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BETWEEN POLITICS, POLICIES AND (CASE) LAW: JUST HOW MUCH 'SOCIAL' CAN PUBLIC PROCUREMENT TAKE IN IN THE CURRENT EU'S INTERNAL MARKET CONTEXT?

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Motto:

'In this context of 'market triumphalism', the public procurement rules have become a site of ideological conflict, crystallising and refracting deeper, related dissatisfactions about the future of the EU and the balance of power between the EU and the Member States, particularly in areas where national social policy has been 'forced' to acquiesce to EU free movement rights'

A Ludlow, '*The public procurement rules in action: an empirical exploration of social impact and ideology'*, (2014) 16 Cambridge Yearbook of European Legal Studies, 15

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CHAPTER I
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1. The general context

More than ever before, the latest EU legal package on public procurement contains a significant number of references to how Member States and contracting authorities may use public procurement to pursue key goals set in various social policies crafted at either the EU or the national levels.

Unfortunately, one way or another, almost all these social goals bear a heavy *national* (hence *protectionist*) load and, as such, have the potential to discriminate: in favour of the entities meeting the minimum social standards imposed by contracting authorities based thereon in the relevant tender documentations (which, in the majority of cases, are *local* traders), and against all the other undertakings (mostly *foreign*) that *may* have an interest in the contract put out to tender and, at least from an economic and technical point of view, could deliver it at the same quality standards or even better and cheaper, but which do not meet the same social standards. This makes these provisions, in terms of the functioning of the internal market and free competition, restrictive in their very essence, creating serious tensions between the traditionally economic dimension of the EU's internal market (dominated by the principle of free competition[1]) and the social dimension thereof (which gained traction only at a later stage of its evolution).

[1] Some authors see competition as an independent, fundamental principle of the EU law itself (and not just an appendix, a complementary tool used to secure the main freedoms). In this reading, competition is seen as a powerful fulcrum aimed at ensuring, with full efficiency, the carrying on of public interest obligations at both the micro (applied to each contract) and the macro (as 'competition in the market') levels. Being a fundamental principle of EU law, it must be applied as such in all areas that fall within the scope of the internal market rules, hence also in the public procurement area. To this extent, it is believed that any constraints placed on the freedom of competition in both wholesale and retail markets are very likely to produce a loss of total welfare due to a reduction in competition on those markets – see A Sanchez-Graells, '*More competition-oriented public procurement to foster social welfare*', presented at the International Public Procurement Conference Seoul (Korea), August 26-28, 2010, at https://www.researchgate.net/publication/228286242_More_Competition-Oriented_Public_Procurement_to_Foster_Social_Welfare. Consequently, welfare is high where competition is high. For an opinion to the contrary, see C McCrudden, '*Buying social justice. Equality and public procurement*', (2007) 60 Current Legal Problems 1. According to the latter author, linking public procurement to sustainability and, in general, to social policy objectives, may in fact encourage competition while increasing welfare. Thus, 'Government regulation is necessary to ensure that significant groups in the society (women, minorities) are included in important market activities in order for there to be an effective market in the first place. Certain types of procurement linkages, such as set asides or bidding preferences for minority-owned businesses, may be justified, therefore, on the basis that *they have a market-creating function which may reduce*

But, over the years, and owing to a dramatic change in the social configuration of our continent, the initial arrangement consecrated by the Treaty establishing the European Economic Community of 1957 has evolved, from an essentially economic structure, to an amazingly complex edifice defined by the "social market economy" where the internal market means not just a mere economic integration but also the full protection of the fundamental (social) rights, the ensuring of a high level of employment across the Union, the crafting and the implementation of a coherent inclusion policy or, last but not least, social cohesion. In this environment, the rigorous rules that first governed the internal market and postulated free competition as the most important guarantee of the effectiveness of the fundamental freedoms enshrined in the Treaties have been gradually honed, distorted and adapted to correspond to the new reality, opening up a generous leeway for other values, traditionally placed outside the internal market. Thus, while the basic internal market rules remained the same, they received new connotations, in a somewhat overturned arrangement where the "value for money" principle (still promoting an open economy and free competition, but now not at any costs) has been redefined to be given a leading role.

