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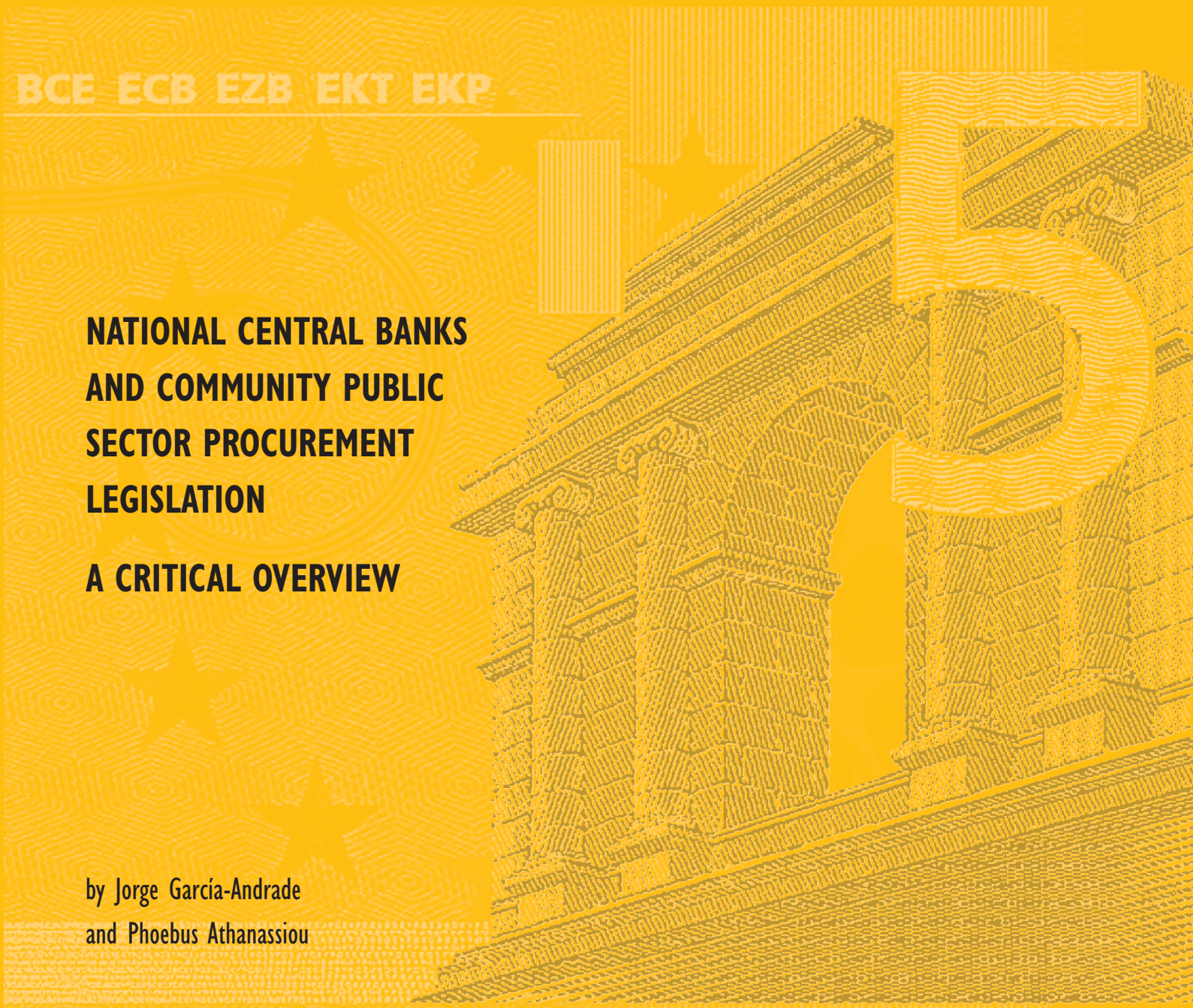

NATIONAL CENTRAL BANKS AND COMMUNITY PUBLIC SECTOR PROCUREMENT LEGISLATION

A CRITICAL OVERVIEW

by Jorge García-Andrade
and Phoebus Athanassiou

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Abstract

On 31 March 2004 the Council of Ministers and the European Parliament adopted the Public Sector Procurement Directive, with a national implementation deadline of 31 January 2006. In common with earlier Community public sector procurement legislation, the new Directive seeks to ensure that European public sector entities award contracts in an efficient, transparent and non-discriminatory manner, thereby contributing to the elimination of public procurement as a non-tariff barrier to the development of a genuine Single Market for goods and services throughout the EU. Although some of the Member State national central banks (NCBs) are listed in an Annex to the Public Sector Procurement Directive as 'contracting authorities', it is not clear to what extent all Member State NCBs are subject to its provisions. A review of national legislation implementing EU public sector procurement rules reveals significant variations with regard to its coverage of Member State NCBs. The lack of ECJ case-law directly on this question leaves somemore room for speculation. The purpose of this paper is to examine whether Member State NCBs are subject to the Public Sector Procurement Directive and to Community public sector procurement legislation at large. For the purposes of their inquiry, the authors will rely on the case-law of the ECJ interpreting Community public procurement rules, on considerations derived from the nature, mission and tasks of Member State NCBs and on the impact of their participation in the ESCB as possible sources of guidance concerning the existence of an obligation for Member State NCBs to comply with the rules and principles enshrined in Community public sector procurement legislation. The paper concludes that there is little reason to suggest that Member State NCBs should not be subject to the principles underlying the Community procurement regime or even to the Community procurement rules themselves.

1. Introduction

Although the EC Treaty contains no explicit references to public procurement[1], the growing economic importance of European public procurement markets[2], the perceived impact of their effective operation on the promotion of unfettered cross-border competition[3] and the close links between public procurement and the fight against corruption[4], have fostered the establishment, from the early 1970s[5] onwards, of a comprehensive Community public procurement regime. A legal framework was developed consisting of a number of directives[6] adopted, inter alia, on the basis of the Community competence to adopt measures for the approximation of national law provisions on the establishment and functioning of the internal market[7] and premised

[1] It should be noted, however, that Article 163(2) EC, on the Community's objective of strengthening the scientific and technological bases of Community industry, does in fact refer to the 'opening-up of national public contracts' and Article 183(4) EC, on the objectives of the Association of the overseas countries and territories, in addition provides that '[f]or investments financed by the Community, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories'.

[2] European public sector procurement markets are the largest in the world. Although their importance varies significantly across the Member States, in 1998 public procurement markets were worth over €720 billion or about 11% of the Union's GDP (Commission Communication, *Public Procurement in the European Union*, COM(1998) 143 final, p. 1). By 2002, the share of public procurement markets as a percentage of EU GDP had risen to over 16% or €1500 billion (Commission working document: *A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future*, available on the Commission's website at http://europa.eu.int/comm/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf). Globally, government procurement of goods and services represented more than 18% of the world GDP or $5,8 trillion, in 2002 figures (*The Size of Government Procurement Markets*, OECD, 2002).

[3] The importance of public procurement as a key non-tariff barrier to the achievement of a genuine intra-Community market in goods and services was noted by the Commission as early as the mid-1980s (Commission White Paper, *Completing the Internal Market*, COM(85) 310 final, pp. 23-24) and has frequently been emphasised by the ECJ (see, in particular, Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 16, and Case C-237/99 *Commission* v *France* [2001] ECR I-939, paragraph 41).

[4] Commission Communication, *A Union Policy against Corruption*, COM(97) 192 final.

[5] Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II) p. 682).

[6] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1); Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1); and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54). See also Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33); Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

[7] Article 95 EC. See also Moreno Molina, *Contratos públicos: Derecho comunitario y Derecho español* (McGraw-Hill, 1996), p. 71 et seq.

on some of the fundamental principles underlying the EC Treaty[8]. Following the debate launched by the 1996 Green Paper on public procurement[9], those directives were recently recast inter alia as Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works, supply and service contracts (the 'Public Sector Procurement Directive' or simply 'the Directive')[10], which entered into force on 30 April 2004, with a national implementation deadline of 31 January 2006[11].

Consistent with the rationale underlying all previous Community public procurement legislation, the Public Sector Procurement Directive seeks to ensure, through its coordination of the procedures for the award of specific types of contracts by designated Member State bodies, that public sector procurement is conducted in an efficient, transparent and non-discriminatory manner[12]. Although the Public Sector Procurement Directive is also intended to modernise, simplify and clarify the existing public procurement regime, in line with the relevant case-law of the European Court of Justice (ECJ), its adoption does not signal a major overhaul of Community procurement law, whilst its fundamental aim remains the same as that of the directives that it has repealed[13], namely to eliminate public procurement as a fundamental obstacle to cross-border trade, in accordance with the four freedoms and the principles of equal treatment[14] and non-discrimination[15], through the opening of public sector

[8] The four 'fundamental freedoms' (with an emphasis on Articles 28 EC, 43 EC and 49 EC), and the prohibition on discrimination on grounds of nationality (Article 12 EC).
[9] Commission Green Paper, *Exploring the way forward*, COM(96) 583 final.
[10] OJ L 134, 30.4.2004, p. 114. Unless otherwise specified, for the purposes of this paper, all references hereinafter to Community secondary legislation on public sector procurement should be understood as references to the Public Sector Procurement Directive. A separate directive on procurement in the utilities sector, adopted on the same day as the Public Sector Procurement Directive, lies beyond the scope of our inquiry and will not be addressed here.
[11] Article 80(1) of the Public Sector Procurement Directive. Only a minority of Member States had transposed the Directive into national law within the deadline. For an account of the state of play on 1 February 2006, see the results of the SIGMA survey on the Implementation of the Public Procurement Directives, available at: http://www.sigmaweb.org/dataoecd/4/30/36361194.pdf. In those Member States which have failed to comply with the deadline, the operation of the principle of direct effect ensures the enforceability of many of the Directive's provisions in national courts, thus contracting authorities need to observe its provisions until such time as new national procurement legislation has entered into force.
[12] For a detailed account of the rationale underlying Community legal action in the field of public procurement, see, in particular, Arrowsmith, *The Law of Public and Utilities Procurement*, (Sweet & Maxwell, 1996), p. 47; Fernández Martín, *The EC Public Procurement Rules. A Critical Analysis* (Clarendon Press, 1996), p. 12. For an overview of the Public Sector Procurement Directive itself, see Bovis, "The new public procurement regime of the European Union: a critical analysis of policy, law and jurisprudence" 30 *European Law Review* (2005), pp. 607-630.
[13] It follows from Article 82 of the Public Sector Procurement Directive that of the provisions of the original three Directives, only Article 41 of Directive 92/50/EEC remains in force.
[14] The ECJ has emphasised the importance of the equal treatment principle in public procurement matters, see, for example, Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 81.

procurement markets to competition from suppliers from across the European Union (EU)[16]. Thus, the principal tools employed by the Public Sector Procurement Directive for the promotion of equal treatment and non-discrimination in the award of contracts are essentially the same as those of its predecessors. Likewise, the objective of the Directive also remains essentially the same, that is to say, ensure the operation of a reasoned decision-making mechanism for the award of contracts, capable of limiting discretion and arbitrary choices on the part of the contracting authorities in the interests of undistorted cross-border competition[17].

