be exempt from EU public procurement rules", 5 October 2011, *Supply Management*, available at <http://www.supplymanagement.com/news/2011/universities-to-be-exempt-from-eu-public-procurement-rules#sthash.YfveQGxu.dpuf> (last accessed September 3, 2015).

⁴ Judgment of 3 October 2000 in *University of Cambridge*, C-380/98, EU:C:2000:529.

assessment of whether tuition fees are 'state funds' or not, as well as on their relative importance vis-à-vis other sources of public and private funding. The former becomes more unclear where a system of student loans is operated that does not necessarily function in commercial terms, as is the case with the English Student Loans Company (SLC). This triggers a related discussion on whether the State is deemed to control the funds administered by such arms-length (private) student loans organisations, which is another hotly disputed area of EU economic law; in this case, State aid (§2.B).

In the second part, the paper explores the position of universities as providers of services, or sellers (§3). Here the traditional position has been to consider that universities can provide a significant volume of services to the State, or to the general public, without having to comply with procurement requirements; *ie* that the State can directly mandate universities to conduct teaching and research activities, as well as award them specific types of R&D contracts excluded from the procurement Directives. However, recent developments might cast doubt on the continued validity of this traditional position. The new Framework for State Aid for Research and Development⁵ makes it clear that research which constitutes an economic activity has to be commissioned by means of a (quasi) procurement exercise in most cases. Directive 2014/24 equally contains specific provisions about how and when teaching and research needs to be procured. Thus, accepting the exclusion of university services from procurement requirements as a rule of thumb is increasingly open to legal challenge. At the same time, the possibility to regulate some or all university activities as either social services of general interest (SSGI) or services of general economic interest (SGEI) also creates complexity. This part of the paper thus assesses to what extent the commissioning of education and research services to universities needs to be subjected to procurement requirements (§3.A). It also looks at the application of State aid rules to the commissioning of these services when procurement is not required (§3.B).

Finally, the paper stresses how even in those cases where, generally, public procurement would need to take place and bind the university as either a buyer or a seller, there are still exemptions for public-public cooperation or *in-house* arrangements that universities may try to benefit from (§4). These could respectively shield universities from competition by non-public and commercial providers when they are sellers, as well as allow them to avoid a public procurement procedure when they are buyers. For these exceptions to apply, there needs to be an element of control of the providing entity by the contracting authority. Thus, certain organisational decisions (such as university spin-offs of revenue-making units) could provide a secondary opportunity for universities to avoid direct compliance with EU public procurement rules when acquiring goods or services from affiliated entities by means of public-public cooperation or *in-house* arrangements (§4.A). Differently, in the case of universities as providers and in view of their inherent *autonomy*, establishing control by other public sector entities interested in commissioning their services is a difficult task. Indeed, a literal interpretation of the recent *Datenlotsen*⁶ case might give the impression that control cannot be present in the university-state relationship, which would bar the use of *in-house* or public-public exemptions when universities act as providers. However, Directive 2014/24 explicitly allows non-

5 Commission Communication 'Framework for State aid for research and development and innovation' OJ [2014] C 198/01 (hereinafter referred to as new Research Framework).

6 Judgment of 8 May 2014 in *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303.

market arrangements previously rejected by the CJEU (such as horizontal in-house situations) and there are indications that the control requirement may have been relaxed. The question therefore arises how these developments in the regulation of public-public and *in-house* exceptions in Article 12 of Directive 2014/24 relate to the *Datenlotsen* Judgment and, more generally, to what extent the CJEU will be willing to ring-fence procurement in favour of university providers (§4.B).

The conclusions of the paper (§5) recapitulate our findings on the extent to which and the conditions under which universities are bound by EU public procurement rules as either buyers or providers.

2. Universities as buyers

From an EU law perspective, a university's obligation to comply with the public procurement rules of Directive 2014/24⁷ crucially depends on its inclusion within the scope of coverage of the Directive.⁸ Some English universities consider themselves bound to comply with EU public procurement rules,⁹ while others do not,¹⁰ and yet others have procurement processes in place that may well be compliant with the EU rules but do not clarify whether the university considers itself obliged to follow them.¹¹ This seems to derive from legal uncertainty as to the actual scope of coverage of the

⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

⁸ For a general overview, see S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, vol 1, 3rd edn (London, Sweet & Maxwell, 2014) 339-383. See also A Semple, *A Practical Guide to Public Procurement* (Oxford, OUP, 2015) 2-3.

⁹ For example Durham, Bristol and Sussex. This list is not meant to be exhaustive, but simply a small selection of clear cases. See Durham University Procurement Policy, *Guide to EU Public Procurement Directive* (undated), available at https://www.dur.ac.uk/procurement/procurement_policy/8euregulations/ (last accessed September 3, 2015). University of Bristol, Procurement Policy (August 2015) on file with authors. Slightly outdated, but this is also clear in the policy followed by the University of Sussex Procurement Office (undated), available at <http://www.sussex.ac.uk/procurement/documentsandpolicies/buyersguideandorderingprocedures/euregulationswhentheybecomeapplicable> (last accessed September 3, 2015).

¹⁰ For example Cambridge. See University of Cambridge, Finance Division, Procurement Services, *The EU Directives on Public Procurement* (EU Guide v 3d May 2015), available at https://www.admin.cam.ac.uk/offices/purchasing/guides/eu_guide.pdf (last accessed September 3, 2015).

¹¹ For example Oxford. See University of Oxford, Council Regulations 1 of 2010, *Financial Regulations, made by Council on 21 June 2010* (Supplement 1 to Gazette, No. 4923, 25 June 2010). Last amended on 10 April 2015 (Gazette, Vol. 145, pp. 447-449, 26 March 2015), available at <http://www.admin.ox.ac.uk/statutes/regulations/101-078.shtml> (last accessed September 3, 2015).

EU rules—which carries on to the domestic *Public Contracts Regulations 2015* that transpose them.¹² Of course, universities can always decide to comply with the EU public procurement rules *voluntarily* and some of them do.¹³ However, from the perspective of legal certainty, it is important to clarify when universities are actually under a duty to comply with EU public procurement rules. Not only to open up possibilities for alternative procurement practices where they are not actually bound by the EU rules, but also to clarify the situation of university *purchasing consortia* that are accumulating more and more purchasing volume,¹⁴ and which obligation to comply with EU rules may well be derived from that of the universities themselves.¹⁵ Therefore, assessing the actual extent of the obligation to comply with EU public procurement rules by universities—either directly or through university *purchasing consortia*—can contribute to increasing legal certainty in this important area of public sector expenditure, widely defined. This is the purpose of this section.

An obligation to comply with the rules in Directive 2014/24 can result from two different situations. Firstly, the obligation can derive from the classification of universities as ‘contracting authorities’ *in nature* in terms of Article 2(1)(2) of Directive 2014/24, which would be the case were universities are formally a State authority. This is an issue left to the Member States’ internal organisational autonomy and operates on the basis of a closed list that rarely includes universities amongst State authorities.¹⁶ Thus, this situation will not be discussed in any further detail.

Second, and more crucially, universities can be bound to comply with EU public procurement rules due to the origin of their funding. There are two situations that trigger *coverage by funding*, which in

12 The Public Contracts Regulations 2015 (SI 2015/102), available at <http://www.legislation.gov.uk/ukSI/2015/102/contents/made> (last accessed September 3, 2015).

13 This is the case of the University of Cambridge, maybe as a result of its previous litigation, since it was involved in the case that led to the Judgment in *University of Cambridge*, C-380/98, EU:C:2000:529, which is discussed below.

14 It may be worth noting that there are four regional educational purchasing consortia in England: London; LUPC – London Universities Purchasing Consortium (<http://www.lupc.ac.uk/>); North East; NEUPC – North-eastern Universities Purchasing Consortium (<http://www.neupc.ac.uk/>); North West; NWUPC – North-western Universities Purchasing Consortium (<http://www.nwupc.ac.uk/>); and South; SUPC – Southern Universities Purchasing Consortium (<http://www.supc.ac.uk/>).

15 This would ensue from Art 2(1)(1) of Directive 2014/24 whereby ‘contracting authorities’ includes associations formed by one or more bodies governed by public law. Any eventual *primary* obligation of such purchasing consortia to comply with EU rules is not assessed, as it would exceed the possibilities of this paper.

16 However, this is the case of France, Greece and Sweden, which have designated their universities as central government authorities in Annex I of Directive 2014/24. Please note that the Annex is in the original language of each of the Member States, which complicates the identification of inclusion of universities named in foreign languages that the authors do not know.

turn refer to either structural or sporadic receipt of state funds. Structural receipt of state funds can lead to the classification of a university as a 'body governed by public law' under Article 2(1)(4) of Directive 2014/24 where the public funds are the major source of university funding (below §2.A). Sporadic receipt of public funds also triggers compliance with EU public procurement rules if they cover most of the cost of specific contracts involving works for university buildings, or supplies or services connected therewith as per Article 13 of Directive 2014/24. However, this is a rather residual issue in practice and, in any case, it is not within the core issues affecting universities' general obligation to comply with the EU public procurement rules. Hence, this is also not discussed in any further detail.

The remainder of this section thus explores universities' coverage by funding as a trigger for their obligation to comply with EU public procurement rules as bodies governed by public law (below §2.A), putting a special emphasis on the specificities of university funding in England, where the Government operates a semi-privatised system of student loans that complicates the assessment of the nature of the funds (below §2.B).

A. Coverage by structural funding: English universities as bodies governed by public law

As mentioned above, universities can be included in the scope of coverage of Directive 2014/24 if they can be classified as 'bodies governed by public law'. Article 2(1)(4) of Directive 2014/24 sets out three conditions that need to be met cumulatively for a university to match the definition: (a) it must be established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) it must have legal personality; and (c) it must be financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or be subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.¹⁷

These conditions were discussed explicitly in relation to English universities by the CJEU in the *University of Cambridge* case.¹⁸ There was no doubt that the first two conditions were met, and the assessment of the university status as a body governed by public law depended on whether it was "*financed for the most part*" by one or more contracting authorities within the meaning of the third indent of that provision'.¹⁹ In that regard, the CJEU stressed that '[o]nly payments which go to finance or support the activities of the body concerned without any specific consideration therefor may be described as "*public financing*".²⁰ The CJEU considered that both (i) awards or grants paid by one or more contracting authorities for the support of research work and (ii) student grants paid by local

¹⁷ For an analysis of the issue of control over universities, see below §4.B, where the difficulties derived from university autonomy regulations are assessed in detail.

¹⁸ *University of Cambridge*, EU:C:2000:529, *in totum*.

¹⁹ *Ibid*, para 19.

²⁰ *Ibid*, para 21.

education authorities to universities in respect of tuition for named students constituted 'public funding' for these purposes.²¹ The Court also clarified that 'financed for the most part' means 'more than half',²² so that universities need to receive more than 50% of their total funding from the State for them to meet this condition. To that effect, the CJEU ruled that '*in order to determine correctly the percentage of public financing ... account must be taken of all ... income, including that which results from a commercial activity.*'²³ In short, then, if a university receives more than 50% of its total income from the State by means of awards or grants related to research and teaching activities not paid as consideration for specific research or other services provided to the funding authority or authorities, then it is a body governed by public law and bound to comply with the rules of Directive 2014/24.