This shift has been endorsed, and even encouraged, by the Court of Justice of the European Union[2] through several milestone decisions, and the pursuing of various social objectives has become a fundamental obligation for all EU institutions.

Inevitably and unquestionably though, public procurement lies at the heart of the internal market, the proper functioning of which entails both *intervention* (from the EU institutions, based on the fundamental rules and principles enshrined in the primary laws of the Union, among which the most important being those of conferral, shared competences and sincere cooperation, doubled by the principles of subsidiarity and proportionality[3]) and *adaptation* (at the national legal frameworks' level – *eg*, via transposition norms, legally imposed boundaries or conditionalities, or repealing measures, *etc*[4]).

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the cost of the procurement to the government by increasing the competition among bidders.' (141, emphasis added).

[2] For convenience, the terms 'EU', the 'Union' and the 'Court of Justice of the Union', or the 'Court of Justice' or, simply, the 'Court' or "CJEU', shall be used throughout this thesis, in defiance of chronology, in preference to any other terms which might correspond to the correct name of those institutions at a certain point in time, such as the "European Community' or the 'Community' and respectively the "European Court of Justice', or the 'ECJ' or the 'Court of First Instance' *etc*, except where confusion would otherwise arise.

[3] See Articles 4 and 5 TEU.

[4] To this purpose, Article 4(3) TEU stipulates that '*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*' (emphasis added).

In this context, it might be worth remembering that the fostering of the economic integration that defines and stays at the core of any form of inter-states construct[5] entails, in principle a hybrid mixture of positive and negative forms of intervention. Negative integration involves, *in concreto*, the abstention from, or the removal of, all (trade) barriers, between the partner states, that may restrict the free movement of goods, services, persons or factors of production. At the EU level, this has mainly been ensured via the explicit provisions consecrating the fundamental principles enshrined in the Treaties, and through the relevant instruments placed in the hands of the EU institutions for their safeguarding. Inasmuch as the *positive* integration is concerned, it implies both the building of a *sui generis* type of sovereignty placed in the hands of a rather complex institutional structure and the possibility to intervene, promptly, by regulatory actions. In the EU context, this was granted via what is now Article 114 TFEU[6] and the core texts that define the EU's competition policy. Between these instruments sits mutual recognition (ushered in by the Court of Justice of the Union and furthered by the other institutions via specific instruments of hard and soft law) as a mixture of positive and negative integration, construed as a way to shape national initiatives by constraining measures, without a regulatory character, taken at the EU level. All

[5] In reality, the European Union is not the only international organization that seeks regional *integration*. Many similar attempts are currently occurring (on more or less levels and tiers) anywhere across the globe. See for example the American Free Trade Agreement (NAFTA) between Canada, Mexico and the USA, the Association of Southeast Asian Nations (ASEAN) formed by Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, the Southern Common Market (MERCOSUR) between Argentina, Brazil, Paraguay, Uruguay, Venezuela and Bolivia or the Central American Common Market (CACM): Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, but also the Bolivarian Alliance for the Peoples of Our America (ALBA – TCP) including Venezuela, Cuba, Bolivia, Nicaragua, Dominica, Ecuador, San Vicente and the Grenadines, and Antigua and Barbuda. Other multilateral organizations are pursuing the same goal in Africa – see for ex. ECOWAS, ECCAS and COMESA. In basically *all* these cases, the economic integration process has, just as the EU's integration, two facets and evolves in two directions, one negative and one positive, simultaneously. For more on this, see http://www.learneurope.eu/index.php?cID=306 (visited 09.10.2019). See also F Scharpf, '*Governing in Europe: effective and democratic?*', Oxford University Press, 1999, esp. Chapter 2.