One question that the Public Sector Procurement Directive does not explicitly address is that concerning the extent to which its provisions apply to Member State national central banks (NCBs). That omission is perhaps somewhat striking given the *sui generis* nature, mission and tasks of NCBs, their participation in the European System of Central Banks (ESCB) and their obligations under the Statute of the ESCB and of the ECB (the 'Statute'). In addition, analysis of national provisions transposing Community public procurement legislation reveals a lack of uniformity concerning the extent to which NCBs are included within its scope. Furthermore, the lack of ECJ case-law directly on the issue leaves the question open to interpretation.

This paper proposes to address the issue, examining whether NCBs do in fact fall within the scope of application of the Public Sector Procurement Directive and of Community public procurement legislation more generally, as interpreted by the ECJ, in order to determine whether NCBs are required to comply, as a matter of principle, with national legislation implementing the Directive or whether it is sufficient for NCBs, where necessary, to adapt their own procurement procedures in line with the

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[15] In Case 810/79 *Überschär* [1980] ECR 2747, paragraph 16, the ECJ held that the prohibition on discrimination on grounds of nationality is a specific expression of the general principle of equal treatment.

[16] The use of public procurement rules for the parallel pursuit of social or environmental objectives has also been considered by the Commission in recent years. See Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, (OJ C 333, 28.11.2001, p. 27) and Commission Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, (OJ C 333 28.11.2001, p. 12). The Public Sector Procurement Directive has admitted these objectives as ancillary to that of its main objective, that is, the removal of public procurement as a non-tariff barrier to the development of a genuine single market for goods and services in the EU (see recitals 1, 5 and 28 of the Directive and Arrowsmith, "An assessment of the new legislative package on public procurement", 41 *Common Market Law Review* (2004), pp. 1315-1322).

[17] As a result of this similarity of objective and the retention in the Public Sector Procurement Directive of the same definition of a 'body governed by public law' used by its predecessors, our analysis of the Public Sector Procurement Directive in this paper can be applied also to previous Community secondary legislation on public sector procurement.

principles underlying Community public procurement legislation and the Public Sector Procurement Directive in order to satisfy the Community procurement regime.

2. NCBs as 'contracting authorities'

The Public Sector Procurement Directive provides that when awarding 'public contracts'[18], 'contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way'[19], applying 'the national procedures as adjusted for the purposes of the Directive'[20]. It follows, therefore, that the definition of the concept of 'contracting authorities' is a key determinant of the applicability of Community public procurement rules in any particular situation.

The Public Sector Procurement Directive defines 'contracting authorities' in Article 1(9). According to that provision, the term encompasses 'the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law'. *Non-exhaustive* lists of bodies governed by public law qualifying as 'contracting authorities' are set out in Annex III to the Directive[21]. Interestingly, Annex III only lists *some* of the NCBs as 'contracting authorities'[22]. The wording of Article 1(9) which requires Member States to 'notify the Commission of any changes to [the] lists of bodies…' set out in Annex III implicitly suggests, however, that the status of national bodies (such as NCBs) may be subject to periodic review and amended accordingly. Despite the non-exhaustive nature of the Annex III list, its express

[18] The definition of public contracts is to be found in Article 1(2)(a) of the Public Sector Procurement Directive. The Directive's provisions apply only where the value of such contracts is estimated to be equal to or greater than the thresholds set out in Article 7 of the Directive, as from time to time amended.

[19] Article 2 of the Public Procurement Directive.

[20] Ibid., Article 28.

[21] It should be noted that according to Article 1(b) of Directives 92/50, 93/36 and 93/37/EEC the relevant lists were to be regarded 'as exhaustive as possible'. Article 1(9) of the Public Sector Procurement Directive, however, unequivocally recognises the non-exhaustive nature of the lists of bodies set out in Annex III. The Court has on several occasions held (see, for example, Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 39) that the list of bodies governed by public law appearing in Annex I to Directive 93/36/EEC was not exhaustive, observing that its accuracy varied considerably from one Member State to another. As a result, it concluded that where a specific body does not appear in that list, its legal and factual situation must be determined in each individual case in order to assess whether or not it constitutes a body governed by public law for the purposes of Community public procurement law. Arrowsmith, op. cit., footnote 12, p. 113, considers the Annex to be 'for guidance only: thus bodies not in the list but within the general definition are still covered, and, conversely, those in the list but not within the general definition would not appear to be included'.

[22] The reference is to the Banque Nationale de Belgique/Nationale Bank van België (Annex III(I)(B)), Danmarks Nationalbank (Annex III(II)) and De Nederlandsche Bank (Annex III(X)). In 1993, when Council Directives 93/36 and 93/37/EEC where enacted, only one NCB - Danmarks Nationalbank - was listed as a body governed by public law (Annex I(II) to Directive 93/37/EEC).

inclusion of only three NCBs and the Directive's silence with regard to the legal position of the remaining NCBs is nevertheless somewhat puzzling and is open to different interpretations. One possible explanation is that those Member States which did not provide for their NCBs to be included expressly within Annex III only refrained from doing so because they considered NCBs unquestionably to be subject to Community procurement law, irrespective of whether they fulfil the qualifying conditions for a 'contracting authority' within the meaning of the Directive[23]. Alternatively, it might be argued that Annex III reveals the lack of a clear consensus between the Member States on the applicability of Community secondary legislation on public procurement to NCBs[24].

In determining the plausibility of those hypotheses, an examination of domestic law implementing Community secondary legislation on public procurement and of national and Community case-law with regard to the legal status of NCBs for public procurement purposes may be of assistance[25]. What this examination readily shows is that NCBs are not invariably perceived across Member States as entities that automatically fall within the scope of public procurement law. In the great majority of jurisdictions, domestic legislation implementing Community public procurement rules does not expressly refer to NCBs as 'contracting authorities'. Partly due to the implementation technique opted for in several EU jurisdictions[26] it is predominantly by reference to national legal considerations or arguing *a contrario* that it can be inferred that the NCBs of certain Member States implicitly fall within the ambit of general public procurement law[27]. It is only in the case of a relatively limited number

[23] The fact that no single NCB is expressly *excluded* from the scope of application of the Public Sector Procurement Directive also supports this view.

[24] This view is supported by the fact that the Public Sector Procurement Directive was adopted prior to the 2004 EU enlargement. Hence its drafting could not have taken into account the stance adopted by the new Member States as to the status of their NCBs under the Public Sector Procurement Directive.

[25] Although the ECJ has held that for the purpose of determining their meaning and scope Community law concepts that make no express reference to the law of the Member States should not be interpreted according to national perspectives, (*Adolf Truley*, op. cit., footnote 21, paragraph 35), a comparative approach is useful here in order to illustrate the uncertainty surrounding the legal position of NCBs in the Member States.

[26] This has often consisted in a definition of 'contracting authorities' which closely follows that of the relevant Community rules without providing any further clarification as regards the precise status of NCBs for public procurement law purposes. See, for example, the case of the Bank of Greece, where no safe conclusions can be drawn, partly because Presidential Decree No 346 of 30 September 1998 largely reproduces the provisions of Directive 92/50/EEC.

[27] This is true, for example, with regard to Danmarks Nationalbank, which can safely be inferred to be a 'contracting authority' for the purposes of *2004-09-16 Bekendtgørelse nr. 937* (Executive order 2004-09-16 No 937 on the procedures for awarding public supply, service and works contracts), since Annex 1 thereto reproduces the text of the Public Sector Procurement Directive; the Deutsche Bundesbank, a 'bundesunmittelbare Person des öffentlichen Rechts' considered to be a 'contracting authority' for the purposes of Paragraphs 97 and 98(2) of the *Gesetz gegen Wettbewerbsbeschränkungen* (Law against restraints of competition), and hence, implicitly, also subject to German public procurement rules; the Banco de Portugal, implicitly deemed to fall, by

of jurisdictions that NCBs are legislatively recognised as being subject to the provisions implementing Community public procurement rules into national law; moreover, even in those cases, inclusion of the NCBs concerned is but a relatively recent phenomenon[28]. Finally, although no jurisdiction in its public procurement rules expressly exempts an NCB from the scope of their application, examples nevertheless exist of Member States where there is either uncertainty on this point[29] or the predominant tendency is for NCBs to be treated as falling outside the scope of general public procurement legislation[30]. The uncertainty is further compounded by the fact that the recast Public Sector Procurement Directive has yet to be implemented in several Member States.