Thus, the current state of the law would seem to leave limited space for doubt as to the classification of English universities as bodies governed by public law, which would depend on a relatively straightforward analysis of their financial statements. However, cumulative changes in the way in which universities receive funding, particularly for their teaching activities, have blurred the legal test initially adopted by the CJEU in *University of Cambridge*. The introduction of a new system of student fees backed up by a semi-privatised scheme of student loans creates uncertainty as to the origin and nature of the tuition fees that English universities now receive from their students. Crucially, the introduction of the tuition fees was not part of the analysis in the *University of Cambridge* case because, even if it was decided in 2000, the CJEU only took into account the request for a preliminary reference issued in July 1998 by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court).²⁴ This leaves the reform of English university financing in need of a fresh legal assessment. We now turn to the basic elements of the current system, and try to reconcile it with the principles for the classification of funding as public or private for the purposes of EU public procurement law under the *University of Cambridge* test.

Tuition fees were first introduced in 1997 to compensate for shortfalls in strictly public support for English universities' teaching activities and were legally enacted by means of the *Teaching and Higher Education Act 1998*.²⁵ The fees started at £1,000 per year in academic year 1998-99 and were then trebled in 2006 and again in 2012, to the current cap of £9,000.²⁶ Their overall importance in university funding has thus been quantitatively increasing,²⁷ and English universities depend more and more on this source of income.²⁸ This trend is likely to continue in the future, particularly in view of the current plans to lift the cap on fees,²⁹ at least for universities that '*can show they offer high-*

21 Ibid, paras 22-23 and 26.

22 Ibid, para 33.

23 Ibid, para 36.

24 *University of Cambridge*, EU:C:2000:529, para 1.

25 SI 1998/30.

quality teaching',³⁰ as well as the suppression of the student number control that existed until academic year 2015-16.³¹ Thus, tuition fees as a major source of income are likely to grow to become quantitatively the largest funding stream for English universities, or at least for the largest majority of them, and will in any case remain a key income stream across the sector. However, the qualitative nature of this source of funding is changing in a way that creates some analytical complications concerning their classification as public or private funding.

Tuition fees are formally paid by students and could be considered a source of private funding or income for universities. However, the UK Government has created a semi-privatised system of student loans which makes the assessment not so straightforward.³² The Department of Business, Innovation and Skills (BIS)—together with the Scottish Ministers, the Welsh Assembly Government and the Department for Employment and Learning in Northern Ireland—owns *The Student Loans*

26 For a critical overview, see J Ball, 'Explained: how is it possible to triple tuition fees and raise no extra cash?', 21 March 2014, *The Guardian*, available at <http://www.theguardian.com/news/datablog/2014/mar/21/explained-triple-tuition-fees-no-extra-cash> (last accessed September 3, 2015).

27 Interestingly, in 2011-12 (i.e. before the last raise in the applicable cap), undergraduate student fee income varied between 0 and 37% of universities' total income; see Universities UK, *Where student fees go*, available at <http://www.universitiesuk.ac.uk/highereducation/Documents/2013/WhereStudentFeesGo.pdf> (last accessed September 3, 2015).

28 This dependence was very clear in the reaction by Universities UK to the Labour proposal to reduce the fee cap from £9,000 to £6,000 during the 2015 general election campaign. Universities UK estimated at £10 billion the need for additional public support that would result from such a reduction of the fee cap. See 'Universities UK board highlights concerns with £6,000 tuition fees proposal', 2 February 2015, available at <http://www.universitiesuk.ac.uk/highereducation/Pages/UUKboardFeesLetter.aspx#.VehnOfVhBc> (last accessed September 3, 2015).

29 Although there is some uncertainty about this. See F Perraudin, 'Universities minister doesn't rule out raising tuition fees', 30 June 2015, *The Guardian*, available at <http://www.theguardian.com/education/2015/jun/30/universities-minister-doesnt-rule-out-raising-tuition-fees> (last accessed September 3, 2015).

30 J Morgan, 'Budget 2015: fees can rise for universities with "high-quality teaching"', 8 July 2015, *Times Higher Education*, available at <https://www.timeshighereducation.co.uk/news/osborne-signals-rise-9k-fee-cap-tef> (last accessed September 3, 2015).

31 See N Hillman, *A Guide to the Removal of Student Number Controls* (2014) Higher Education Policy Institute Report 69, available at <http://www.hepi.ac.uk/wp-content/uploads/2014/09/Clean-copy-of-SNC-paper.pdf> (last accessed September 3, 2015).

Company (SLC),³³ which adopts the form of an Executive Non-Departmental Public Body (NDPB),³⁴ is entirely Government-funded³⁵ and not-for-profit, and the appointment of the members of its Board are made by the shareholders directly (ie by the BIS and other State authorities). So there is no doubt that it constitutes a body governed by public law (see discussion above). Its creation as a NDPB is meant to allow for its operation as a 'body which has a role in the processes of national government, but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers'.³⁶ Moreover, its executive status means that, amongst other things, the SLC is able to make decisions in an autonomous way, enter into contracts and own assets and dispose of them.³⁷ Therefore, the SLC is a body governed by public law that manages public funds in a rather independent fashion in terms of specific decisions whether to lend or not money to specific applicants. However, it also has very limited autonomy in the way it adopts its non-

32 There were plans for its full privatisation, but these seem to have been abandoned. See A Chakraborty, 'Student loans: not even Cameron could privatise the unprivatisable', 22 July 2014, *The Guardian*, available at <http://www.theguardian.com/commentisfree/2014/jul/22/student-loans-cameron-privatise-sale> (last accessed September 3, 2015). However, rumours of reinvigorated attempts to at least sell part of the loan portfolio are recurring; O Williams-Grut, 'The Tories are resurrecting plans to privatise a big chunk of Britain's student loans', 21 May 2015, *Business Insider UK*, available at <http://uk.businessinsider.com/chancellor-george-osborne-to-sell-off-1998-2012-student-loan-book-now-vince-cable-gone-2015-5> (last accessed September 3, 2015).

33 <http://www.slc.co.uk/about-us/remit.aspx> (last accessed September 3, 2015).

34 For background, see <https://www.gov.uk/guidance/public-bodies-reform> (last accessed September 3, 2015).

35 It received £154 million in 2013-14; see Cabinet Office, 'Public bodies 2014: data directory', available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387313/Annex_B_-_Public_bodies_2014_Data_Directory_PDF.pdf (last accessed September 3, 2015). However, the SLC pays £5.9 billion to higher and further education providers yearly and manages a loan book with a value of £62 billion; Student Loans Company, *Corporate and Business Plan FY14-15 to FY16-17* (2015) 5, available at http://www.slc.co.uk/media/3435/corporate_and_business_plan_fy14-15.pdf (last accessed September 3, 2015).

36 Cabinet Office, *Public Bodies: A Guide for Departments*, 2006, available at http://www.civilservice.gov.uk/wp-content/uploads/2011/09/2_policy_Characteristics-word_tcm6-3410.doc (last accessed September 3, 2015).

37 M Treasury, *Classification of Expenditure Public and Private Sectors: New Bodies, Partnerships, Joint Ventures, Privatisation and Nationalisation*, November 2000, available at <http://www.wga.gov.uk/pages/classification.html> (last accessed September 3, 2015).

commercial decisions (see below §2.B for further details).³⁸ *The fact that the SLC pays tuition fees directly to universities on behalf of students complicates the simple assessment that such fees are paid by the students.* This is a key issue for the purposes of our discussion because classifying tuition fees as private income for universities would potentially bring public funding below the 50% threshold that triggers the obligation to comply with the EU public procurement rules. Thus, a detailed analysis is carried out in the following subsection.

B. Key Issue: Are student fees financed through student loans State resources?

The previous discussion stressed how the CJEU interprets “public funding” as inclusive of student grants paid by local education authorities to universities in respect of tuition for named students.³⁹ The question is whether the same reasoning applies to tuition fees paid directly by the SLC to universities *on behalf* of named students. A quick answer could be that it simply does.⁴⁰ However, determining the nature of this source of university income may be complicated if we take into account that the university sets its tuition fee level regardless of the actual student’s access to finance. That is, the university expects the same fee regardless of the student opting to pay for it directly or with an SLC loan, or any other financial facility. Moreover, lack of payment by the SLC to the university would not necessarily exempt the student from having to pay the tuition fees, or else see its registration terminated—although universities have implemented temporary loan schemes to try to avoid this. Consequently, the main ‘funding’ relationship is that between each student and the university it chooses to enrol in, and the SLC could be seen as a ‘mere’ intermediary or an agent for the student. The fact that the student has at least a *residual obligation to pay* the tuition fee to the university may have changed the nature of the funding received by English universities. Thus, this issue seems to merit some closer scrutiny.

EU public procurement rules and the interpreting case law of the CJEU have not developed the criteria to distinguish between private and public funding any further than in *University of Cambridge*. However, functionally equivalent criteria are clearly developed in the neighbouring area of EU State aid law, where the imputability of an aid measure to the State—or, in simpler terms, the existence of ‘public funding’ *lato sensu*—is a key jurisdictional requirement to apply the prohibition in Article 107(1) TFEU.⁴¹ We submit that the same criteria can be used for the analysis of the private or public nature of the tuition fees paid by the SLC directly to English universities.

In that regard, it is interesting to stress that the CJEU has been developing a growing body of case law concerned with the assessment of the public or private nature of the funds managed by arm’s length entities and not-for-profit associations. There are two 2013 cases particularly relevant for our

³⁸ The criteria for such decisions are, indeed, set by the Government. See Cabinet Office, Student Finance, available at <https://www.gov.uk/student-finance> (last accessed September 3, 2015).

³⁹ *University of Cambridge*, EU:C:2000:529, paras 23 and 26.

⁴⁰ Clearly supporting this position, see Beresford-Jones (n 3), who stressed that ‘the increasing sum being paid through tuition fees funded via the SLC is unlikely to assist universities to wriggle free of the public procurement regime’.

discussion, which set conditions and requirements at two different levels. At a general level, the CJEU has clarified that the key element to determine whether specific funds are 'public' or, technically, 'State resources' is to focus on the control over those funds.⁴² Indeed,

The concept of 'intervention through State resources' is intended to cover, in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid

...

*even if the sums corresponding to the measure in question are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources.*⁴³

In that regard, the fact that BIS controls the SLC and could at any point in time reduce or even withdraw the grant aid support it provides for its subsequent payment to higher education institutions⁴⁴ is a very strong indication that the creation of such arm's length entity does not suffice to 'privatise' the funds made available to universities through the direct payment of the corresponding tuition fees by SLC *on behalf* of the students. Indeed, the difficult issue regarding State control of the funds in this setting derives from the direct payment SLC makes to universities because students are never in possession or control of the funds, so there is no risk that students will dedicate their loans to anything different than paying the tuition fees (and this is, most likely, the precise goal of the direct payment mechanism). If the loans were paid to students and they then paid the fees on to the university, given that the State would have lost control of the use of the funds, this could change the analysis. Of course, if students were contractually obliged to use the funds exclusively to pay the tuition fees and that was effectively monitored, the situation would be in a grey area and a discussion on the intensity of that control could ensue. However, under the current design of the SLC loans and for so long as the SLC pays tuition fees to universities directly and on behalf of the students, there seems to be little scope to challenge that those funds remain under public control at all times.

41 See the *Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU*, available at http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf (last accessed September 3, 2015).

42 Judgment of 19 December 2013 in *Vent De Colère and Others*, C-262/12, EU:C:2013:851.

43 *Ibid*, paras 20-21, references omitted.