[6] According to which 'Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. *The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*. (…) Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.' (paras (1) and (2) – emphasis added). *Nota bene*, pursuant to Article 26 TFEU to which Article 114(1) refers, '1. *The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.* 2. *The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*. (…)' (paras (1) and (2), emphasis added).

these forms of intervention have been ordained to anticipate and fend off any internal market failures, which the EU may face just as any other free market.[7]

So, the fathers of the European integration made sure that the EU institutions may intervene via appropriate regulatory actions, or subsidies (targeting Member States) or other policy instruments (see for ex. the EU's common policies such as the social policies subsumed under the continuously evolving European social model). On the other hand, in the European framework, regulatory actions include not only *legislative* initiatives *per se* (*ie*, regulations adopted by the Council and the European Parliament, or directives, decisions, comitology regulations, co- and self-regulation or even regulation coming from autonomous EU regulatory agencies *etc*), but also *indirect* forms of action (such as common or quasi-common EU *policies*), or various soft law arrangements or even measures specific to private law (as are those on product liability and consumer protection) or to penal law (on, for example, counterfeiting, environmental infringements, or grave forms of human rights abuse) *etc*.

In this context, it is important to clarify the meaning of the 'internal market' postulated by the Treaties. According to Article 114(2) TFEU (cited above), the internal market 'shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.' This definition is nevertheless too general and hence problematic.[8] It inevitably comprises several dimensions, of which the vertical one (*ie*, that which characterizes the division of responsibility between the EU and Member States and impacts directly on the scope of the internal market rules and the degree of autonomy left to national institutions) is a continuous source of tensions.[9] To this problems, the Court itself added new ones, as it forced, through its case law, the boundaries of the internal market far beyond the four fundamental freedoms.[10] One thing is nonetheless certain: in the internal market environs, all

[7] For discussion, see P C de Sousa, '*Negative and positive integration in EU economic law: between strategic denial and cognitive dissonance?*', in (2012) 13 German Law Journal.
[8] S Weatherill, '*The Internal Market as a legal concept*', Collected Courses of the Academy of European Law, Oxford University Press, 2017, Kindle ed., 1.
[9] Ibidem.
[10] '[This is] demonstrated by [its repeated attempts] (…) to usher a new concept of 'internal market', *no longer limited to the protection of the four fundamental freedoms and undistorted competition, but also encompassing all those values and interests, such as the social ones, that are linked to them* (…). Article 3 TEU may help in this sense, as it gives to social objectives a constitutional status in the European legal order and, hence, a stronger position vis-à-vis internal market rules.' – F Costamagna, '*The internal market and the welfare state after the Lisbon treaty*', 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 8 (emphasis added).

actors, that is, both the EU and the Member States, must *cooperate* and assist each other in order to attain the Union's objectives and ensure the success of the integration process.[11]

It is also important to mention that, during its evolution, the functioning of the internal market was enriched with new instruments. Among them, the most important in this context are the European citizenship (brought about by the Treaty of Maastricht of 1992) and the Charter of Fundamental Rights of the European Union[12] (endowed, by Article 6(1) TEU, with full constitutional force). This basically characterizes the '*social integration*' approach which the Court has embraced piecemeal but steadfastly, in an attempt to mark out the 'basic European identity' that has been defining the European integration since its very conception and which has brought forward the protection of the individual as a 'new dimension of the [European] rule of law'[13].

To make things even more complex, the EU's primary laws ostensibly trace a demarcation line between competition and the four freedoms (two fundamental pieces of the whole system), which they approach discretely.[14] The first one appears to be mainly interested in *private companies*' deportment whereas the second, in how the *Member States* contribute to the full functioning of the internal market. Moreover, there are signs that not even the fundamental freedoms themselves share the same regime.[15] Why is this issue so

[11] See, again, Article 4 TEU.