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reason of its legal nature, within the scope of application of Decree-Law No 59/99 of 2 March 1999 on the legal framework for public works which implements Community public procurement rules; the Suomen Pankki which, as an institution governed by public law is, implicitly, subject to the provisions of the Law on Public Procurement, Finnish Statute No 1505/1992, which implements Community procurement rules; Narodowy Bank Polski which, in the light of Articles 3 and 4.2 of the Law on Public Procurement of 29 January 2004, Dz. U. 2004 No. 17 Item 177, as amended, read in conjunction with Article 5 of the Law on Public Finance of 30 June 2005, Dz. U. 2005 No. 249 Item 2104, as amended, can be deemed to be subject to Community procurement rules, as implemented into national law; Sveriges Riksbank, considered to fall within the scope of application of *Lag (1992:1528) om offentlig upphandling* (Law (1992:1528) on public procurement), on the basis of Article 1(5) thereof; and the Banque centrale de Luxembourg which, whilst not expressly mentioned either in the Public Procurement Law of 30 June 2003 or in the relevant Regulation of July 2003, nevertheless meets the general definition of *'organismes de droit public'* thereby falling within the scope of the 2003 law.

[28] This is true, for example, of the Banque de France which, pursuant to Law 91-3 of 3 January 1991, as recently amended (see Regulation No 2005-649 of 6 June 2005, Art. 40), has become subject to public procurement rules, after the *Conseil d'Etat* (Council of State) had declared it to be a '*sui generis* public legal person'. Previously, the Banque de France was considered to be a 'private legal person', thus exempt from public procurement rules. Likewise, the issue of the applicability of public procurement rules to the Banca d'Italia was only finally settled in 2002 when Law 166/2002 of 1 August 2002 inserted an explicit reference to the Banca d'Italia in Article 33 of Law 109/1994. Even prior to that amendment, however, the Banca d'Italia was presumed to be subject to general public procurement law in its quality as an '*ente pubblico*' (see Article 2(2)(a) of Law 109/1994). Nevertheless, Article 17 of Legislative Decree n.163/2006, inter alai implementing the Public Sector Procurement Directive into Italian law, includes the Banca d' Italia among the authorities excluded from its publicity requirements, in the case of contracts declared to be secret. Similarly, the Central Bank of Cyprus has only recently (17 February 2006) been listed as a 'contracting authority' in Annex III to Law 12(I)/2006 which implements the Public Sector Procurement Directive into national law.

[29] This appears to be the case with regard to the Central Bank and Financial Services Authority (Ireland) which, while not listed under Annex III, appears to fulfil several of the Procurement Directive's qualifying requirements. A centralised procurement office operates within the CBFSAI that applies Procurement Directive compliant guidelines.

[30] This is true, for example, with regard to the Banco de España, where Article 4(1) of Law 13/1994, of 1 June 1994, provides that the Banco de España is not subject to public procurement legislation generally applicable to the State unless specifically indicated otherwise (see, also, Royal Legislative Decree 2/2000 of 16 June 2000, implementing Community procurement rules, which does not expressly mention the Banco de España). Similarly, the Bank of Greece has been declared by the Athens District Court of First Instance (sitting with a single judge) (Decision No 4455/2001) *not* to fall within the scope of the national legislation implementing Directive 93/37/EEC because it fails to fulfil no less than two of the three conditions necessary for classification as a 'public law legal entity'. The case of the Central Bank of Malta is even more striking as Legal Notice 473 of 2004 exempts the CBM from the Public Contract Regulations, implementing Community procurement rules into Maltese law.

ECJ case-law on the application of Community public procurement rules to NCBs is sparse and somewhat unhelpful[31]. A judgment of relevance to the characterisation of NCBs as 'contracting authorities' is that in *Felix Swoboda*[32]. The facts of the case were that the plaintiff challenged before the Austrian *Bundesvergabeamt* (Federal Procurement Authority) the decision of the Oesterreichische Nationalbank (OeNB) to use a negotiated procedure for the nomination of a service provider to undertake a removal to new premises. Uncertain of the interpretation to be given to Council Directive 92/50/EEC, transposed into Austrian law by virtue of the *Bundesvergabegesetz* (Law on Purchase Contract Awards), the *Bundesvergabeamt* referred the case to the ECJ, seeking a preliminary ruling on several questions relating to the interpretation of the Directive. While the actual questions may not be of an immediate interest to us in the context of this paper, what *is* of interest is the implicit recognition by the ECJ that the OeNB was indeed subject to the provisions of the Directive[33]. In the same vein, it is interesting to note that none of the parties to the proceedings, not excluding the defendant itself, challenged the OeNB's subjection to Community procurement rules: their arguments focused on the *object* of the contract itself, rather than on the issue of whether or not the OeNB came within the scope of application of the Directive to start with. In his opinion, Advocate General Mischo went one step further, unreservedly qualifying the OeNB as a 'contracting authority', without nevertheless scrutinising its legal position vis-à-vis the Directive[34]. Despite the inherent limitations of the preliminary rulings procedure, which cannot decide on the application of specific provisions of Community law as transposed into national law[35], it must be observed, that *Felix Swoboda* may well constitute something of a (missed) opportunity for a more thorough examination of the legal position of NCBs with regard to Community public procurement law.

Our brief examination of the implementation of Community secondary legislation on public procurement and into national and Community case-law on the inclusion of NCBs within the scope of public procurement legislation suggests that,

[31] This is in sharp contrast to the Court's general procurement-related case-law, which is rich and varied. For a thorough analysis see Bovis, "Recent case-law relating to public procurement: a beacon for the integration of public markets", 39 *Common Market Law Review* (2002), pp. 1025-1056.
[32] Case C-411/00 *Felix Swoboda* v *Oesterreichische Nationalbank* [2002] ECR I-10567.
[33] The ECJ examined the regime applicable to public service contracts composed of services falling within different provisions of the Directive, assuming, throughout its judgment, that the OeNB was bound by its provisions. See, for example, its observations in paragraph 12 where the ECJ cited the (former) definition of public supply contracts as a key component of the applicable legal framework and acknowledged the OeNB's 'contracting authority' status under the Directive.
[34] See the Opinion of Advocate General Mischo, point 7.
[35] In Case 6/64 *Costa* v *ENEL* [1964] ECR 585, the Court declared it had 'no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty'. See also Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and others* v *Ente Nazionale Risi* [1994] ECR I-711, paragraph 19.

notwithstanding the general tendency to treat NCBs as entities falling within its scope, there is still room for doubt, in particular, as regards the *extent* of their obligation to comply with Community public procurement rules. This uncertainty stems from the fact that the legal position of NCBs in Community public procurement law has yet to be inquired into in any depth. In the following sections of this paper we propose to undertake that inquiry and to examine the considerations at stake.

3. NCBs as 'bodies governed by public law': tasks, purpose and character

Article 1(9) of the Public Sector Procurement Directive defines 'contracting authorities' to be 'the State, regional or local authorities, bodies governed by public law, [and] associations formed by one or several of such authorities or one or several of such bodies governed by public law'. While an NCB is readily distinguishable from the State, regional or local authorities, it is less obvious whether it constitutes a 'body governed by public law'. These are defined by that provision as bodies (a) 'established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character'; (b) 'having legal personality'; and (c) 'financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law'. All three conditions must be satisfied cumulatively in order for an entity to be considered a body governed by public law[36]. As regards NCBs doubts exist as to whether they satisfy limbs (a) and (c) of the definition. This appears to call into question the seemingly unqualified assumption that NCBs are to be treated as 'contracting authorities'. The abundance of ECJ case-law on the interpretation of these conditions reflects, in part, the difficulty inherent in delineating their precise legal content and adds fuel to the controversy surrounding the legal position of NCBs under Community public procurement law.

Given that it is clear that NCBs exist separately from the State and other public entities, in part by reason of their separate legal personality[37], in order to assess

[36] It follows from Case C-44/96 *Mannesmann Anlagenbau* v *Strohal* [1998] ECR I-73, paragraph 21, that an entity must satisfy all three conditions to be regarded as a body governed by public law within the meaning of Community procurement rules.

[37] In addition to constituting an essential condition for their legal capacity, the separate legal personality of NCBs also contributes to their operational independence, formally 'segregating' them from the State or other public authorities. On the separate legal personality of NCBs, see, inter alia, Paragraph 2 of the Law on the Deutsche Bundesbank; Article 1 of Organic Law No 5/1998 of 31 January 1998 on the Banco de Portugal; Article 3.1 of the Law concerning the monetary status and the Central Bank of Luxembourg; Article 1.2 of the Law on Banka Slovenije of 3 July 2002; and Article 2.1 of the Law on Lietuvos bankas.

whether or not they are capable of constituting 'contracting authorities' we propose first to focus our attention on whether they meet the requirement of Article 1(9)(a), that is to say, whether they have been 'established for the specific purpose of meeting needs in the general interest'[38].

3.1. Needs in the general interest

The ECJ has held that needs in the general interest are those which 'are as a general rule met otherwise than by the availability of goods or services in the marketplace' as well as those which 'for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence'[39]. Activities 'closely linked to public order and the institutional operation of the State' have also been held to meet the general interest test[40].

An examination of the primary central banking tasks, as defined in the EC Treaty and in the Statute[41], indicates that, notwithstanding the independence enjoyed by the NCBs, in their pursuit, the said tasks are not intended to serve the individual interests of their Executive Board members or shareholders but, instead, those of the general public. The same is also true of the primary objective of NCBs, that is, to conduct independently the State's monetary policy, in other words, to issue and manage the volume of the national currency or, in the case of a Eurosystem NCB[42], to 'maintain price stability' and, '(W)ithout prejudice to [that objective] to support the general economic policies in the Community'[43]. The NCBs' contribution to 'the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system'[44],

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[38] This was the approach taken in Case C-353/96 *Commission* v *Ireland* [1998] ECR I-8565 and in Case C-306/97 *Connemara Machine Turf* v *Coillte Teornata* [1998] ECR I-8761 (both cases arising out of the same set of facts).

[39] Case C-360/96 *BFI Holding* [1998] ECR I-6821, paragraphs 50 and 51, as reaffirmed in Joined Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraph 37. See also *Adolf Truley*, op. cit., footnote 21, where 'needs in the general interest' were deemed to be those which 'are linked to public policy in so far as the State has a clear interest in exercising close control over [them]' (paragraphs 50 and 52).

[40] *Mannesmann*, op. cit., footnote 36, paragraph 24.