44 This has been the case of further education; L Okolosie. 'Adult education is being slashed and burned - this is too important to ignore', 26 March 2015, *The Guardian*, available at <http://www.theguardian.com/commentisfree/2015/mar/26/adult-education-funding-cuts> (last accessed September 3, 2015).

It is also important to stress that, in determining whether the funds actually managed by the arm's length entity are available to the competent national authorities, the CJEU has paid particular attention to whether the decisions are adopted independently from Government or not. The Court found that such was not the case where the '*organisation ... decides how to use those resources, which are entirely dedicated to pursuing objectives determined by that organisation*'.⁴⁵ As mentioned above, the SLC actually has very limited discretion concerning the use of the resources made available to it, particularly because the conditions for the entitlement to a student loan—and especially a tuition fee loan—are predetermined by the Government. Thus, public control of the funds made available to SLC operates at two levels: firstly, in terms of the total volume of funding made available (or not) to SLC and, secondly, in terms of the conditions in which that funding can be used to provide student financial support.

Further, at a more specific level, the CJEU has also clarified that there has to be a minimum exercise of 'State prerogatives' by the arm's length institution for the funding it manages to remain 'public'. Or, *a contrario*, that the possibility of exercising 'State prerogatives' taints the funding with a clear public shade. Indeed, in considering that a specific intervention did not constitute public funding, the Court stressed that

*That mechanism does not involve any direct or indirect transfer of State resources, the sums provided ... do not go through the State budget or through another public body and the State does not relinquish any resources, in whatever form (such as taxes, duties, charges and so on), which, under national legislation, should have been paid into the State budget. The contributions remain private in nature throughout their lifecycle and, in order to collect those contributions in the event of non-payment, the ... organisation must follow the normal civil or commercial judicial process, not having any State prerogatives.*⁴⁶

This is not the case of the SLC, particularly when it comes to the recovery of the student loans. The SLC has the possibility of benefitting from the State prerogatives linked to the collection of taxes and, as a matter of general design, student loans are repaid through salary withholdings by employers.⁴⁷ Regardless of the poor practical results of this strategy,⁴⁸ it is clearly not an *inter privatos* or

45 Judgment in *Doux Élevages and Coopérative agricole UKL-AREE*, C-677/11, EU:C:2013:348, para 37.

46 *Ibid*, para 32.

47 See HM Revenue & Customs, *An Employer's Guide to the Collection of Student Loans* (2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276347/E17_2014_.pdf (last accessed September 3, 2015).

48 R L Cosslett, 'No wonder people aren't paying back their student loans', 28 November 2013, *The Guardian*, <http://www.theguardian.com/commentisfree/2013/nov/28/paying-back-student-loans> (last accessed September 3, 2015).

commercial mechanism. Moreover, student loans are subjected to a final age-based write-off,⁴⁹ and other types of condonation conditions that are resulting in a large volume never being repaid,⁵⁰ which is yet another clear indication of the public nature of the funds because the consequences of such write-offs and any other failure to recover the loans ultimately hits the public purse,⁵¹ and not the universities' balance sheets.

For all these reasons, it seems clear that the changes introduced in the way English universities receive funds for their teaching activities has not qualitatively changed in a way capable of eroding their condition of "public funding" for the purposes of their inclusion in the scope of coverage of the EU public procurement rules as bodies governed by public law under the *University of Cambridge* test.

Incidentally, thus, this source of funding should also be considered public funding when the recipients are not traditional universities, but alternative and private providers of higher education services, which now benefit from the scheme of student loans.⁵² In these cases, then, the *status quo* could change if the percentage of fees paid through SLC-backed student loans exceeds 50% of their total revenue, in which case the rest of the conditions for their classification as bodies governed by public law would require reassessing (above). The key point in that case would be to determine whether commercial and alternative providers funded in more than 50% through student loans as described above could be considered to have been established '*for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character*'. This seems highly

49 <http://www.slc.co.uk/services/loan-repayment/loan-cancellation.aspx> (last accessed September 3, 2015).

50 S Mali, 'Student fees policy likely to cost more than the system it replaced', 21 March 2014, *The Guardian*, available at <http://www.theguardian.com/education/2014/mar/21/student-fees-policy-costing-more> (last accessed September 3, 2015).

51 R Syal, 'Up to 40% of new student loans may never be repaid', 11 December 2013, *The Guardian*, available at <http://www.theguardian.com/education/2013/dec/11/student-loans-may-never-be-repaid> (last accessed September 3, 2015). R Garner, 'Tuition fees: Three quarters of students won't be able to pay off their debt', 18 November 2014, *The Independent*, available at <http://www.independent.co.uk/news/education/higher/tuition-fees-three-quarters-of-students-wont-be-able-to-pay-off-their-debt-9866446.html> (last accessed September 3, 2015).

52 See 'Watchdog called in on private college use of student loans', 22 May 2014, *Times Higher Education*, available at <https://www.timeshighereducation.com/news/watchdog-called-in-on-private-college-use-of-student-loans/2013526.article>, and the ensuing National Audit Office, *Investigation into financial support for students at alternative higher education providers*, HC 861 Session 2014-15, 2 December 2014, available at <http://www.nao.org.uk/wp-content/uploads/2014/12/Investigation-into-financial-support-for-students-at-alternative-higher-education-providers.pdf> (both last accessed October 5, 2015). See also C Cook, 'Huge growth in private students taking state loans', 26 January 2015, *BBC News*, available at <http://www.bbc.co.uk/news/uk-politics-30988416> (last accessed October 5, 2015).

unlikely for commercial providers, but cannot be automatically discarded for other alternative providers of higher education. If the situation arose where non-commercial alternative providers funded in more than 50% by student loans could operate without complying with procurement rules while 'traditional' universities are bound by those rules, a difficult issue of level playing field could arise. In those circumstances, the creation of an 'exposure to market competition' exception to compliance with public procurement rules could be desirable—as has been always recognised under the utilities procurement regime.⁵³ However, these considerations exceed the possibilities of this paper and will, consequently, not be explored any further.

C. Preliminary conclusion

The discussion in the first part of this paper has shown how English universities are very unlikely to free themselves from the obligation to comply with EU public procurement rules as buyers, even if their dependence on student loan-backed tuition fees continues to increase in the future and becomes the largest source of income for these higher education institutions. Only a significant reform of the way in which the SLC is controlled and funded, or in the way in which loans are paid out, would alter this situation, which at present seems unlikely. Consequently, for as long as the main source of revenue continues to originate—directly or indirectly—in the general budget, English universities will remain bound to comply with these rules. This case study could be useful in other EU Member States currently considering a reform of the way in which their universities and higher education institutions are funded and, generally, seems to indicate that universities will structurally remain within the scope of coverage of the EU public procurement rules unless they become institutions with major commercial or private revenue streams. If universities' activities were to be classified as themselves having to be procured from them by the state, this would constitute such a commercial revenue stream. In how far this could be the case will be the topic of the next section.

3. Universities as providers

In this second part of the paper we will explore the position of universities as providers of public services, broadly defined. First, continuing with the case study of universities in England, we will assess in which cases public procurement needs to take place when universities provide public services to the State (§3.A) in the form of tuition of higher education students or research services. Regarding higher education tuition in England, it is worth stressing that, despite the fact that students pay tuition fees (most of them indirectly, through SLC-backed student loans, see above §2.B), the State directly tops-up university funds by means of teaching-related funding that is made available to universities through grants of the *Higher Education Funding Council for England* (HEFCE).⁵⁴ Thus, there is a first question to be addressed in determining whether the granting of such funding to universities is in *strict* consideration for those educational services, which should thus require a tendering exercise under the EU public procurement rules. Or, in other words, it requires

⁵³ Article 34 of 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 [2014] OJ L94/243.

⁵⁴ HEFCE, *How teaching is funded*, available at <http://www.hefce.ac.uk/lt/howfund/> (last accessed October 15, 2015).

clarifying whether the State (through HEFCE) enters into public contracts for the provision of higher education services with the universities in such a way as to trigger compliance with the EU public procurement rules or not (§3.Ai). A similar issue arises concerning the general funding that HEFCE makes available for 'quality-related research' developed by English universities, in particular under the Research Excellence Framework (REF).⁵⁵ Such general (public) research services will be distinguished from the provision of commercial or economic research services to the public sector, which will trigger different public procurement treatment (§3.Aii). Given that procurement rules will not always be applicable or, where applicable, will not necessarily exclude the granting of an economic advantage to English universities, the analysis in this part of the paper will also extend to the assessment of the funding linked to the provision of education and some research-related services from a State aid perspective (§3.B).

A. When does public procurement need to take place?

It is worth highlighting from the outset that '*there is a basic tension between the freedom of Member States to identify public services and designate undertakings as responsible for carrying out public service obligations and requirements that in doing so they must respect the public procurement rules*'.⁵⁶ This tension is reflected in the question 'when do public procurement rules apply to the commissioning of services provided by universities?', which is not easy to answer.

Directive 2014/24 applies only to *public contracts*.⁵⁷ Public contracts are defined by Article 2(1)(5) of Directive 2014/24 as '*contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services*'. As an important requirement under the definition, the commissioning body needs to be a contracting authority. Unlike the scenarios discussed above where the universities are the buyers (§2), it is clear that when they are the providers of educational and research services, the State as the buyer is a contracting authority (Article 2(1)(1)). There is no question either that, if they are providing economic teaching and research services,⁵⁸ universities can qualify as economic operators under the definition in Article 2(1)(10) of Directive 2014/24, whereby an economic operator is an entity offering goods, services or supplies on a market. As stressed in Recital 14 of the same Directive:

'It should be clarified that the notion of 'economic operators' should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on

55 HEFCE, *How we fund research*, available at <http://www.hefce.ac.uk/rsrch/funding/> (last accessed October 15, 2015).

56 W Sauter, *Public Services in EU Law* (Cambridge, CUP, 2015) 163.

57 Or, in terms of its Article 1(1) it establishes rules on the procedures for procurement by contracting authorities with respect to public contracts.

58 This is related to the question whether or not an economic activity is taking place to which we will get back to below at the end of this section.

the market, irrespective of the legal form under which they have chosen to operate. Thus, firms, [...], universities, public or private, and other forms of entities than natural persons should all fall within the notion of economic operator, whether or not they are 'legal persons' in all circumstances.⁵⁹

It is also clear that the definition of public contracts does not require providers to make a profit, and that a pecuniary interest for the purposes of the definition under Article 2(1)(5) can amount to the reimbursement of costs.⁶⁰ Thus, the existence of a written contract (or a 'contract concluded in writing') becomes the key issue in the assessment of whether the funding made available by HEFCE to English universities fits the definition of a public contract so that the commissioning of services to universities is covered by the EU public procurement rules.⁶¹ Given that Member States have the possibility to mandate and support the provision of this type of services without entering into written contracts, for instance, by simply creating regulatory regimes that achieve the same result, this is a point that deserves careful consideration. Indeed, as Recital 114 of Directive 2014/24 states

Member States and public authorities remain free to [...] organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Thus, where the provision of such social services⁶² does not rely on a contract-based method of delivery and management, public procurement rules will not apply. Ultimately, then, it is necessary to determine whether HEFCE's financial support entails the 'mere financing of such services' and is therefore not covered by the procurement rules or, conversely, it takes place within the framework of a public contract and, by implication, needs to be subjected to such rules. As we discuss in this section, answering this question is not straightforward, particularly when services are provided under complex regulatory schemes such as the funding system in place for English higher education institutions.