[12] OJ [2000] C 364/01. In fact, following the advancing of the Charter up to a constitutional level was received by the Member States with extreme concern, as they were afraid 'that European judges might end up using the provisions of the Charter on social rights as a Trojan horse for imposing further limitations on Members States' social sovereignty' - F Costamagna, '*The internal market and the welfare state after the Lisbon treaty*', 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 11.

[13] L Azoulai, '"*Integration through law*" *and us*' (2016) International Journal of Constitutional Law 14, 455. Along the same line, see also T Konstadinides, '*The Rule of Law in the European Union. The internal dimension*', Hart Publishing, 2017.

[14] As the literature notes, 'Two strategic plans have facilitated the economic integration of the member states. These plans were enacted by European institutions and have been subsequently transposed into national laws and policies by member states. The first plan included a series of actions and measures aiming at the abolition of all tariff and non-tariff barriers to intra-community trade. The second plan has focused on the establishment of an effective, workable and undistorted regime of competition within the common market, in order to prevent potential abuse of market dominance and market segmentation, factors which could have serious economic implications in its functioning.' (C H Bovis – '*EU Public Procurement Law*', Edward Elgar, 2012, 2)

[15] As some authors put it, 'The competition rules in the Treaty on the Functioning of the European Union (TFEU) apply directly to private parties and, in so far as they constitute 'undertakings', they may apply to public bodies too. Other competition rules in the TFEU make particular provision for state practices, most notably the state aid rules. The personal scope of the free movement provisions is a good deal more awkward. All the provisions of the TFEU which deal with free movement apply to the acts of public authorities in the Member States. By contrast, the provisions on free movement of workers and services apply directly to private parties, albeit that the precise scope appears not to have remained static, but the provisions on free movement of goods do not. This is not stipulated by the TFEU – it is the consequence of the choices made by the Court of Justice of the European Union ('the Court') in its case law. But the Court has never explained just why there is no convergence in the personal scope of application of the free movement rules.' – see S Weatherill, '*The internal market as a legal concept*', Collected courses of the Academy of European Law, Oxford University Press, 2017,

important, especially in the public procurement context? Well, because any forms of discrimination based on *nationality* (either produced by a legal norm applicable to a certain procedure, or by the contracting authority itself, through the tender documentation) shall inevitably render applicable the principles and provisions to do with the internal market as such, whereas all the other forms of discrimination between competitors (to read, bidders), including collusion and bid rigging, shall fall within the scope of the rules governing the free competition. In the first case, the discriminatory measures need to be justified and proportional in order to pass the test of validity, and such justification cannot be offered by other circumstanced but only by an exceptional condition as explicitly laid down in the Treaties or, fail that, an overriding public interest (*eg,* a fundamental *social* right *etc*). In the second case, however, the justification follows other, much punctual and narrow, rules. On another tier, it is common ground that, in general, social policy objectives are designed to respond to stringent (or less stringent) *local community* problems. They often hide an aid which national or local governments intend to give to local businesses (or people) in order to help them bounce back from economic collapse or at least bring them to a satisfactory competitional (or welfare) level. Such kind of aid hits both the cross-border trade *and* free competition.

Essentially, the two dimensions (fundamental freedoms and competition) are osculating, axiologically, in the intricate scope of EU's internal market, as they purportedly are its main functional instruments for integration.[16] The apparent dichotomy between the free movement rules and the competition rules was in fact conclusively resolved by the European Court of Justice in *Leclerc* (a case to do with the fixing of prices for books) where it decided, based on couple of other previous decisions that only anticipated this upshot, that: "*Whilst it is true that the rules on competition are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness*

Kindle ed., 95. It is nonetheless worth reminding here that the 'personal scope' of the internal market rules received a clearer contour in several benchmark cases like C-36/74 *Walrave & Koch* [1974] ECR 1405 or C-415/93 *Bosman and Others* [1995] ECR I-4921. See also M Tønnesson Andenæs, *'Services and free movement in EU law'*, Oxford University Press, 2002. The latter author explores in more depth the 'conventional view' adopted by the fathers of the Treaties that the freedoms should follow different paths (with an emphasis on the obvious differences between the free movement of goods v the freedom to provide services across the Union).