[41] Under Article 105(2) EC and Article 3.1 of the Statute , these tasks are to define and implement the monetary policy of the Community, to conduct foreign-exchange operations, to hold and manage the official foreign reserves of the Member States and to promote the smooth operation of payment systems.

[42] Eurosystem NCBs are the twelve NCBs of the Member States of the euro-area. For a presentation of the Eurosystem see, generally, ECB, "The Eurosystem and the European System of Central Banks", *Monthly Bulletin* (January 1999), p. 7, available at http://www.ecb.int/pub/pdf/mobu/mb199901en.pdf; Zilioli and Selmayr, *The Law of the European Central Bank*, (Hart Publishing, 2001), p. 166.

[43] Article 2 of the Statute.

[44] Ibid. Article 3.3. It must be noted that although not all NCBs participate in banking sector supervision, the public interest aspect of their involvement therein, from both its prudential supervision

their assistance in the collection by the ECB of 'the necessary statistical information either from the competent national authorities or directly from economic agents'[45] and the issuance by the (Eurosystem) NCBs of banknotes 'which shall be the only notes having the status of legal tender within the Community'[46] are further examples of NCB tasks with a distinct general interest flavour.

The public interest dimension of the NCBs' tasks is also evident throughout the entire range of activities that NCBs traditionally performed - and, in some cases, continue to perform - on behalf of the State or other public institutions, in their capacity as fiscal agents, treasurers and depositories, whether in receiving or making payments into accounts that public entities hold with them or in settling their debts vis-à-vis third parties (mainly through the payment of interest to their creditors) or in issuing and redeeming debt instruments for public debtors or in granting temporary liquidity assistance to public entities etc.

On account of the clear link to the general interest of the tasks pursued by NCBs whether from a 'public policy' – definition and implementation of monetary policy – or from a 'public order' perspective – issuance and protection of banknotes – it is evident that NCBs routinely meet needs in the general interest within the meaning of the Public Sector Procurement Directive, thereby fulfilling prima facie this particular component of the Article 1(9)(a) condition.

3.2. Purpose of establishment

Several NCBs were originally established as private institutions for the purpose of satisfying needs which may only have been associated in part with the pursuit of the general interest within the meaning of the Public Sector Procurement Directive[47]. Case-law has demonstrated, however, that the *original* purpose pursued by a body at the time of its establishment is not decisive in determining whether a body is established for the specific purpose of meeting needs in the general interest. This matter was addressed in *Universale-Bau*[48], a reference for a preliminary ruling from the *Vergabekontrollsenat des Landes Wien* (Public Procurement Review Chamber of

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and consumer protection perspectives, cannot be underestimated. Admittedly, in historical terms, the attribution of banking supervision functions to NCBs has tended, however, to follow that of the currency issuance privilege. Ultimately, it remains the case that on account of the inevitable moral hazard involved there is no consensus on whether the authority responsible for the definition and implementation of monetary policy should also engage in banking supervision, particularly where it is obliged to act as a lender of last resort.

[45] Ibid. Article 5.1.

[46] Ibid. Article 16.

[47] This is true of most NCBs including, for example, the Bank of Greece, the Banco de España, the Banca d'Italia and the Nationale Bank van België/Banque Nationale de Belgique.

[48] Case C-470/99 *Universale-Bau AG* [2002] ECR I-11617.

the *Land* of Vienna) concerning the interpretation of Directive 93/37/EEC on public contracts.

The facts of the case were that EBS, originally a commercial sanitation undertaking but, subsequently, sole responsible for the principal public sewage plant of Vienna and operating subject to the majority-control of the city of Vienna, issued a public invitation to tender for the award of a public works contract in Vienna. After being informed by EBS that they were not to be invited to submit a tender, the plaintiffs challenged the award procedure before the *Vergabekontrollsenat* which, *inter alia*, had to determine whether EBS was a contracting authority within the meaning of the Directive. On a preliminary reference from the *Vergabekontrollsenat*, it was argued before the ECJ that EBS could not be regarded as a body governed by public lawbecause it had originally not been established for the specific purpose of meeting needs in the general interest but, instead, as a commercial undertaking which had only subsequently undertaken such tasks. Adopting a functional approach, informed by the need to ensure the effectiveness of the aforementioned Directive, the ECJ held that, 'a body which was not established to satisfy specific needs in the general interest not having an industrial or commercial character, but which has subsequently taken responsibility for such needs, which it has since actually satisfied, fulfils the condition required by [the Directive] so as to be capable of being regarded as a body governed by public law within the meaning of that provision, on condition that the assumption of responsibility for the satisfaction of those needs can be established objectively'. In reaching that conclusion the ECJ determined that it was not decisive whether or not the statutes of the undertaking had been amended to reflect the changes in its sphere of activities[49].

It follows from the above case that the original objects of an entity do not of themselves provide grounds to exclude it from the scope of Community public procurement law. Hence, an NCB cannot escape its obligation to comply with Community procurement rules solely on account of the fact that the general interest tasks that it *currently* pursues were only entrusted to it subsequent to its establishment as a commercial undertaking.

3.3. Non-industrial or commercial character of the body

Article 1(9)(a) of the Public Sector Procurement Directive requires not only that a particular entity meets needs in the general interest but, also, that those needs fulfil the

[49] Ibid. paragraphs 57 to 63.

criterion of 'not having an industrial or commercial character'. The fundamental reason why the Directive excludes from its scope of application bodies engaging in commercial or industrial activities is that to subject them to public procurement procedures would infringe their contractual freedom and, at the same time, undermine their business prospects and deprive them of their operational flexibility[50]. Moreover, the economic justification for requiring certain bodies to comply with public procurement rules is in their case altogether absent. Private operators acting within the context of a competitive market are unlikely to be guided by national preferences or a country-specific bias capable of prejudicing the legitimate interests of cross-border service providers or product suppliers[51].

Although it is settled case-law that the expression 'not having an industrial or commercial character' refers to the needs satisfied by an entity rather than to the entity itself[52], the *commercial* legal status of particular entities has been regularly invoked in support of the argument that such entities should not be subject to the requirements of public procurement law. The premise of the argument is that the activities of an entity established in the form of a private company could only be of an industrial or commercial character. Given the fact that several NCBs are incorporated as private companies under national law[53], this argument is of immediate relevance to our present purposes.

The relevance of an entity's legal form for the purposes of the Community public procurement rules was examined by the ECJ in *Commission* v *Ireland*[54]. At issue in that case was whether an undertaking which had called for tenders for fertiliser supply (the Irish Forestry Board Ltd - *Coillte Teoranta*) was a 'contracting authority' for the purposes of Directive 77/62/EEC. The Irish Government denied that the body was a contracting entity arguing instead that it was an entity not subject to the Directive's provisions by reason of it being 'a private undertaking subject to the Companies Act'

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[50] See Braun, "Strict compliance versus commercial reality: the practical application of EC public procurement law to the UK's Private Finance Initiative", 9 *European Law Journal* (2003), pp. 579-581.
[51] *BFI Holding*, op. cit., footnote 39, paragraph 43.
[52] '[I]t is clear from the second subparagraph of Article 1(b) of Council Directive 92/50/EEC, in its different language versions, that the absence of an industrial or commercial character is a criterion intended to clarify the meaning of the term 'needs in the general interest' as used in that provision' (*BFI Holding*, op. cit., footnote 39, paragraph 32; see also, *Mannesmann*, op. cit., footnote 36, paragraph 31; and *Agorà and Excelsior*, op. cit., footnote 39, paragraph 35).
[53] The Oesterreichische Nationalbank (Article 2 of the Federal Law on the Oesterreichische Nationalbank of 1984), the Nationale Bank van België/Banque Nationale de Belgique (Article 2 of the Law establishing the Organic Statute of the Nationale Bank van België/Banque Nationale de Belgique), the Bank of Greece (Article 1 of the Statute of the Bank of Greece) and De Nederlandsche Bank (Article 1 of the Articles of Association of De Nederlandsche Bank).
[54] *Commission* v *Ireland*, op. cit., footnote 38, paragraphs 25 - 33.

and 'a commercial company belonging to the State'[55]. Focusing on the public nature of the tasks of the company and on the control exercised by the Irish Government[56], the ECJ held that notwithstanding its corporate trappings the undertaking at issue was a contracting authority.

That an entity may not be excluded from the scope of application of public procurement law merely because of its legal status has also been affirmed by the ECJ in a series of recent judgments relating to the *rationae personae* scope of Spanish public procurement legislation implementing Community public procurement law. Adopting a functional interpretation of the concept of a 'body governed by public law' the ECJ has held consistently that in order to determine the classification of a private law entity for public procurement law purposes regard must be had to whether it fulfils the three cumulative conditions set out in Community secondary legislation (currently to be found in Article 1(9) of the Public Sector Procurement Directive). In that regard, no attention would need be paid to an entity's private law status or to the commercial law nature of the rules applicable to its activities because, to do so, would be to undermine the effectiveness of Community secondary legislation on public procurement[57].

Given the conclusion that an entity's private law legal status does not automatically exclude its categorisation as a 'contracting authority' and having regard to the fact that the 'industrial or commercial character' of the activities pursued by an entity cannot be determined in advance simply by reference to its legal form, it follows that for the purposes of Community procurement law it is not decisive whether an NCB is incorporated as a private law company. Instead, regard should be had to the character of the *activities* that it pursues.

3.4. Non-industrial or commercial character of the activities

In principle, for the purposes of their classification as 'bodies governed by public law' within the meaning of the Public Sector Procurement Directive, NCBs satisfy the requirement that their activities are not of a commercial or industrial character.

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[55] Ibid, paragraph 29.

[56] The list of entities operating subject to the control of public agencies and declared to be contracting authorities – notwithstanding their corporate form – is long (see, for example, *Mannesmann*, op. cit., footnote 36, paragraphs 20 to 21; *Commission* v *France*, op. cit., footnote 3, paragraph 47; *Universale-Bau*, op. cit., footnote 48, paragraphs 51 to 53).