In the recent *Libert* Judgment,⁶³ the CJEU offered some guidance as to the interpretation of the written contract requirement in scenarios where the provision of the public service does not necessarily derive from a unique and complete single written contract between the contracting

⁵⁹ Emphasis added.

⁶⁰ Judgment of 19 December 2012 in *Ordine degli Ingegneri della Provincia di Lecce*, C-159/11, EU:C:2012:817, para 29. See further Arrowsmith (n 8) 394-397, and Semple (n 8) para 1.03

⁶¹ We will discuss this here for generic funding provided by HEFCE for teaching and research as the most unclear area of public funding provision. In other areas of research funding (e.g. through the research councils or government departments) the existence of some form of written contract can generally be assumed which makes this criterion more clear cut.

authority and the supplier, but from an interplay of contractual and regulatory obligations.⁶⁴ The dispute concerned the obligation to submit the development of social housing to public procurement. The Belgian State had not been tendering contracts for social housing because the obligation to market a specified proportion of homes through social housing organisations in advantageous terms to predefined social groups was created by a general law. The question was whether the inexistence of a single direct contractual relationship between the developers and the Belgian authorities excluded compliance with EU procurement rules. The CJEU found that these circumstances did not preclude the possibility of the existence of a contract between the authorities and the developer in question for the purposes of the application of the procurement rules. However, the CJEU did hint that for such contract to exist, it had to '*regulate the relationship between the contracting authority and the economic operator concerned [... and] the development of social housing units [rather than] the next stage which entails placing them on the market*'. The determination of '*whether the development of social housing units [... was] within the framework of a contractual relationship between a contracting authority and an economic operator*' was left to the domestic court.⁶⁵

62 We use the expression 'social services' in a broad way, to refer both to social services of general interest (SSGI) and services of general economic interest (SGEI), so as to cover all possibilities. Strictly speaking, procurement rules will generally not apply to SSGI that are non-economic in nature because some of the conditions in the definition of public contract will not be met. Moreover, distinguishing whether an activity is an SSGI or an SGEI will sometimes require assessments that already involve a consideration of how the services are commissioned, which could render some tests circular. Furthermore, as discussed below (n 75), Directive 2014/24 uses all these terms in a rather confusing manner without that resulting in a different legal regime as far as procurement rules and requirements are concerned. Thus, for our purposes, social services is an all-encompassing category, and it explicitly covers higher education, despite the fact that Directive 2014/24 sometimes uses the expression special services to refer to education. Generally, on these conceptual complications, see U Neergaard, 'The Concept of SSGIs and the Asymmetries between Free Movement and Competition Law', in U Neergaard et al (eds), *Social Services of General Interest in the EU* (The Hague, TMC Asser, 2013); U Neergaard, 'Services of general economic interest: the nature of the beast', in M Krajewski, U Neergaard and J van de Gronden (eds), *The Changing Legal Framework for Services of General Economic Interest* (The Hague, TMC Asser, 2009); and GS Ølykke and P Møllgaard, 'What is a service of general economic interest?' (2013) *European Journal of Law and Economics* 1-37.

63 Judgment of 8 May 2013 in *Libert and Others*, C-197/11, EU:C:2013:288.

64 The latter was also partially discussed in the Judgment of in *Asociación Nacional de Empresas Forestales (Asemfo)*, C-295/05, EU:C:2007:227, where the CJEU took into consideration that the non-commercial terms of the acts of entrustment to the in-house entity were determined by law. For analysis, see Arrowsmith (n 8) 391-392.

65 See *Libert*, C-197/11, EU:C:2013:288, at paras 112 to 115.

Mutatis mutandi, we submit that determining whether the provision of the (public) services of higher education and university research is subjected to the EU public procurement rules depends on the assessment of whether such activities take place ‘within the framework of a contractual relationship’ between HEFCE and each of the English universities it funds. This will be particularly relevant because the absence of a contractual relationship—understood as one where the funding is provided in exchange or in consideration of the provision of specific services under predetermined conditions—would exclude HEFCE’s grants from any tendering obligation whatsoever. Thus, assessing to what extent the funding is tied to specific conditions that make the relationship acquire a ‘contractual nature’ is crucial for our purposes.

In this regard, it is important to stress that the funding HEFCE provides is instrumented through ‘funding agreements’, which HEFCE itself defines in the following terms:

*The annual funding agreement between HEFCE and the institutions it funds sets out the recurrent grant allocated for the year, the circumstances under which that grant may be adjusted, and **particular terms and conditions associated with it. These include, for example, any requirements relating to student numbers and to comply with regulated tuition fee limits and access agreements.** For publicly funded higher education institutions, the funding agreement is part two of the Memorandum of Assurance and Accountability.⁶⁶*

Such a Memorandum of Assurance and Accountability between HEFCE and Institutions is subtitled ‘*Terms and conditions for payment of HEFCE grants to higher education institutions*’ and, in our view, could be regarded as the basis of the contractual relationship between HEFCE and the publicly funded higher education institutions because, as the document itself clarifies:

*The memorandum of assurance and accountability between HEFCE and the institutions we fund sets out the terms and conditions for payment of HEFCE grants. This memorandum should be read in conjunction with the ‘funding agreement’ for each institution, which gives **specific conditions, funds available and educational provision agreed in return for those funds.**⁶⁷*

Assessing the content of such ‘specific conditions’ is quite difficult because they are not public. However, in its general guidance, HEFCE indicates that

Terms and conditions set out in the funding agreement include, for example, requirements to: make certain data returns, including those that inform our allocations or that are used for public information purposes, such as the KIS; comply with regulated tuition fee limits and any access agreement with the Office

⁶⁶ HEFCE, *Glossary*, available at <http://www.hefce.ac.uk/glossary/#letterF> (last accessed October 15, 2015). Emphasis added.

⁶⁷ HEFCE, *Memorandum of Assurance and Accountability between HEFCE and Institutions*. The document is fully accessible at http://www.hefce.ac.uk/media/hefce/content/pubs/2014/201412/HEFCE2014_12.pdf (last accessed October 15, 2015).

for Fair Access; provide or update a strategic statement about widening participation and make annual monitoring returns; comply with the Quality Assurance Agency for Higher Education (QAA) UK Quality Code for Higher Education as it relates to postgraduate research programmes.⁶⁸

Generally, then, it is quite clear that funding is not unconditional and that it is closely linked to the provision of specific volumes of services (at least as teaching is concerned) and compliance with specific qualitative controls of the services provided. It should be acknowledged that HEFCE leaves significant leeway to individual institutions to decide how to use the funds they receive.⁶⁹ However, in our view, that does not erode the general contractual nature of the relationship and the strong link between the volume of funding and that of the services provided by each institution.⁷⁰ Thus, the existence of specific conditions and monitoring mechanisms point clearly to the existence of a 'framework of a contractual relationship' between HEFCE and the universities it funds. Thus, it seems to us that, from this perspective, the EU public procurement rules are generally applicable to the commissioning of teaching and research (public) services by HEFCE to English universities by means of the annual grants it provides to complement the funding universities receive from students via fees (above \$2) and other sources of commercial revenue.

However, also at a general level and related to the question whether an entity is an economic operator, it is worth stressing that public procurement rules only apply to 'economic activities' (Recital 6 of Directive 2014/24). Therefore, another issue requiring clarification before definitely concluding whether HEFCE commissioning should comply with EU public procurement rules is to determine if the activities conducted by universities are of an economic nature or not. We will discuss this further below, separately for teaching (§3.Ai) and research (§3.Aii). Finally, there are threshold under which the Directive does not apply. As the thresholds differ for different activities these will equally be discussed separately below (§3.Ai for teaching and §3.Aii research).

i. Teaching activities

As mentioned above, the most important remaining question is whether the provision of higher education services constitutes an economic activity, i.e. if English universities are offering those services in a market. While the European Commission, with reference to the CJEU's case law in the

⁶⁸ HEFCE, *Guide to funding 2015-16. How HEFCE allocates its funds*, para 181, available at http://www.hefce.ac.uk/media/HEFCE,2014/Content/Pubs/2015/201504/2015_04.pdf (last accessed October 15, 2015).

⁶⁹ See HEFCE, *Guide to funding 2015-16* (n 68) para 17: 'Institutions receive most of their teaching, research and knowledge exchange funding as a grant that they are free to spend according to their own priorities, within our broad guidelines. We do not expect them, as autonomous bodies that set their own strategic priorities, to model their internal allocations on our calculations. However, certain conditions are attached to funding and are specified in institutions' funding agreements with us'.

⁷⁰ See HEFCE, *Guide to funding 2015-16* (n 68) para 36: '... we fund the activities of institutions. However, we do count students in our funding methods, as a proxy measure for the level of teaching and research activities taking place at institutions.'

area of the free movement of services,⁷¹ has traditionally regarded higher education as non-economic in nature, it has also more recently established that ‘*in certain Member States public institutions can also offer educational services which, due to their nature, financing structure and the existence of competing private organisations, are to be regarded as economic*’.⁷² Whether this is the case for higher education has to be decided on a case by case basis taking into account the political choices of the Member State.⁷³ In England, where private operators are increasingly competing with publicly-funded ones and the whole set of recent reforms was aimed at creating a market place,⁷⁴ the question of whether or not an economic activity is taking place triggers an interesting discussion. In such a system one might consider higher education as an economic service for which the institutions get paid partly through tuition fees (which are mostly financed through public loans, see discussion above §2) and partly through the reimbursement of costs by the state by means of the block grants HEFCE makes available to universities. If we thus conclude that universities in England are economic operators providing public services of an economic nature (*i.e.* SGEIs) for which they are partly reimbursed by the state through HEFCE grants, then public procurement rules (should) apply to the commissioning of those services to English universities by the State through HEFCE—and, conversely, the direct award of that funding without competitive mechanisms could amount to the award of State aid (as discussed below §3.B).

However, the rules in Directive 2014/24 do not apply in their entirety to the commissioning of this type of services, as public service contracts for certain services listed in Annex XIV,⁷⁵ which mentions *inter alia* ‘administrative social, educational, healthcare and cultural services’⁷⁶ fall under a light

71 Judgment of 27 September 1988 in *Belgian State v Humbel and Edel*, C-263/86, EU:C:1988:451, para 14 seq, and Judgment of 7 December 1993 in *Wirth v Landeshauptstadt Hannover*, C-109/92, EU:C:1993:916, para 13 seq.

72 Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest OJ [2012] C 8/02 paragraph 28.

73 See further A Gideon, ‘Higher Education Institutions and EU Competition Law’ (2012) 8 *Competition Law Review* 169 and A Gideon, ‘The Position of Higher Education Institutions in a Changing European Context: An EU Law Perspective’ (2015) 53 *JCMS: Journal of Common Market Studies* 1045.