[57] C-214/00 *Commission* v *Spain* [2003] ECR I-4667, paragraphs 53 to 57; Case C-283/00, *Commission* v *Spain* [2003] ECR I-11697, paragraphs 69 to 75 and Case C-84/03 *Commission* v *Spain* [2005] ECR I-139, paragraphs 27 to 30.

However, a closer examination of the entire range of activities pursued by NCBs readily reveals that at least some of those activities are not of a public but of a commercial nature, notwithstanding their clear link to the monetary policy related tasks and objectives of the NCBs[58]. Subject to this important qualification, it could be argued that, at least as regards the exercise of these activities, an NCB could not readily be distinguished from a private operator[59]. The question may be reasonably asked, therefore, whether the pursuit of commercial activities by an NCB might not have an impact on its classification as a 'body governed by public law' or if the precise *division* between its public interest tasks and its commercial or industrial activities may not be of relevance to this classification.

In answering that question, it should be noted from the outset that the ECJ has construed the criterion relating to the absence of a commercial or industrial character from the activities pursued by an entity as a qualification intended to clarify the expression of 'needs in the general interest'. Holding that 'the only interpretation capable of guaranteeing the effectiveness of [this criterion] is that it creates, within the category of needs in the general interest, a sub-category of needs which are not of an industrial or commercial character'[60] the ECJ has recognised two categories of 'needs in the general interest'[61]: those needs which are not of an industrial or commercial character and those which are[62]. It must also be recalled that according to the case-law

[58] Article 18(1) of the Statute provides that 'in order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the [NCBs] may operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in Community or in non-Community currencies, as well as precious metals' and 'conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral'. Moreover, Article 23 of the Statute provides inter alia that 'the ECB and [NCBs] may … acquire and sell spot and forward all types of foreign exchange assets and precious metals; … hold and manage the assets referred to in this Article; conduct all types of banking transactions in relations with third countries and international organisations, including borrowing and lending operations'.

[59] We consider such financial activities to qualify as 'industrial or commercial activities', both of which should be construed as designating any economic activity carried out against the background of a competitive market.

[60] *BFI Holding*, op. cit., footnote 39, paragraph 34.

[61] Ibid. paragraph 36.

[62] Despite the ECJ's acknowledgement that there might be needs in the general interest which have an industrial or commercial character, there is no specific example of a case in which it has actually been held that needs in the general interest were of an industrial or commercial nature. Instead, it has been suggested implicitly that activities which would be industrial or commercial if undertaken by a private entity acting in its private interest lose their industrial or commercial character where they (also) meet needs in the general interest (ibid., paragraph 53.). Moreover, the ECJ indicated that 'the fact that there is competition is not sufficient to exclude the possibility that a body (…) governed by public law may choose to be guided by other than economic considerations', even though it went on later to observe that 'the existence of competition is not entirely irrelevant to the question whether a need in the general interest is other than industrial or commercial' (ibid., paragraphs 43 and 48). Finally, it should be noted that the ECJ also indicated that, 'since it is hard to imagine any activities that could not in any circumstances be carried on by private undertakings, the requirement that there should be no private

of the ECJ, 'needs in the general interest not having an industrial or commercial character' are 'generally, first, those which are met otherwise than by the availability of goods or services in the market place and, secondly, those which, for reasons associated with the general interest, the State itself chooses to provide or over which it wishes to retain a decisive influence'[63].

The implications for the classification as a 'body governed by public law' of the 'duality' of the activities undertaken by an entity were examined by the ECJ on a reference for a preliminary ruling from the Austrian *Bundesvergabeamt* in *Mannesmann*[64]. At issue in that case was whether an independent commercial printing entity (*Österreichische Staatsdruckerei* - ÖS) established by the State and pursuing both private and general interest activities, was required to observe the requirements of Directive 93/37/EEC on public works contracts when inviting tenders for a technical project. In its judgment, the ECJ held that '[t]he fact (…) that meeting needs in the general interest constitutes only a relatively small proportion of the activities actually pursued by the [entity] is … irrelevant, provided that it continues to attend to the needs which it is specifically required to meet'[65]. The ECJ also provided guidance on the requirement set out in the Directive that the body in question must have been established for the 'specific' purpose of meeting needs in the general interest, not having an industrial or commercial character. In the ECJ's view, that requirement 'does not mean that [an entity] should be entrusted *only* with meeting such needs'[66], while '…to interpret [the Directive] in such a way that its application would vary according to the relative proportion of its activities pursued for the purpose of meeting needs not having an industrial or commercial character would be contrary to the principle of legal certainty…'[67]. Accordingly, all contracts entered into by an entity displaying a 'duality' of activities fall within the scope of Community public procurement legislation[68].

As a result, as regards NCBs, although a literal interpretation of the Public Sector Procurement Directive's requirement for the absence of a commercial or industrial aspect to an entity's activities might suggest that NCBs fall outside the scope of Community procurement rules, the ECJ's broad definition of the concept of 'bodies

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undertakings capable of meeting the needs for which the body in question was set up would be liable to render meaningless the term "body governed by public law"' (ibid., paragraph 44).

[63] *Agorà and Excelsior*, op. cit., footnote 39, paragraph 37. See also *BFI Holding*, op. cit., footnote 39, paragraphs 50 and 51.

[64] Op. cit., footnote 36.

[65] Ibid. paragraph 25.

[66] Ibid. paragraph 26 (emphasis added).

[67] Ibid. paragraph 34.

[68] Ibid. paragraph 35.

governed by public law' means in practice that only an entity which undertakes industrial or commercial activities *in the private interest* – as opposed to entities simply engaging in commercial activities – is capable of lying outside the ambit of Community procurement rules. Accordingly, even though NCBs might routinely undertake *some* commercial activities, the overall general interest purpose and monetary policy related thrust thereof, as reflected in the principal NCB tasks[69], means that these activities as a whole should be considered to fall within the scope of Community public procurement law, irrespective of the weighting attached to such commercial activities as a proportion of their total output.

4. NCBs as 'bodies governed by public law': financing, supervision and appointment

To be characterised as a 'body governed by public law', it is not sufficient that a legal entity pursues tasks in the general interest not having an industrial or commercial character. It is also required that it meets one of the three disjunctive conditions set out in Article 1(9)(c) of the Public Sector Procurement Directive, relating to its financing or supervision or to the appointment of (some) of its members by the State, regional or local authorities or other bodies governed by public law. The ECJ's case-law on this requirement is premised on the assumption that the purpose of Article 1(9)(c) is to pool together the three principal avenues through which a 'close dependency' relationship can develop between a contracting authority and a particular entity, such as to influence the latter's decisions on public contracts, thus justifying its inclusion within the scope of Community public procurement rules[70]. Having suggested in the earlier parts of this paper that NCBs prima facie fulfil the Article 1(9)(a) and (b) conditions, it now falls to be considered whether they also meet this third condition necessary for their classification as 'contracting authorities'.

4.1. Financing

It follows from the first of the three alternative conditions of Article 1(9)(c) of the Public Sector Procurement Directive that an entity satisfying the other requirements of the Directive and 'financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law' must be considered to be a 'body governed by public law'. The relevant ECJ case-law suggests that although receipt of

[69] See Articles 2, 3.1, 5.1, 16 and 19.1 of the Statute.
[70] *Commission* v *France*, op. cit., footnote 3, paragraphs 42 and 44; *Mannesmann*, op. cit., footnote 36, paragraph 20; *University of Cambridge*, op. cit., footnote 3, paragraph 20; *Adolf Truley*, op. cit., footnote 21, paragraph 69.

public funds raises a presumption that the beneficiary might be a 'body governed by public law', such a presumption is not irrebuttable, since it must be ascertained also whether public financing leads to the beneficiary's 'close dependency' on the State or another contracting authority.

The circumstances in which public financing can lead to a situation of 'close dependency' were examined by the ECJ on a reference for a preliminary ruling from the High Court of Justice England and Wales concerning the interpretation of Community public procurement directives in *University of Cambridge*[71]. In that case the University challenged a ministerial decision to retain universities, by reason of their public financing, in the UK's list of 'bodies governed by public law'. Requested to, inter alia, determine 'what monies [were] to be included in the expression financed … by [one or more contracting authorities]' and 'what percentage … [was] to be given to the expression for the most part in [secondary Community procurement legislation]', the ECJ held that '[N]ot all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency'. It further stated that: '[o]nly payments which are intended to finance or support the activities of the body concerned without any specific consideration therefore may be described as "public financing"'[72]. It drew a distinction, therefore, between awards and grants for the support of research work (public financing), and sums paid by the State to a university in the context of a contractual relationship (non-public financing), which give rise only to such dependency as is analogous to that existing 'in normal commercial relationships formed by reciprocal contracts freely negotiated between the contracting parties'[73]. The ECJ also interpreted the financing condition to be a *quantitative* one, construing the qualification relating to public financing 'for the most part' to mean 'more than half'[74].

The ECJ's approach to the interpretation of the first of the three Article 1(9)(c) conditions suggests that the concept of 'financing' is to be construed broadly, to encompass both the direct financing of an entity by the State or another contracting authority but, also, indirect forms of financing including, for instance, the conferral of monopoly rights or privileges resulting in the accrual of revenue. A case-by-case examination of an entity's financing appears appropriate, therefore, in order to ascertain its degree of dependency on the State. As regards the financing of NCBs,

[71] Op. cit., footnote 3.
[72] Ibid. paragraph 21.
[73] Ibid. paragraph 25.
[74] Ibid. paragraph 33.

while these are not directly financed through the State budget, it is common ground that their principal source of income is 'seigniorage'[75], an indirect form of financing through the issuance of money unrelated to the pursuit of conventional commercial activities such as are undertaken by other financial institutions. Not only does the issuance of money account for the major part of an NCB's revenue[76], it also represents a key, legally entrenched public prerogative of NCBs[77]. It follows therefore that seigniorage constitutes a public law financing mechanism capable of satisfying the first of the three alternative dependency conditions. Moreover, because the proportion of an NCB's revenue generated through this particular form of privileged financing represents the most substantial element of its revenue, it is possible on a literal interpretation of the Public Sector Procurement Directive to argue that, in principle, NCBs fulfil the Article 1(9)(c) 'financing condition'. Whether this particular form of financing also gives rise to a relation of dependency or subordination, within the meaning of the 'close dependency' test developed by the ECJ, will be returned to later in this paper.

4.2. Management supervision

The second of the Article 1(9)(c) conditions relates to the exercise by the State or another contracting authority of 'management supervision' over an entity. The case-law of the ECJ reveals that not every conceivable manner of external public authority control is sufficient to give rise to a situation of 'management supervision'. Instead, the ECJ has put the emphasis, once again, on the existence of controls capable of leading to a relationship of dependency and subordination towards a contracting authority.

The *qualitative* dimension of the second of the Article 1(9)(c) conditions was emphasised in *Commission* v *France*[78] where the ECJ was invited to determine whether three social housing companies established under French law fell within the

[75] This refers to a central bank's income from issuing paper currency, corresponding to the 'excess of the face value over the costs of production of the currency' (P. Newman, *The New Palgrave: A Dictionary of Economics* (The Stockton Press, 1988) p. 287). Newly issued notes are paid for with the reserves that commercial banks hold with their NCB: because NCBs pay no interest on those reserves, this operation entails no financial cost for the NCB, hence its privileged financing character (see Martínez-Resano, "Central bank financial independence", *Banco de España, Servicio de Estudios*, Documento ocasional No 0401, p. 22, available at http://www.bde.es/informes/be/ocasional/do0401e.pdf).

[76] NCBs also collect revenue from a number of other sources including the management of foreign assets, precious-metal holdings or the fees paid by third parties for the use of certain facilities.

[77] The issuing privilege of NCBs, that is their exclusive right to issue legal tender, is confirmed by Article 16 of the Statute according to which: 'The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Community'.

[78] Op. cit., footnote 3.

scope of Directive 93/37/EEC. The ECJ reiterated its statement in *University of Cambridge* that each of 'the [three] alternative conditions, … reflects the close dependency of a body on the State, regional or local authorities or other bodies governed by public law[79], indicating that 'since management supervision … constitutes one of the three criteria, it must give rise to dependence on the public authorities equivalent to that which exists where one of the other alternative criteria is fulfilled'[80]. On the facts, the activities of the entities concerned were very narrowly circumscribed, with very detailed rules of management and extensive powers retained by the government minister, to order their winding up, to appoint a liquidator or to suspend their managerial organs such that the ECJ concluded that the 'management supervision' condition was fulfilled, noting that their management was 'subject to supervision by the public authorities which allow[ed] the latter to influence [their] decisions … in relation to public contracts'[81]. The circumstances capable of giving rise to the conclusion that an entity is under public authority management supervision were also examined by the ECJ, to much the same effect, in *Commission* v *Ireland*[82] and *Adolf Truley*[83].

As regards NCBs, an examination of their statutes and other relevant national legislation suggests the existence of a variety of external controls. For example, some NCBs are subject to the control of politically appointed commissioners[84] or external auditors[85]. In addition, some NCBs must submit their annual accounts[86] or periodic activity

[79] Ibid. paragraph 44.
[80] Ibid. paragraph 49.
[81] Ibid. paragraph 59.
[82] Op. cit., footnote 38, paragraphs 37 and 38 where the ECJ concluded that 'the Minister's power to give instructions to Coillte Teoranta, in particular requiring it to comply with State policy on forestry or to provide specified services or facilities, and the powers conferred on that Minister and the Minister for Finance in financial matters give the State the possibility of controlling Coillte Teoranta's economic activity…It follows that, while there is no provision expressly to the effect that State control is to extend specifically to the awarding of public supply contracts by Coillte Teoranta, the State may exercise such control, at least indirectly'.
[83] Op. cit., footnote 21, paragraphs 69 and 70. In that case the ECJ observed that mere review of a body's activities does not satisfy the test for management supervision 'since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts'.
[84] Paragraph 14 of the Law on De Nederlandsche Bank of 9 April 1998; Article 40 of the Federal Law on the Oesterreichische Nationalbank of 1984; Article 7 of the Law on Danmarks Nationalbank; Article 47 of the Statute of the Bank of Greece and Paragraph 10 of Law No 214/1998 of 27 March 1998 on the Suomen Pankki.
[85] Article 41 of the Organic Law on the Banco de Portugal; Article 15 of the Law concerning the monetary status and the Central Bank of Luxembourg; Article 52 of the of the Law on Banka Slovenije of 3 July 2002; and Paragraph 18 of Law No 214/1998 of 27 March 1998 on the Suomen Pankki. See also Article 27.1 of the Statute.
[86] Article 30 of the Law concerning the monetary status and the Central Bank of Luxembourg and Article 4(2) of the Law on the autonomy of the Banco de España.

reports to national political authorities[87]. Applying by analogy the reasoning of the ECJ in *Commission* v *ECB*[88], to the extent that NCBs are subject in practice to certain external controls, those controls should not be such as to lead to their subordination or impinge on their independence. Since it cannot be decided *in abstracto* whether a particular NCB satisfies the second of the three dependency conditions, for our present purposes we do not intend to engage in a case-by-case examination of the circumstances affecting each individual NCB. It is sufficient at this stage to note, however, that we have not detected any conceptual obstacles preventing an NCB from fulfilling this particular condition. Furthermore, we will be returning later to the related issue concerning the compatibility of the 'close dependency' test – read by the ECJ into the second of the three conditions of Article 1(9)(c) of the Public Sector Procurement Directive – with some of the fundamental principles underlying the operation of NCBs.

4.3. Appointment

NCBs also would fulfil the Article 1(9)(c) condition where it can be demonstrated that more than half of the members of their administrative, managerial or supervisory board are appointed by the State regional or local authorities or other bodies governed by public law. It follows from the ECJ's case-law, as with the preceding two dependency conditions, that there is more to this particular alternative than the purely factual, quantitative dimension which a literal reading of it might suggest. According to the ECJ, the issue is not whether the individual circumstances of a particular entity bring it within the *letter* of the Public Sector Procurement Directive but, in the case of the third condition, whether the appointment of the members of its governing bodies by a contracting authority is likely to render it dependent on or subordinate to the State or any other body governed by public law in such manner that the latter are in a position to influence their decisions in relation to public contracts. Although the appointment requirement has, understandably, received somewhat less judicial attention than the other two alternative dependency conditions, various pronouncements of the ECJ and of its Advocates General suggest that, from the point of view of the Court, exactly the same assumptions apply to it as to the

[87] Article 5(b) of the Statute of the Bank of Greece; Article 26 of the Law on Banka Slovenije of 3 July 2002; and Article 3 of Law No 6/1993 of 17 December 1992 on Česká národní banka.
[88] Case C-11/00 *Commission* v *European Central Bank* [2003] ECR I-7147, where the ECJ ruled that the control exercised by the European Anti-Fraud Office (OLAF) over the ECB was compatible with its independence and that its powers of investigation did not of themselves undermine the independence of the ECB (paragraphs 135 and 138).

financing and management supervision requirements of Article 1(9)(c) analysed above[89].

An examination of national legislation and the statutes of the NCBs reveals that most[90], although not all[91] of them appear to fulfil this third condition.

5. The 'close dependency' test and its tension with central bank independence

Our analysis of ECJ case-law on the interpretation of Article 1(9) of the Public Sector Procurement Directive regarding the position of NCBs under Community public procurement law indicates the absence of a conceptual obstacle – in terms of principle – to NCBs fulfilling the requirements of that provision. It is argued, however, on the basis of the ECJ's 'close dependency' test that demonstrating NCB compliance with any one of the alternative conditions laid down in Article 1(9)(c) could prove problematic. This position reflects the view taken by the Court that all three of the alternative conditions set out in paragraph (c) were intended to reflect the close dependency of an entity on the State or another contracting authority and, as a consequence, that for an entity to fulfil *any* one of the conditions necessary for its inclusion within the scope of Community public procurement law, a relationship of dependency must be established between that entity and the public authorities. The fundamental difficulty inherent in demonstrating an NCB's compliance – at least with regard to its ESCB related activities – with what amounts to an *additional* requirement read by the ECJ into Article 1(9)(c), is the inevitable tension between the test of 'close dependency' developed in the case-law and the principle of central bank independence.

The gradual 'constitutionalisation' of the principle of central bank independence, apparent in the provisions of Article 108 EC[92], can hardly be said to be unrelated to

[89] See, for example, the Opinion of Advocate General Mischo in *Commission* v *France*, op. cit., footnote 3, points 48 and 67.
[90] Articles 23 and 33 of the Federal Law on the Oesterreichische Nationalbank of 1984; Article 23 of the Law establishing the Organic Statute of the Banque Nationale de Belgique/Nationale Bank van België; Article 6 of the Law No 6/1993 of 17 December 1992 on Česká národní banka; Article 24 of the Law on the autonomy of the Banco de España; Paragraphs 10 and 13 of Law No 214/1998 of 27 March 1998 on the Suomen Pankki; Paragraph 12 of the Law on De Nederlandsche Bank; Articles 10(4) and 10(5) of the Law on Lietuvos Bankas; Articles 7 and 12 of the Law concerning the monetary status and the Central Bank of Luxembourg; Article 27 of the Organic Law on the Banco de Portugal; Articles 35 and 36 of the Law on Banka Slovenije of 3 July 2002; Paragraph 7(3) of the Law on the Deutsche Bundesbank; Chapter 1, Article 3 of the Law on Sveriges Riksbank (1988:1385) and section 1(2) of the Bank of England Act 1998.
[91] This may, for example, be true of the Bank of Greece (see footnote 30).

the singular advantages that empirical research[93] associates with the insulation of central banks from the vagaries of the political process. The fundamental tenet of the principle of central bank independence is the argument that an autonomous central bank will 'favour the long term over the short term in its monetary policy decisions'[94], thereby minimising the possibility of interference by myopic and self-centred political administrations in the definition and implementation of a 'depoliticised' and credible monetary policy. The well-documented relationship between central bank independence and financial stability broadly confirms the assessment that central bank independence and inflation are inversely proportional[95] and explains the overwhelming consensus among commentators that, while central bank independence may not of itself eliminate the problem of 'time inconsistency', the more independent a central bank is, the narrower the possibility that the cycle of its monetary policy preferences will fluctuate as frequently – and as unpredictably – as that of political administrations[96]. The increasing number of States around the world where the legal guarantees of central bank independence have in recent years been reinforced[97]

[92] This provides inter alia that 'When exercising (their powers and tasks under the Treaty and the Statute) neither the ECB, nor a national central bank…shall seek instructions from Community institutions or bodies, from any government of a Member state or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or the national central banks in the performance of their tasks'. Article 108 EC is reproduced in Article 7 of the Statute and should be read in conjunction with Articles 101 EC, 102 EC, 109 EC and 116(5) EC.