74 BIS, HIGHER EDUCATION - Students at the Heart of the System (The Stationary Office 2011).

75 As mentioned above (n 62), this is an example where education is named separately from social services; both in the heading of the relevant subsection of Directive 2014/24 (as ‘social and other specific services’) and in the body of the Annex (as ‘administrative social, education, healthcare and cultural services’). However, given that the applicable legal regime is the same (*i.e.* light touch), for the purposes of our discussion, there is no need to use the expression ‘social services’ with any further degree of precision.

touch regime which enables a more social approach in this area.⁷⁷ Title III Chapter I of Directive 2014/24 sets out the particular procurement regime for these services. According to Recital 114, the reasoning behind this alternative, softer regime is that the level of competition that can be expected for these services is rather limited, at least from a 'cross-border dimension', because such '*services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions*'. The light touch regime applies to contracts above a specific value (€750,000) that we assume to always be exceeded by the level of the grants provided by HEFCE,⁷⁸ and mainly requires announcement of intention to award a contract and publication of results (Article 75). Otherwise Member States are free to set the specific rules for the award of these contracts as long as they guarantee fairness and transparency and take into account the specificities of the service and other aspects such as accessibility and needs of certain users, etc. (Article 76). They can also reserve certain services to certain participatory third sector organisations (Article 77). When applying the light touch regime, Member States are also prescribed to take Article 14 TFEU and Protocol No 26 into consideration as well as the 'rules applicable to service contracts not subject to the specific regime' (recital 114).

It is worth stressing that even if, contrary to our assessment above, the arrangements between HEFCE and the universities were not to be regarded as public contracts, the general Treaty principles of transparency and equal treatment reflected in the Directive still apply to the assignment of special and exclusive rights, such as licences and authorisations to engage in certain regulated economic activities,⁷⁹ at least if there is a potential cross-border interest.⁸⁰ The only situation that could completely escape the application of the general principles would be the provision of *non-economic*

76 More specifically, the Annex includes higher education services (CPV code 80300000-7).

77 Semple (n 8) para 1.37.

78 According to Article 4(d) of Directive 2014/24 the value threshold is of €750,000, which is to be equated to £625,050 as per Communication of 14 December 2013 on corresponding values of the thresholds of Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council [2013] OJ C366/1. This instrument is still in force despite referring to the previous generation of EU Directives. One can safely assume that the amount of reimbursement costs for publicly funded higher education services exceeds the mentioned threshold. For academic year 2015-16, HEFCE granted £1,418 million in teaching-related funding and only 130 universities were funded; see HEFCE, *Guide to funding 2015-16* (n 68) para 67.

79 Indeed, the CJEU has also requiring compliance with these principles when no public contract is involved, such as in the case of authorisations; see *GS Ølykke*, 'Is the granting of special and exclusive rights subject to the principles applicable to the award of concessions? Recent developments in case law and their implications for one of the last sanctuaries for protectionism' (2014) 23(1) *Public Procurement Law Review* 1-20.

80 A Sánchez-Graells, 'Competition and State Aid Implications of the Spezzino Judgment (C-113/13): The Scope for Inconsistency in Assessing Support for Public Services Voluntary Organisations' (2015) June SSRN p. 5, Semple (n 8) para 1.74 seq, Sauter (n 56) p. 166 seq.

services.⁸¹ As discussed earlier in this section, this is unlikely to cover higher education services where the provision is based on competitive market-like mechanisms. The application of the Treaty principles can complicate certain aspects of the organisations of those arrangements, such as the imposition of an absolute exclusion of non-English universities—which would need to be assessed under the rules applicable to State aid and, in particular to State aid for SGEIs (as discussed below §3.B). Thus, the only way to try to avoid compliance with the soft touch regime of EU public procurement rules and the general Treaty principles entirely would be to articulate them as non-economic services. In the case of England, this does not seem plausible, as it would require undoing a very significant number of market-oriented reforms of the higher education sector. Having said that, despite a partly bold approach in earlier case law favouring the Treaty rules on free movement,⁸² more recent cases such *Spezzino*,⁸³ but also *Dirextra* or *Sarc*,⁸⁴ seem to indicate a certain reluctance by the CJEU to get too involved in policy decisions in areas where the main responsibility rests with the Member States. Therefore, this could create more scope of non-subjection of (non-contractualised) higher education models to general EU law requirements. This will be discussed further below (§3.B). For a definite conclusion a judgment by the Court might have to be awaited.

ii. Research activities

Once again, the most important remaining step in our analysis requires to evaluate whether the carrying out of research activities by universities constitutes an economic activity for the purposes of their subjection to EU public procurement rules. Research would, according to the Commission's Framework for State Aid for Research and Development⁸⁵ (hereinafter Research Framework), constitute a non-economic activity if it was '*independent R&D for more knowledge and better*

81 Article 2 of Protocol No 26 TFEU.

82 Most significantly perhaps in the area of education, Judgment of 7 July 2005 in *Commission vs Austria*, C-147/03, EU:C:2005:427; and Judgment of 1 July 2004 in *Commission vs Belgium*, C-65/03, EU:C:2004:402 where the Court significantly altered national university access policies. But see also Judgment of 23 October 2007 in *Morgan and Bucher*, joined cases C-11/06 and 12/06, EU:C:2007:626; Judgment of 18 July 2013 in *Prinz and Seeberger*, joined cases C-523/11 and C-585/11, EU:C:2013:524; Judgment of 24 October 2013 in *Thiele Meneses*, C-220/12, EU:C:2013:683; Judgment of 24 October 2013 in *Elrick*, C-275/12, EU:C:2013:684, and, recently, Judgment of 26 February 2015 in *Martens*, C-359/13, EU:C:2015:118 on the extension of portability of study grants. Or Judgment of 11 September 2007 in *Schwarz and Gootjes - Schwarz*, C-76/05, EU:C:2007:492; Judgment of 18 December 2007 in *Jundt*, C-281/06, EU:C:2007:816; and Judgment of 20 May 2010 in *Zanotti*, C-56/09, EU:C:2010:288 on changes in tax deductibility.

83 Judgment of 11 December 2014 in *Azienda sanitaria locale n. 5 «Spezzino» and Others*, C-113/13, EU:C:2014:2440.

84 Judgment of 12 December 2013 in *Dirextra Alta Formazione*, C-523/12, EU:C:2013:831 ; and Judgment of the General Court of 12 June 2014 in *Sarc v Commission*, T-488/11, EU:T:2014:497. Yet in these cases there was a certain overlap with policy aims followed at the EU level itself.

understanding'. Activities '*such as renting out equipment or laboratories to undertakings, supplying services to undertakings or performing contract research*', on the other hand, are activities of an economic nature. Generic funding provided by HEFCE and most public competitive funding for research in universities would thus be linked to a non-economic activity because universities undertake that research independently and in pursuance of more knowledge and better understanding; while contract research carried out by universities for public authorities would be of an economic nature.⁸⁶

However, in some cases it might be difficult to draw the line between competitive funding of a non-economic nature and a research service provided for a public authority, for example, when public calls are so specific that they could be interpreted as the public authority actually commissioning a service. In such situations it would not matter if the authority is a government department or a dedicated funding body. It merely depends on the nature of the research. Thus, in this area there is no hard and fast rule that allows to determine whether research-related funding is exempted from compliance with the EU public procurement rules, and a case by case analysis will be necessary. As we will see below, if the research is of an economic nature and funded / awarded directly or in discriminatory ways, this could also constitute State aid (§3.B).

Unlike its older version,⁸⁷ the new Research Framework explicitly lays out the rules that need to be adhered to when the state is commissioning economic research. Accordingly, if a public authority contracts research, it has to follow the public procurement rules.⁸⁸ Otherwise the price has at least to reflect the market value. It is assumed that such is, in particular, the case if the selection procedure is open, all rights and obligations are made available to everyone interested, there is no preferential treatment and either the results may be widely disseminated and the public purchaser gets the intellectual property rights (IPR) or the public purchaser gets free access to all IPR and other parties can get non-exclusive licenses for the market price.⁸⁹ Where this is not the case, '*Member States may rely on an individual assessment of the terms of the contract between the public purchaser and the undertaking, without prejudice to the general obligation to notify R&D&I aid pursuant to Article 108(3) of the Treaty*'.⁹⁰

85 Commission Communication 'Framework for State aid for research and development and innovation' OJ [2014] C 198/01.

86 See with a more detailed assessment for research funding in three Member States A Gideon, 'Blurring Boundaries between the Public and the Private in National Research Policies and Possible Consequences from EU Primary Law' (2015) 11 *Journal of Contemporary European Research* 50.

87 Community framework for state aid for research and development and innovation OJ [2006] C 323/01

88 Research Framework (n 85) para 32.

89 Ibid, para 33.

Regarding compliance with the applicable procurement rules, Directive 2014/24 contains specific provisions about how and when research needs to be procured. In Recital 35, the Directive stresses the importance of co-funding of research by industry and declares that the Directive therefore only applies if there is no-co-funding, but, instead, the contracting authority receives all the results unless the co-funding or result sharing is only symbolic. If the contracting authority does receive all the results, the provider '*having carried out those activities, [...] [may still] publish an account thereof*'. Recital 47 declares research and innovation to be '*among the main drivers of future growth*' and makes an explicit connection to the Europe 2020 strategy. Public authorities are therefore encouraged to use procurement to '*spur innovation*'.⁹¹ Directive 2014/24 should thus '*contribute to facilitating public procurement of innovation and help Member States in achieving the Innovation Union targets*' in combination with the Pre-Commercial Procurement Communication⁹² which deals with procurement activities not falling under the public procurement directives. According to Article 14 Directive 2014/24, the Directive only applies to certain types of research,⁹³ which include those research services that seem to be relevant for universities: research and development services and related consultancy services, research and experimental development services, research services, research laboratory services, marine research services, experimental development services, design and execution of research and development, pre-feasibility study and technological demonstration and test and evaluation services. Further, as already stressed in Recital 35, the research service has to be entirely for the public authority (i.e. it receives all the benefits and pays for it entirely).

If we do have an economic research service for a public authority –no matter if it is a research council or a government department– whether or not a public procurement procedure would have had to be held would depend on the value of the contract. In so far the general thresholds in Article 4 of Directive 2014/24 apply to research, its rules will be applicable to contracts in excess of €134,000 (£111,676) for public service contracts awarded by central government authorities (including BIS and HEFCE according to Annex 1 of the Directive itself) and €207,000 (£172,514) for public service contracts awarded by sub-central contracting authorities. Research procurement that does not fall under the Directive can still be assessed under the Pre-commercial Procurement Communication.

90 Ibid, para 34.

91 The usefulness of public procurement for innovation has indeed already been examined and found to be greater than that of direct subsidies. Amann M and Essig M, 'Public procurement of innovation: empirical evidence from EU public authorities on barriers for the promotion of innovation' (2015) online first Innovation: The European Journal of Social Science Research. For general discussion, see A Sánchez-Graells, 'Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies?' (2016) 22(2) *European Public Law Journal*, forthcoming.

92 Commission Communication 'Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe' COM(2007) 799 final of 14 December 2007.