[93] There is a wealth of writing on the issue of central bank independence. See, Alesina and Summers, "Central bank independence and macroeconomic performance", 25(2) *Journal of Money, Credit and Banking* (1993), pp. 151-162; Issing, "Central bank independence – economic and political dimensions", 196 *National Institute Economic Review* (2006), pp. 66-76; Papadia and Ruggiero, "Central bank independence and budget constraints for a stable euro", 10 *Open Economies Review* (1999), pp. 63-90; Randzio-Plath and Padoa-Schioppa "The European Central Bank: independence and accountability", *Center for European Integration Studies*, University of Bonn, Working paper B16-2000 , p. 4, available at http://www.zei.de/download/zei_wp/B00-16.pdf; Smits, *The European Central Bank - Institutional Aspects*, Centre for Commercial Law Studies Queen Mary and Westfield College, University of London, International Banking and Finance Law Series Vol.5 (Kluwer, 1997), p 154 et seq.

[94] Randzio-Plath and Padoa-Schioppa, op. cit., footnote 93, p. 4.

[95] The link between central bank independence and economic growth is somewhat more tenuous, although there is some evidence of a positive correlation between the two. See De Long and Summers, "Macroeconomic policy and long-run growth", *Federal Reserve Bank of Kansas City Economic Review* (1992, fourth quarter), pp. 5-30; Cukierman et al., "Central Bank Independence, growth, investment and real rates", *Carnegie-Rochester conference series on public policy* (1993), No 39, pp. 95-145.

[96] A possible flipside of central bank independence can be a lack of transparency and accountability. For an economist's account of some of the potential *disadvantages* of central bank independence, see Eijffinger and de Haan, "The political economy of central bank independence", *Special Papers in International Economics* (1996), No 19, available at http://www.princeton.edu/~ies/IES_Special_Papers/SP19.pdf

[97] It is interesting to note that until relatively recently central bank independence was the exception rather than the rule even within the old Continent. Of the 'old' Member State NCBs, only the Deutsche Bundesbank enjoyed, under Paragraph 12 of the Law on the Deutsche Bundesbank, a degree of independence comparable to that currently guaranteed under the EC Treaty and the Statute. For a comparison of the relevant provisions of national legislation and the statutes of the NCBs of the 'old' Member States, see Van den Berg, *The making of the statute of the European System of Central Banks*, (Dutch University Press, 2005), pp. 90-91.

testifies to the ascendancy of a principle central to the philosophy and operations of the ESCB and reaffirms its universally acknowledged value as an ultimate institutional prerequisite for the achievement of key monetary policy objectives including price stability[98].

For analytical and econometric purposes, legal and economic literature has traditionally divided central bank independence into four elements: institutional, personal, financial and functional (or operational) independence[99]. Institutional independence essentially entails that a central bank's decision-making bodies should not seek or take instructions from national or supra-national institutions or bodies while the latter should, for their part, abstain from seeking to influence central banks in the performance of their tasks[100]. Since institutional independence is a necessary but not sufficient condition for attaining actual autonomy, personal, functional and financial independence guarantees have also been introduced into the laws governing a number of central banks worldwide. Thus, *personal independence* has been ensured generally through guarantees on security of tenure preventing the arbitrary dismissal of a central bank governor and other decision-makers[101]. *Financial independence* has typically been achieved through provisions designed to ensure that for their budget and resources central banks do not depend on a national or supra-national administration capable of exerting undue influence on their monetary policy definition and implementation tasks. Finally, *functional independence* has been entrenched through guarantees of a central bank's ability to avail itself of all monetary policy means and instruments necessary for the exercise of its powers and for the achievement of its objectives, independently of any national or supra-national body. Within the EU, the institutional framework in each of the Member States has either already undergone or is in the process of undergoing the adjustments necessary to cater for each of the different aspects of central bank independence. These requirements have been elevated to the status of key legal convergence criteria for NCB admission to Stage Three of EMU[102]. The independence of the NCBs of the

[98] In the Eurosystem context, price stability refers to the general level of prices in the economy and implies avoiding prolonged inflation or deflation. It follows from Article 105(1) EC that price stability represents the primary monetary policy objective of the Eurosystem. The ECB's quantitative definition of financial stability of October 1998 quantifies financial stability as 'a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%' which is 'to be maintained over the medium term'.

[99] This distinction also made in the ECB Convergence Reports.

[100] This proposition is consistent with the provisions of Article 108 EC, op. cit., footnote 92.

[101] In the case of the ESCB, personal independence is guaranteed by Articles 14.2, 11.3 and 11.4 of the Statute which safeguard the security of tenure and minimum term of office of Governing Council and Executive Board Members respectively.

[102] 'Old' Member States, including Denmark, were required to ensure that, at the beginning of Stage Three of EMU, their national legislation, including the statutes of their NCBs, guaranteed central bank independence (see EMI, *Convergence Report 1998* (EMI, 1998), p. 12 et seq., available at

Member States participating in Stage Three of EMU was unequivocally recognised in 1998 and 2000 when the Council of the European Union officially acknowledged that (participating) Member States fulfilled all legal convergence criteria – including that of central bank independence – necessary for the adoption of the single currency[103].

It follows from the preceding discussion that an NCB enjoying the level of independence guaranteed by the Statute cannot without considerable difficulties be amenable to the 'close dependency' analysis favoured by the ECJ in its case-law. This arises from the fact that central bank independence is, by definition, incompatible with any form of dependency, whether on the State or another contracting authority, and is, furthermore, fundamentally inconsistent with the sort of subordination that the ECJ analysis necessarily implies[104]. What is more, the elevation into a firm legal test of what should perhaps be approached as no more than a useful rule of thumb, would appear to be responsible for something of a paradox. Although the framework in which (most) NCBs operate accords with the *wording* of each of the alternative conditions set out in Article 1(9)(c) of the Public Sector Procurement Directive and although no obvious conceptual obstacle to prevent an NCB from fulfilling these conditions can be detected, their characteristics of independence as central banks are of such nature as to preclude, in practice, their compliance with the 'close dependency' test. Such a paradox inevitably affects not only NCBs but, also, a wide range of independent authorities in the Member States, whose safeguards of independence in national law may prove to be incompatible with the Court's analysis of Article 1(9)(c), despite the fact that those bodies would normally be expected to be subject to the Community public procurement rules. Taken to its logical conclusion, the 'close dependency' test might even be used to challenge an NCB's claim to full formal and actual autonomy, thus casting doubts on the utility of and imposing possible limits on the principle of central bank independence itself, thereby generating

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http://www.ecb.int/pub/pdf/conrep/cr1998en.pdf). Member States with a derogation (the 'new' Member States and Sweden) are required to adapt their national legislation to guarantee central bank independence as a legal convergence condition for their accession to Stage Three of EMU (see ECB, *Convergence Report 2004* (ECB, 2004), p. 25 et seq., available at http://www.ecb.int/pub/pdf/conrep/cr2004en.pdf). Different considerations apply to the UK, a Member State with an opt-out clause and the right to choose whether or not to participate in the Third Stage of EMU (ibid., pp. 23-24).

[103] Council Decision 98/317/EC in accordance with Article 109j(4) of the Treaty (OJ L 139, 11.5.1998, p. 30) and Council Decision 2000/427/EC in accordance with Article 122(2) of the Treaty on the adoption by Greece of the single currency on 1 January 2001 (OJ L 167, 7.7.2000, p. 19).

[104] Although it may not be possible to form an advance view on the independence guarantees applicable in the case of non-participating NCBs, it remains the case that as a matter of principle, all NCBs, except for those enjoying an opt-out clause, should also be independent (Zilioli and Selmayr, op. cit., footnote 42, pp. 137 and 141). In addition to the narrow ESCB perspective, the independence of several non-participating NCBs is constitutionally guaranteed as with Lietuvos Bankas (Articles 125 and 126 of the Constitution of the Republic of Lithuania) and the Central Bank of Cyprus (Articles 118 to 121 of the Constitution of the Republic of Cyprus).

unnecessary confusion, instead of legal certainty, in an area as sensitive as that of public procurement.

A serious implication of the incompatibility of the 'close dependency' test with the principle of central bank independence is that resistance to its application might, however unintentionally, lead to the intuitive (but no less) unwarranted conclusion that NCBs are not capable of falling within the scope of the Public Sector Procurement Directive and that, therefore, they should perhaps not even be subject to the principles underlying Community procurement legislation at large. There are several reasons why such a conclusion should be disregarded as repugnant both to the letter and to the spirit of the Public Sector Procurement Directive. First, there is nothing in the provisions of the Public Sector Procurement Directive which of itself suggests that NCBs were intended to be excluded as a matter of principle from its scope of application[105]; if anything, the inclusion of several NCBs in the Annex III list seems to point in the opposite direction[106]. Second, leaving aside for a moment the 'close dependency' requirement read by the ECJ into Community public procurement legislation, it is difficult to think of any substantive reasons why NCBs should not, as a matter of principle, fall within the scope of application of the Public Sector Procurement Directive. NCBs are no less susceptible than other public bodies from succumbing to the temptations that Community public procurement rules are intended to guard against, that is the preferential treatment of domestic players to the detriment of their cross-border competitors and the distortion of competition through the erection of barriers to the participation of outsiders within a national market[107]. Another reason why the exclusion of NCBs from the scope of application of the Public Sector Procurement Directive would be unwarranted, artificial and overtly formalistic is that it would be absurd for a public body, such as an NCB, to be excluded simply on account of its independence, when at the same time it is possible

[105] It should be noted that Article 16(d) of the Public Sector Procurement Directive, which explicitly excludes public service contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services from the scope of the Directive, does not relate to the activities of an NCB in its capacity as a *contracting authority* but in its capacity as a *provider of services* to a contracting authority, such as the State. The Article 16(d) exception is not redundant, however, since in so far as both contracting authority and service provider are distinct legal persons and public authorities the services provided by an NCB to another contracting authority would, in principle, fall within the remit of the Directive. Were this exception not to exist, contracting authorities wishing to contract for central banking services would, in principle, be required to follow Community public procurement procedures and as result central banks would find themselves competing with private financial entities (or other NCBs) for the award of public contracts. This interpretation is also supported by the wording of recital 27 to the Public Sector Procurement Directive.