93 Those which fall within CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5.

This Communication suggest 'an approach to procuring R&D services which involves risk-benefit sharing and does not constitute State aid'.⁹⁴ The approach is based on risks and benefits sharing, competitive development in phases (i.e. a variety of companies can participate in the beginning the number of which will be limited in later phases) and the separation between the pre-commercial and the commercial phase. The use of this form of procurement is encouraged by Horizon 2020 and other EU research policy mechanisms.⁹⁵

B. Relation to state aid law

The previous sections have clarified in which cases the commissioning of public services to English universities should comply with EU public procurement rules. This section explores some of the State aid implications of the English university funding system and the interplay of state aid and public procurement. Generally, if an economic activity takes place, aid may not be provided selectively to undertakings if this distorts competition and affects trade between Member States. It is not the aim of this article to provide a detailed analysis of the English university funding regime under Article 107 TFEU. Suffice to say that, given the fact that some providers of higher education (universities) have access to HEFCE's grants while others do not (alternative and commercial providers)⁹⁶ and some research funding for economic activities might reach providers selectively, there are open questions regarding the general rules under Article 107 TFEU—and the selectivity of HEFCE's funding scheme could come under significant pressure due to the lack of notification of HEFCE's State aid scheme to fund higher education in England to the European Commission. We will limit the analysis here to the area where public procurement law and the state aid rules overlap. There are two points that might be worth mentioning at a preliminary phase of our analysis. First, that compliance with State aid law can take place in cases of breach of EU public procurement law,⁹⁷ and vice versa—although this

94 Pre-commercial Procurement Communication para 5.

95 Semple (n 8) para 1.29

96 See UCU briefing, *The private providers' 'designation' bonanza*, February 2014, at 2: 'Private providers cannot currently access the HEFCE administered funds', available at http://www.ucu.org.uk/index.cfm?articleid=6975#.Vh_XEX6rSUK (last accessed October 15, 2015). See also HEFCE, *Guide to funding 2015-16* (n 68) para 6, where it is stated that 'HEIs are bound by the requirements of their charter and statutes (or equivalent) and by the law relating to their charitable status' and para 29, where it is stressed that that the governing body of an HEI must assure that it 'delivers its charitable purpose for the public benefit'. Both aspects clearly seems to exclude the possibility of for-profit providers accessing HEFCE funding. On HEFCE's glossary page (n 66), the definition of 'Alternative provider' strengthens this conclusion by indicating that it is 'A general term for providers of higher education which are not funded by regular government grants. They can be or-profit or not-for-profit, and of any corporate form'.

97 Indeed, it should be stressed that the absence of a tendering procedure does not preclude a finding that State aid and other competition rules have not been violated; see *Olsen v Commission*, T-17/02, EU:T:2005:218, confirmed on appeal by the CJEU, *Olsen v Commission*, C-320/05 P, EU:C:2007:573.

second scenario is not commonly accepted.⁹⁸ And, second, that decisions concerning State aid for this type of public services raise very high political stakes, which may have justified a (progressive) lack of intervention by the European Commission and the CJEU in recent years.

For State aid rules to be regarded as infringed, teaching and research would need to be regarded as economic activities (in most cases SGEIs), since State support for non-economic services in the terms of Article 2 of Protocol No 26 TFEU would not be caught by the prohibition of Article 107(1) TFEU. Our discussion is thus framed within the narrow area of State aid for SGEIs, where compliance with public procurement law can be utilised to avoid regarding economic activities funded by the State as actually receiving State aid for the purposes of Article 107 TFEU. The landmark case of *Altmark*⁹⁹ essentially provided that recourse to public procurement law can avoid state aid accusations in such situations because the tendering of public contracts for the provision of the SGEIs is assumed to suppress any undue economic advantage that a direct award of the contract could have generated otherwise. More specifically, in *Altmark*, the CJEU determined that, together with the other three cumulative conditions, selecting the undertaking which is to discharge public service obligations 'pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community' excludes the existence of State aid.¹⁰⁰

Following this case, the so-called *Altmark*¹⁰¹ and *Altmark II*¹⁰² packages provide for assessment criteria to establish whether the *Altmark* conditions are fulfilled and, consequently, there is no State aid in the funding of the provision of SGEIs (i.e. whether the public service obligation is clearly defined, the parameters on which the compensation is calculated are transparent and established in advance, the compensation is not excessive and the costs included in the calculation of the compensation are themselves reasonable).¹⁰³ The current *Altmark II* package¹⁰⁴ provides for an exemption of State aid control for SGEIs receiving support below €15 million per year. As discussed above, the value for procurement of higher education services is well above that figure. Thus, as far as the teaching activities of universities fall within the category of SGEIs, it seems clear that lack of compliance with procurement rules, in addition to an infringement of those rules in themselves, also opens up the possibility of an infringement of the applicable State aid rules unless a clear case of absence of over-compensation can be supported. For economic research services that remain below

98 For discussion, see A Sanchez-Graells, 'Public Procurement and State Aid: Reopening the Debate?' (2012) 21(6) *Public Procurement Law Review* 205-212.

99 Judgment of 24 July 2003 in *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415.

100 *Altmark*, C-280/00, EU:C:2003:415, para 93.

101 In 2005 the Commission adopted the first SGEI package, also known as the "Monti-Kroes-Package" setting out the conditions under which state aid in the form of public service compensation is compatible with the TFEU; see IP/05/937 available at http://europa.eu/rapid/press-release_IP-05-937_en.htm (last accessed 1 November 2015). This package was replaced by the "Almunia package", below (n 102).

the €15 million per year threshold, this would mean that such services, if they are of general interest, would often be exempted from the state aid rules, though they may still fall under the public procurement regime (above §3.Aii).

This interplay between state aid rules and public procurement rules (i.e. that recourse to a public procurement procedure can, in the case of SGEIs and under certain conditions, avoid state aid accusations) seems to have been broadened in the recent *Spezzino* case.¹⁰⁵ In this case, the Court had not tested whether the services directly contracted by the State (ambulance services) were economic in nature or not, which complicates its interpretation.¹⁰⁶ Nonetheless, the Court determined that the assignment of those services would ‘fall, in principle, within the scope of’ of the relevant procurement Directive.¹⁰⁷ The Court then went on to state that it was for the national court to decide if the entrustment of the activities in question would fall under the normal or light touch procurement regime or, if the relevant value thresholds were not met, they would fall outside the Directive entirely. In any case the Court stressed that regardless of the applicability of any specific procurement regime, the Treaty principles on transparency and equal treatment would still have to be taken into consideration if there was a cross-border interest in the entrustment of the services (see above §3.Ai)—which, again, was to be decided by the national court. If this was the case, the

102 This is also known as the “Almunia package”, which refers to the instruments adopted by the European Commission between December 2011 and April 2012 for the modernisation of SGEI rules. These are: 1) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Quality Framework for Services of General Interest in Europe, Brussels, 20.12.2011, COM(2011) 900 final; 2) the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [OJ 2012/21/EU]; 3) Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [OJ 2012/C 8/02]; 4) Communication from the Commission—European Union framework for State aid in the form of public service compensation (2011) [OJ 2012/C 8/03]; and 5) Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest [OJ 2012/L 114/8].

103 For discussion, see A Sánchez-Graells, ‘The Commission’s Modernization Agenda for Procurement and SGEI’, in E Szyzszak & J van de Gronden (eds), *Financing Services of General Economic Interest: Reform and Modernization*, Legal Issues of Services of General Interest Series (The Hague, TMC Asser Press / Springer, 2012) 161-181.

104 Decision 2012/21/EU on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest OJ [2012] L 7/3.

105 *Spezzino*, C-113/13, EU:C:2014:2440.

Court continued, the direct award of the services to voluntary, non-profit organisations would be an infringement of the free movement of services and the freedom of establishment.

However, considering the primary responsibility of the Member States in the area of health care, the Court recognised that this infringement could be justified on the basis that the Member State was seeking to guarantee 'sufficient permanent access to a balanced range of high-quality medical treatment and, secondly, assist in ensuring the desired control of costs and prevention, as far as possible, of any waste of financial, technical and human resources'.¹⁰⁸ This was considered a valid justification if the scheme in question actually did contribute to its 'social purpose and the pursuit of the objective of the good of the community and budgetary efficiency'.¹⁰⁹ In this respect the Court emphasised that the voluntary organisations may not pursue other objectives, make any profit, pass any profits to their members or break any requirements for such organisations in national law. Whether these conditions were fulfilled was for the national Court to decide. This thus indicates that national law can directly award certain social services to voluntary, non-profit associations if they actually fulfil the social aim pursued in awarding the services to them and contribute to budgetary efficiency.¹¹⁰ In so far, when it comes to such organisations, it is possible to avoid both the public procurement rules and state aid law (i.e. the *Altmark* test would not have to be conducted), since 'it follows from the findings relating to the interpretation of EU law on public procurement that there is no need to examine [...] [the matter] in relation to those rules on competition'.¹¹¹

106 Indeed, part of the reasoning of the Court in the *Spezzino* case seems to derive from the particular treatment of ambulance services under the relevant procurement rules (Directive 2004/18). This has been further complicated by the treatment of this services under Article 10 of Directive 2014/24, which raises questions about the delimitation of the effects of *Spezzino* for other types of social services, either economic or non-economic. For discussion of the complexities of the procurement treatment of ambulance services, see R Caranta, 'The Changes to the Public Contract Directives and the Story they Tell about how EU Law Works' (2015) 52(2) *Common Market Law Review* 391, 424 ff. See also R Caranta, 'Mapping the margins of EU public contracts law: Covered, mixed, excluded and special contracts', in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Copenhagen, DJØF, 2014) 87 et seq.

107 *Spezzino* Ibid para 38.

108 Ibid para 57.

109 Ibid para 60.

110 On the question what 'budgetary efficiency' actually means and if it could be aligned with *Altmark* by interpreting it as the service provided by the non-profit organisation having to be equal or cheaper in costs than a typical undertaking see Sánchez-Graells (n 80).

111 *Spezzino* para 64.

The question for us then is whether this could be applied to universities. There certainly seems to be a cross-border interest for the provision of teaching and research services in many cases¹¹² and it seems likely that, as explored above (§3.A), the procurement rules or the alternatives named in the Research Framework are applicable to certain economic research services and the light touch regime or at least the general Treaty principles are applicable to teaching services (unless the activity is entirely non-economic). If this is the case and such activities are directly awarded to local voluntary providers, there would be an infringement of the free movement of services and the freedom of establishment which could, potentially, be justified according to the *Spezzino* case law.

As regards higher education, it is worth stressing that, as in the case of health care, this is also a primary responsibility of the Member States. Research, on the other hand, is a shared responsibility between the Member States and the European Union. Yet it is stressed in a specific caveat in Article 4(3) TFEU that '*in the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs*' (emphasis added). The last caveat seems to make the application of *Spezzino* possible from the perspective of extending its effects to core areas of Member State competence. In both cases, provision of education and research services through specific national providers could ensure equal access to education and knowledge and a high standard of both research and teaching activities, and thus serve a particular social purpose similar to the one in *Spezzino*.

Yet, it seems questionable that universities can fulfil the more detailed criteria the Court outlined in *Spezzino*, namely that they are voluntary organisations, that they may pursue only the social objective assigned to them and that they may not make any profit. For starters the form universities take differs between the Member States. In England, where universities are largely third sector organisations (charities), they are usually not strictly non-profit, but not-for-profit organisations.¹¹³ Secondly, universities pursue a variety of objectives and it differs between Member States if these are assigned to them in national legislation. In England, for example, research is not even a statutory task of universities and universities provide all sorts of services including housing, catering and a variety of other clearly economic services. It thus seems, at least in the case of English universities, unlikely that they can benefit from *Spezzino* directly, at least if interpreted strictly. However, as we have seen above, the light touch regime for educational services in Directive 2014/24 provides a similar, yet broader, provision allowing to assign contracts to certain organisations only.

112 See on various Court of Justice cases indicating that there is a cross-border link, Gideon (2015; n 73) and on the question of market definition across borders in EU competition law Gideon (2012; n 73).

113 On the definition of the notion of the third sector and the difference between non-profit and not-for-profit see I Wendt and A Gideon, 'Services of general interest provision through the third sector under EU competition law constraints: The example of organising healthcare in England, Wales and the Netherlands' in Schiek D, Liebert U and Schneider H (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge, CUP, 2011) 255 with further references.

Consequently, if following the *Spezzino* rationale narrowly,¹¹⁴ it seems that an infringement by universities of the procurement rules (whether fully or as light touch regime) or of the Treaty principles respectively, would still also indicate an infringement of the requirement in *Altmark* that providers are selected '*pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community*'. Yet, *Spezzino* is not the only case where the Court showed more leniency when an area of primary responsibility of the Member States was concerned. It might therefore also be conceivable that the Court would broaden the *Spezzino* rationale in future case law in the sense that the requirement for least-cost oriented public procurement can at least be reinterpreted towards a process capable to assist in ensuring a '*sufficient permanent access to a balanced range of high-quality [services] and, secondly, [...] the desired control of costs and prevention, as far as possible, of any waste of financial, technical and human resources*'. This could suffice to relax both the procurement and State aid controls applicable to the commissioning of teaching and, to some extent, economic research activities to universities. However, exploring the full implications of this possibility exceeds the scope of this paper.

C. Preliminary conclusion

Member States which structure their higher education systems according to a market approach are likely to place higher education within the legal framework applicable to public services which constitute an economic activity. In that regard, in the case of England, we have seen how the entrustment and funding of the provision of higher education services within a contractual relationship between HEFCE and each university requires, in our opinion, compliance with the light touch regime created by Directive 2014/24. Even if that was not the case, the Treaty principles of non-discrimination and transparency would still apply unless the services would have to be regarded as entirely non-economic which seems unlikely. However, recent case law of the CJEU indicates its reluctance to get involved in areas of primary responsibility of the Member States, which may well result in an absence of practical consequences following from a lack of compliance with those EU procurement rules and principles. Certainty might only be achieved through case law in the future.

As regards research, non-economic research (which will comprise most publicly funded research) does not have to be commissioned on the basis of any procurement procedure. Research constituting an economic activity, if it is entirely for the contracting authority and its value exceeds the threshold of Article 4 of Directive 2014/24 needs to be commissioned through a full-fledged public procurement procedure (*i.e.* not under the light touch regime). Otherwise, in addition to infringing public procurement law, this could amount to the granting of State aid, unless it followed the procedure described in paragraph 33 of the Research Framework mentioned above (§3.Aii) or is notified to the Commission as a State aid measure and cleared according to that framework.

Our discussion has also assessed funding for both economic education and research under the State aid rules applicable to SGEIs. For these to apply, the economic teaching and research services would need to be of general interest and assigned in a clear an entrustment act to the undertakings in question. Within this framework, our analysis has shown that there is a clear safeguard for acts of such research and teaching services that can be valued below €15 million a year, in which case there

¹¹⁴ It is worth also bearing in mind here, as mentioned in n 106, that it is unclear how far the case law can be applied to services other than ambulance services at all.

is no need to carry out any further assessment. This should exclude State aid implications in the case of most economic research contracts provided they are of general interest. Regarding economic education services, this means that providers that receive support in excess of that amount need to be chosen on the basis of the public procurement rules or, alternatively, be able to make a clear and compelling case of absence of over-compensation. We have also assessed to what extent this requirement can be relaxed on the basis of the recent *Spezzino* case. While a strict interpretation of that case seems to indicate that universities cannot profit from it, the Court has in recent case law shown a more lenient approach to the application of directly applicable EU law to areas of primary responsibility of the Member States and it seems thus possible that the *Spezzino* rationale could be broadened. However, in this point, legal certainty will require future case law.

In addition, and in the light of the fact that Directive 2014/24 in recital 114 points to the provisions on SGEIs, it might more generally be possible to argue that the application of the Treaty rules would obstruct the performance of the services of general interest in question. As regards higher education, strictly applying the principles of non-discrimination and thus potentially having to fund foreign and / or private providers of higher education would arguably threaten the performance, viability and quality of the national higher education system. For research this this seem less likely, as only economic research falls under the provisions in the first place and if economic research is being conducted on a market, it would not appear that generally the application of the Treaty rules would obstruct the performance. Aside from this, however, the new Research Framework and the new General Block Exemption Regulation (GBER)¹¹⁵ provide for generous exemptions for research from the application of state aid law.

4. When can universities utilise in-house or public-public exemptions?

In view of the significant constraints that EU public procurement rules impose on universities both as buyers (§2) and providers (§3), it is worth exploring legal avenues to create some flexibility in the system. Thus, this section will conduct an assessment of the exemptions for public-public cooperation or in-house arrangements that could shield universities from competition by non-public and commercial providers (§4.A). It will also assess in how far these exemptions are useful for universities when commissioning services themselves (§4.B).

A. Universities as providers

If we assume that, at least in some cases, universities would be providers of research or educational services for a contracting authority and thus fall under the public procurement rules (§3), there are still exemptions for public-public cooperation or in-house arrangements that could shield universities from competition by non-public and commercial providers. Article 12 of Directive 2014/24 provides that *public-public cooperation mechanisms* are excluded from the public procurement rules if they are based on cooperation between public authorities to perform public services together in the public interest and less than 20% of those activities are offered by the cooperating public authorities on the open market. In turn, *in-house arrangements* are excluded if the contracting authority

¹¹⁵ Commission Regulation 651/2014/EU declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty OJ [2014] L 187/1.

exercises control similar to the one it exercises over its own departments over the service providing entity,¹¹⁶ and the entity must carry out the essential part of its activities for the authority (at least 80%).¹¹⁷ The control element is important, as, when there is such control, the situation is more similar to an integrated system where the authority provides the service itself rather than to a market situation.¹¹⁸ The in-house arrangement can be exercised jointly by more than one public authority, indirectly through another controlled entity, inverted (i.e. the controlled entity is the one contracting to the controlling entity) or horizontal (i.e. a contract is awarded to another entity which is controlled by the same mother entity).¹¹⁹

In the case of universities, the in-house providing exemption might be a useful avenue for the state to avoid having to use a public procurement procedure to allow universities to conduct education and research services. For this exemption to apply, there would thus need to be control of the university by the state and the university would need to conduct the vast majority of its activities for the contracting authority (i.e. be economically dependent).¹²⁰ However, in the case of universities and in view of their inherent autonomy, establishing control is a difficult task. Indeed, a literal interpretation of the recent *Datenlotsen*¹²¹ case might give the impression that control cannot be present in the university-state relationship. This case concerned a potential horizontal in-house

116 This requirement includes that there must be no private participation whatsoever, with the only exception of non-blocking private participation mandated by law in the service providing entity.

117 See J Wiggen, 'Public procurement rules and cooperation between public sector entities: the limits of the in-house doctrine under EU procurement law' (2011) 20 *Public Procurement Law Review* 157; J Wiggen,, 'Public procurement law and public-public co-operation: reduced flexibility but greater legal certainty ahead? The Commission's Staff Working Paper on the application of EU public procurement law to relations between contracting authorities and the 2011 proposal for a new Directive' (2012) 21 *Public Procurement Law Review* NA225; and J Wiggen,, 'Directive 2014/24/EU: the new provision on co-operation in the public sector' (2014) 23 *Public Procurement Law Review* 83.

118 R Cavallo Perrin and D Casalini, 'Control over In-house Providing Organisations' (2009) 18 *Public Procurement Law Review* 227.

119 For a critique on the new rules see A Sánchez Graells, *Public Procurement and the EU Competition Rules* (Hart 2015) p. 252 seq, 265-272, Janssen WA, 'The institutionalised and non-institutionalised exemptions from EU public procurement law: Towards a more coherent approach?' (2014) 10 *Utrecht Law Review* 168. For a summary of the old rules including the case law see European Commission, 'Concerning the application of EU public procurement law to relations between contracting authorities (public-public-cooperation)' (2011) SEC(2011) 1169 final Commission Staff Working Paper, Cavallo Perrin and Casalini (n 118).

120 On the economic dependency see further European Commission (n 119) p. 6 seq.

121 Judgment of 8 May 2014 in *Datenlotsen Informationssysteme*, C-15/13, EU:C:2014:303.

relationship and was decided before Directive 2014/24 entered into force. The Court here rejected the horizontal relationship, which is now explicitly foreseen. However, the Court did continue that

in any event [...] the City of Hamburg is not in a position to exercise “similar control” over the University. The control exercised by the City of Hamburg over the University extends only to part of its activity, that is to say, solely in matters of procurement, but not to education and research, in which the University has a large degree of autonomy. Recognising the existence of “similar control” in such a situation of partial control would run counter to the case-law cited [...]. In those circumstances, there is no need to examine whether the exception concerning in-house awards is capable of applying to so-called “horizontal in-house transactions” [...].¹²²

It might thus be conceivable that the Court would continue to reject a relationship of control even if it will now have to recognise the existence of the horizontal relationship. Yet, this does not seem to take into account the specific situations of universities. By their very nature universities have to be able to exercise academic freedom. It seems absurd that this in itself should take them out of the in-house exception. Instead, it seems preferable to follow the approach suggested by the Advocate General who proposed that

the autonomy which the universities enjoy in relation to teaching and research is the expression of the freedom of teaching and research, a principle that is set out [...] in the Charter of Fundamental Rights of the European Union, Article 13 of which provides that arts and scientific research are to be free of constraint and that academic freedom must be respected. From that perspective [...] in order for entities such as the universities to be eligible for the in-house exemption, it cannot be required that control should be exercised over their teaching and research activities also, since the autonomy of the universities in relation to those activities is an expression of values of a constitutional nature common to the legal systems of the Member States and enshrined in the Charter. [...] It follows from the foregoing considerations that [...] the similar control exercised must extend to all of the contractor’s activities, except for the special rights and powers which the universities enjoy in the areas of teaching and research.¹²³

It therefore seems sensible to revise the *Datenlotsen* judgment in its entirety and relax the control requirement in the sense that the Advocate General suggested, which would still mean that universities would have to be controlled in all other areas except teaching and research. With the change in legislation there seems scope for this. Since the new Directive has extended significantly the scope for public-public cooperation and relies on arguments of a nature different than in-house as traditionally conceptualised by the Court, the Court could interpret Article 12(2) of Directive 2014/24 as not necessarily encompassing only the sort of control that Article 12(1) consolidates. In

¹²² Ibid, paras 31-33; emphasis added.

¹²³ Opinion of the Advocate General Mengozzi of 23 January 2014 in *Datenlotsen*, C-15/13, EU:C:2014:23, para 73.

that regard, the control exercised over universities as described by the Advocate General may well suffice in 'new' scenarios of the in-house exemption. Once more, new case law will be necessary to shed light on the issue.

Nevertheless, even the control requirement as established by the Advocate General does not seem to be the present in all university systems. In England, universities are legally independent entities¹²⁴ over which government influence is mainly exercised through steering through funding and issuing general legislation rather than any form of direct control. They 'are exceptionally autonomous', ranking in the top three of the European University Association's *University Autonomy Tool*.¹²⁵ Accordingly, they are entirely free from an organisational point of view, and able to decide completely independently upon structure, dismissals, creation of governing boards, etc. Except for the cap on fees and the requirement of approval before taking a large loan, they are equally free financially and as regards staffing they only need to negotiate salary for certain categories of staff with unions, but there are no requirements from the government.¹²⁶ In such as system, it seems likely that the control element is not given even if the broader approach suggested by the Advocate General was to be followed.