[106] This observation is without prejudice to our earlier comments in footnote 21.

[107] The fact that as a result of their autonomy NCBs are not exposed to the second type of risk that Community public procurement rules were intended to address, namely, that a contracting authority tries to influence another body dependent on it, in no way invalidates our conclusion.

for a private entity acting in the pursuit of the public interest to be subject to Community public procurement rules[108]. Finally, it should be noted that, whatever the merit of the central bank independence argument as an obstacle to including NCBs within Community public procurement rules, this would appear only to be of relevance in the context of an NCB's ESCB-related procurement activities, since the guarantee of central bank independence under Article 108 EC relates only to the NCBs' exercise of 'the tasks and duties conferred upon them by [the] Treaty and the Statute of the ESCB'[109][110].

To exclude NCBs from the remit of Community public procurement law solely because of the incompatibility of the close dependency test with their independence must be rejected on yet another ground. Even on the assumption that, on account of that incompatibility Community public procurement rules did not apply to NCBs, the latter would still be bound as a matter of Community law to follow the *principles*[111] underlying the rules. This conclusion clearly follows from the recent decision in *Parking Brixen*[112], in which the ECJ was required to interpret the provisions of Directive 92/50/EEC as regards the award of a contract for the management of a public car park. On the facts, the contract awarded was considered to be a public service concession, thus lying outside the scope of the relevant directive[113]. Significantly however, the ECJ observed, that 'public authorities concluding [public service concession contracts] are, none the less, bound to comply with the fundamental rules of the EC Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular[114]. Reaffirming previous

[108] See our discussion in section 3.3 of this paper on the significance of an entity's legal status for the purpose of Community public procurement rules.
[109] While this provision cannot possibly mean that an NCB is free to develop a 'close dependency' relationship with its national (or other, supra-national) authorities with regard to those of its tasks that fall outside the remit of the ESCB, such as, for instance, financial supervision, the clear implication must be that it was intended to distinguish between purely national tasks and ESCB tasks. The implications of this distinction should also extend to the public procurement obligations of NCBs.
[110] A further argument, applicable to those NCBs which, under their national laws, are public law legal persons (such as the Deutsche Bundesbank, the Banca d' Italia or the Banque centrale du Luxembourg) might be that these NCBs, far from depending from the state authorities are, actually, state authorities in their own right, with their own financial resources, originally granted by the State as capital, so 1(9)(c), first alternative, fully applies to them in a direct manner. The argument is nevertheless weakened because even NCBs that are public law legal persons have a separate legal personality.
[111] These include the relevant 'fundamental freedoms' enshrined in the Treaty and the principles of equal treatment, non-discrimination, proportionality and transparency (see also recital 2 to the Public Sector Procurement Directive and our discussion of those principles in the introduction to this paper). It must be noted that those principles go well beyond the principle of good administration which, however relevant, is not one of the foundations of the Community public procurement law and which does not necessarily entail that the award of contracts should be made public, as is required by the principles of publicity and transparency which are central to the Public Sector Procurement Directive.
[112] Case C-458/03 *Parking Brixen* [2005] ECR I-8612.
[113] Ibid. paragraph 40.
[114] Ibid. paragraph 46.

case-law on the matter[115], the ECJ added that the principles of non-discrimination on grounds of nationality and equal treatment – to be applied to public service concessions even in the absence of discrimination on grounds of nationality – 'imply … a duty of transparency which enables the … public authority to ensure that those principles are complied with'. This duty requires 'a degree of advertising sufficient to enable the service concession to be opened up to competition and the impartiality of procurement procedures to be reviewed[116]. It follows, therefore, that even if one were to accept that Community public procurement rules are not directly applicable to NCBs, the general procurement law principles enshrined in those rules are most certainly of relevance to NCBs and they are obliged to ensure their compliance therewith[117]. More recently, the ECJ applied the same reasoning as in *Parking Brixen* to *ANAV*, a case also dealing with a concession[118], while the Commission has also issued an Interpretative Communication dealing with the basic standards and best practices that need to be followed in the award of contracts not or not fully subject to the provisions of the Public Procurement Directives[119].

6. Conclusion

Our examination of the Public Sector Procurement Directive has revealed no substantive grounds on which to argue that NCBs should be exempt from the scope of application of Community public procurement legislation. Moreover, despite the obvious incompatibility of the 'close dependency' test with the principle of central bank independence, there is little on the basis of which to conclude that NCBs – even in connection with their ESCB-related procurement activities, where the principle of central bank independence most prominently comes into play – were intended to be excluded from the remit of the Public Sector Procurement Directive. In any event, given that the principles underlying the Community public procurement regime are,

[115] The ECJ had already emphasised the need for contracting authorities to comply with general Treaty principles even where Community public procurement rules do not formally apply, see Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH* v *Telekom Austria* [2000] ECR I-10745.
[116] *Parking Brixen*, op. cit., footnote 113, paragraphs 48 and 49.
[117] It should be noted that the ECB considers itself bound by the *principles* of Community public procurement law. This conclusion follows from Article 19.1 of the ECB Rules of Procedure and from the ECB's internal procurement rules both of which are broadly in line with the principles enshrined in the Public Sector Procurement Directive. Given that it would be unreasonable if of all the ESCB participants only the ECB were to be subject to Community procurement rules, it can reasonably be argued that NCBs – as integral parts of the ESCB – should also be required to apply these rules, at least with regard to their ESCB-related procurement activities.
[118] Case C-410/04 *Associazione Nationale Autotransporto Viaggiatori (Anav) v Comune de Bari, AMTAB Servizio, SpA*. Judgement of 6 April 2004.
[119] Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, (200/C 179/02), OJ C 179, 1.8.2006, p.2.

on account of their Treaty basis and because of their less transient nature, ultimately, of greater significance than the rules of the Public Sector Procurement Directive themselves, once it has been acknowledged that those principles apply to NCBs and need to be complied with even in the case of contracts falling outside the ambit of Community public procurement law, the issue of the applicability of the rules to NCBs gradually falls into perspective, being safely approached as something of a formal question rather than as one of substance.

In the light of this conclusion, in order to ensure compliance with Community public procurement rules, it would appear to be sufficient for NCBs to adapt or adopt, as appropriate, adequate procurement rules which reflect the principles underlying the Public Sector Procurement Directive, that is, the principles enshrined in Articles 43 EC and 49 EC and those of equal treatment, non-discrimination and transparency. Such action avoids the need to determine the exact legal status of NCBs under the terms of the Public Sector Procurement Directive and the extent to which NCBs are bound by its provisions. In keeping with the principle of transparency, NCB procurement rules should be made publicly available. Such rules can only serve their purpose if they are fully accessible to goods and service providers across Europe, enabling such providers to rely on them where an NCB is alleged to have deviated from its internal procurement procedures – compliant with Community law – and in those circumstances facilitating the conduct of a review.

The proposed solution leaves open, nevertheless, the issue of the ECJ's interpretation of Article 1(9)(c) as well as the validity of the 'close dependency' test. Quite apart from its implications concerning the applicability of Community procurement rules to NCBs, it should be noted that the 'close dependency' test inevitably also affects the position of a wide range of independent authorities in the Member States, whose safeguards of independence under national law may be incompatible with the degree of subordination that the test implies. For the reasons set out above, it would appear that the ECJ is likely to find itself in an awkward situation should it be confronted with a case involving a dispute concerning the application of Community procurement rules to an NCB or to another entity with similar attributes. It is unclear to what extent the ECJ would be in a position to maintain the line of reasoning developed in its case-law with regard to the true construction of Article 1(9)(c) of the Public Sector Procurement Directive without indirectly challenging the principle of central bank independence or of the autonomy of such other authority as might be involved. Faced with the obvious difficulty of reconciling the 'close dependency' test with the independence of an entity such as an NCB, the possibility cannot be excluded

that the ECJ might find itself compelled to readjust its existing position on this issue, perhaps by proposing a 'lighter' close dependency test. However, even such a task would not be easy. To develop a test which is capable of being applied only in some cases but not in others is problematic. Ensuring that such exceptions to the test as might be necessary in the case of NCBs or other independent authorities do not ultimately undermine its usefulness and validity might well prove to be something of a challenge[120]. Alternatively, it is also possible that the ECJ might seek to subject all public authorities – without prejudice to their independent status – to the provisions of the Public Sector Procurement Directive not by adjusting or qualifying its interpretation but by departing altogether from its previous pronouncements and from the 'close dependency' test, opting instead for a more teleological interpretation of Article 1(9)(c).

Interesting times lie ahead for this particular area of Community law.

[120] The likelihood of a creative interpretation of the close dependency test is all the more likelier given the fact that the ECJ does not subscribe to a formal stare decisis doctrine, as a result of which the Community's case-law system is characterised by the absence of formal precedents (notwithstanding the *de facto* system of precedent introduced by the Court in *Joined Cases 28-30/62, Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v. Nederlandse Belastingadministratie* [1963] ECR 31). This feature might not, in principle, favour too inflexible an application of the close dependency test to the sui generis circumstances of an NCB.

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