B. Universities as buyers

When it comes to the subjection of universities as buyers to compliance with the EU public procurement rules (§2), alternative organisational decisions could also provide a secondary opportunity to avoid direct compliance with EU public procurement rules by means of public-public cooperation or in-house arrangements (for example when purchasing services from a wholly owned spin-off which the university controls). This would, of course, depend on the individual case and an assessment of the extent to which the university exercises a control that is similar to the one it has over its own units would be required. For example, control might be limited if a holding company is involved.¹²⁷

In addition, the generous exemptions in the new Research Framework also seem to largely exclude research transactions with spin-offs or in public-private partnerships (PPPs) from State aid control if all profits are reinvested or the cooperation is genuine respectively. This seems to underline the Commission's decision in *Sarc*¹²⁸ in which it followed a very generous approach towards the low royalties a spin-off paid their parent university. On a complaint by a competitor, the General Court

124 D Palfreyman, 'The English chartered university/college: how 'autonomous', how 'independent' and how 'private'?' (2003) 15 *Education and the Law* 149.

125 European University Association, 'United Kingdom' (2015) <<http://www.university-autonomy.eu/countries/united-kingdom/>> accessed 21st August 2015.

126 Ibid.

127 Janssen (n 119).

128 See Judgment of the General Court of 12 June 2014 in *Sarc v Commission*, T-488/11, EU:T:2014:497.

denied the competitor standing, though it would have seemed likely that on substance this could have constituted State aid. One might interpret this as the General Court (and the Commission) showing some restraint in an area where, despite the shared competence due to the caveat in Article 4 (3) TFEU, the Member States remain largely responsible for the establishment and implementation of research policies. A more cynical interpretation, however, might be that the General Court simply did not want to conduct a complicated economic analysis if not backed by the Commission and rather dismiss the claim on procedural grounds than opening proceedings for un-notified aid.

Generally, the new rules in the public procurement Directive 2014/24 as well as in the Research Framework seem to indicate that the Union legislator wanted to give more leeway to universities for alternative organisational arrangements such as spin-offs and PPPs. This might be due to the fact that, at least as regards research, these are explicitly encouraged by EU policy.¹²⁹ In addition, the affected policy areas are (often) of primary responsibility of the Member States and a certain discretion is therefore envisaged. Yet, it was realised that such arrangements bear the possibility of contradicting directly applicable EU law, as they become increasingly market-oriented. Member States then feel the EU rules on, inter alia, procurement and competition have interfered too much with areas of primary responsibility which they wish to protect, which is why the legislator introduced increasing exemptions. For example, the Commission had initially suggested that 90% of activities of a controlled entity needed to be conducted for the controlling entity to make use of the in-house exemption, but during the legislative process this went down to 80%.¹³⁰ It could be asked whether this approach is not potentially simply more complicated, still leaves the possibility of tensions with primary law and, once a service has reached a certain degree of marketization, disadvantages competitors. However, as the law stands, it seems that universities have significant leeway to enter into *in-house provision* arrangements with spin-off companies they control, especially if profits are reinvested, which may be an area susceptible of attracting significant attention by universities in their strategic plans in terms of promotion of innovation and its commercial exploitation by universities.

5. Conclusions

This paper has assessed the extent to which universities are bound to comply with EU public procurement and State aid rules, both as purchasers (§2) and providers (§3). The analysis has included a consideration of public-public cooperation and in-house provision exceptions to the general rules (§4). It has carried out this analysis on the basis of the regulatory framework applicable to English universities as a case study, as well as by means of a critical assessment of recent legislative modifications and new strings of case law of the CJEU. Our main findings and conclusions are as follows.

When universities act as buyers, they are bound to comply with EU public procurement law if they are classified as 'contracting authorities'. Following the test in the *University of Cambridge* case, universities will be regarded as contracting authorities when they are bodies governed by public law and this will fundamentally depend on whether they receive more than 50% of their funding from

¹²⁹ Gideon (n 86) with further references.

¹³⁰ Janssen (n 119).

public sources. Our assessment of the English reform of higher education funding arrangements has shown that despite the introduction of significant student fees, the funding channelled to universities by the Department of Business, Innovation and Skills through the Students Loan Company does not detract from its public nature. Thus, if together with other sources of public funding, the funding received from the SLC exceeds 50% of their overall revenue, English universities remain bound to comply with EU public procurement rules in their role as buyers and this situation is likely to remain in the future. This case study is interesting for other EU Member States considering changes in the way they fund their universities. In simple terms, our analysis shows that unless they take a full arms' length approach and make universities bear commercial risks derived from the lack of public guarantee for the payment of student fees, universities will remain bound to comply with EU public procurement rules. This can be perceived as a disadvantage where the provision of higher education services is opened to competition by alternative providers, including for-profit providers, which may support the possibility to create a mechanism of exception for activities exposed to competition similar to the one existing under the special EU rules applicable to utilities procurement. If the funding from commercial income (e.g. funding for economic services provided to the public, private or third sector income, or income from student fees paid directly by home or international students) outweighs the public funding received through the SLC and other public income, universities would, on the other hand, not be bound by public procurement law anymore.

When universities act as providers of teaching and research services, our analysis has indicated that they can only be directly entrusted with the provision of teaching or research activities that can be conceptualised as services of a non-economic nature. Conversely, where these activities are of an economic nature because they are provided under conditions of market competition—and, in the case of research, the contracting authority retains all value derived from specific research projects—their entrustment to universities need to comply with the EU public procurement rules. In the case of higher education teaching activities in England, we have shown that these, in our opinion, could be classified as economic in nature and that the funding arrangements amount to contractual relationships. Consequently, HEFCE should subject the award of research funding through grants to the light touch regime created by Directive 2014/24. Even if our assessment of the contractual nature of the relationships was inaccurate and such light touch regime was not applicable, HEFCE would still need to comply with the general principles of transparency and non-discrimination, which would complicate certain aspects of the organisations of those arrangements, such as the imposition of an absolute exclusion of non-English universities—and would need to be assessed under the rules applicable to State aid and, in particular of State aid for SGEIs (as discussed below). As regards research activities we submit that most publicly funded research will be of a non-economic nature since it is conducted '*for more knowledge and better understanding*'. Yet, if a more clearly defined piece of research which could be conducted on a market by a private provider is commissioned by the state, it does constitute an economic activity regardless of how it is labelled. In these that cases, the assessment could thus become a more complicated endeavour. If the assessment established that the activity is economic in nature it would need to comply with the Procurement Directive or the alternative arrangements under the Research Framework. Research procurement that does not fall under these instruments can still be assessed under the Pre-commercial Procurement Communication.

We have restricted our State aid analysis to the cases where state aid law and public procurement rules overlap, which is mainly in the framework applicable to services of general economic interest

(SGEI). Where teaching and research services can be conceptualised as non-economic services of general interest, we have submitted that State aid control does not apply. Under the SGEI framework, we have stressed that the high safe harbour threshold of €15 million in the Altmark II package comes to leave most awards for economic research activities outside the remit of control of the State aid rules. Where that threshold is exceeded, which we assume is the case with most awards connected to teaching activities, at least in England, our analysis has shown how compliance with the applicable procurement rules becomes a key element for the assessment under the State aid rules as well. Following *Altmark*, unless there has been a procurement exercise for the selection of the undertaking providing the SGEI, it is necessary to prove that there is no excessive compensation. This may be difficult to do, thus creating a risk of infringement of EU State aid rules in the way HEFCE funds English universities. Nonetheless, even though a strict interpretation of *Spezzino* would probably not include universities because they are not strictly non-profit and provide a vast range of activities, we have considered that, in the light of recent CJEU case law more generally, there may be scope to discuss if a relaxation of this strict assessment is possible, so as to consider compliance where the way the SGEI is procured is able to ensure '*sufficient permanent access to a balanced range of high-quality [higher education services] and, secondly, [...] the desired control of costs and prevention, as far as possible, of any waste of financial, technical and human resources*'. This may also feed back into the interpretation of the requirements derived from the light touch regime we consider applicable to economic teaching activities.

Finally, we have explored whether exceptions based on public-public cooperation or in-house provision could be used to create flexibility for universities. Our analysis has shown how universities as providers are unlikely to qualify for either of these exceptions. Looking in particular to the in-house exception, the current interpretation by the CJEU seems to exclude this possibility due to the *academic freedom* inherent in the status of universities. Moreover, even if, as we advocate, a more nuanced approach defended by Advocate General Mengozzi was adopted, this would be ineffectual in the case of English universities, which score amongst the top three most independent in the European Union. The reverse situation seems to arise where universities are buyers and seek to commission services or supplies from spin-off companies under their control. In this case, we have seen that the applicable rules create significant leeway by shielding universities from public procurement as well as state aid rules, which may well influence the use of such spin-off companies for the purposes of channelling and commercially exploiting the results of university research.

Overall, when it comes to the case of English universities as buyers, our analysis shows that the question whether they are bound by public procurement rules depends on the amount of commercial income they receive. As summarised above, the funding received from the SLC is, in our opinion, to be regarded as public. In contrast, given that, according to our analysis, the teaching funding from HEFCE needs to be subjected to the public procurement rules' light touch regime—and in case such procurement exercise is carried out by HEFCE in the future—this can be considered as commercial income. Equally, tuition fees which are actually directly paid by students (home and international) are to be considered commercial income. As regards research, funding provided for non-economic research activities is public, while we argue that funding for economic research activities is commercial income; even if the purchaser is a public body. In addition, most other income by universities, for example through the provision of accommodation services, or the direct or indirect exploitation of shops and hospitality premises will equally be commercial income. Ultimately, thus, the subjection of English universities to EU public procurement rules as buyers

depends on an exact calculation of all these income streams, so as to determine whether public funding outweighs their commercial income or not. This may well differ between universities depending on the significance of the individual funding streams.

Universities and HEFCE are also bound to comply with the light touch regime in Directive 2014/24 in the provision of higher education services, as well as with the full-fledged procurement regime or the alternative provided in the Research Framework in the provision of economic research activities. Thus, we have identified a risk of on-going infringement of EU procurement rules if a strict approach is adopted. A similar risk has been identified regarding EU State aid rules, at least as funding for teaching is concerned. We have also raised the point that this risk is difficult to assess and its actualization will crucially depend on the interpretation by the CJEU, which has recently signalled in *Spezzino* a clear lack of willingness to interfere with Member States' organisation of public services if it can find a way to accommodate soft compliance or approximate compliance with their goals. Thus, this is an area where only future case law can clarify the doubts that may remain in our analyses.

More generally, when it comes to the applicability of EU public procurement and State aid rules to universities, the paper has shown how decisions concerning the way universities are funded and the degree of competition between providers of higher education services that a Member State allows or facilitates are the two key elements for the analysis. Thus, Member States seeking to establish a framework where universities are not subjected to procurement and State aid rules in any specific way may want to reconsider the interaction between funding decisions and legal frameworks for universities market activities. In the country of our case study, England, this has recently gained even more significance with the issuing of a new green paper¹³¹ during the time of writing which attempts to continue the path towards marketization of universities. Our analysis can thus inform any further future reforms of the way in which English universities are funded and the interaction between their funding status and their subjection to EU public procurement and State aid rules.

131 BIS, *Fulfilling our Potential - Teaching Excellence, Social Mobility and Student Choice* (Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office 2015).