[16] See, in this regard, Protocol No.(27) to the TEU and the TFEU, according to which 'the High Contracting Parties' have agreed, '*considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted*', that '[t]o this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.' (emphasis added).

of its implementing measures; nor may they introduce or maintain in force measures, even of legislative nature, which may render ineffective the competition rules applicable to undertakings."[17] (emphasis added).

This assertion is enough to conclude that, as a matter of principle, Member States are due to be censured in their attempts to intervene in order to favour some entities against others and thus affect the general EU legal competition framework, but also that both the free movement and the competition rules are subsumed under one and the same ideological construct, *ie*, that of the single (internal) market. The idea that the entire European structure depends on the coherent functioning of this market (and the removal of all barriers to free trade inside its borders) may explain why *all* the provision of the EU Treaties must be read along the same lines.

On another hand, the main challenges to Member States' sovereignty in the social sphere came, surprisingly, from the EU institutions themselves during the exercise of their constitutional powers. This led to the 'infiltration' of the basic internal market rules in the social sphere. And, vice-versa, although explicitly consecrated in, and protected by, numerous EU legal acts to do with fundamental human rights, fundamental *social* rights have been, until quite recently, similarly to common economic and cultural rights, rarely construed as imposing *legally binding* obligations on Member States. This rather hindered, in practice, their proper enforcement.

Furthermore, the major changes in the constitutional arrangement at the EU level came slowly, in stages, and were rather caused by the political reshuffles that took place within the principal EU institutions (the Parliament and the Council). This practically delayed, if not annihilated, the immediate strike of a concrete, stable balance between the economic and the social sides of the internal market. Not even the latest wave of political reform, brought about by the Treaty of Lisbon – which re-arranged, in a radical manner, the structure of the internal market – changed much in *practical* terms[18], and the race between the

[17] C-229/83, *Leclerc and Others* [1985] ECR 1, para 14. The decision in *Leclerc* took a lot from that rendered in C- 13/77, *GB-INNO-BM /ATAB*, [1977] ECR 2115 – see in particular paras 30 and 31. The link was even more emphatically envisaged in *Asjes* – Joint cases C-209 to 2013/84, [1986] ECR 1425, para 77. All these cases converge into the rules enshrined in Article 4 TEU cited above, which create a duty for Member States not to jeopardise the Union's objectives linked to the internal market – for a discussion on these cases, see W VerLoren van Themaat and B Reuder, '*European competition law: a case commentary*', Edward Elgar Publishing, 2014.

[18] 'The Treaty of Lisbon reinforces the eminently defensive nature of the European social dimension by introducing a host of reforms that seem to be primarily concerned with preserving States' social competences from the intrusion of EU law. Conversely, the drafters of the Treaty chose not to endow the EU with [some efficient and effective] new social competences that might have contributed to strengthen the European social dimension, by giving a basis to the development of a much-needed European social policy.' (F Costamagna,

centralized model proposed by the Treaties and the regulatory competition touted by some Member States has not been definitively settled.[19]

In a nutshell, as the EU's legislative and administrative bodies are still devoid of essential powers (such as that of *direct* intervention via legislative measures, which could have helped them establish an articulated common framework or certain common standards), the much-sought integration is, in the social field, still a desideratum. This might explain the inefficiency of the so many instruments offered by the latest legislative package adopted in the field of public procurement, as demonstrated by the latest survey ran by the European Union under one of the biggest projects initiated so far in the area of sustainable procurement, at the EU level[20].

Fortunately, encouraged by the changes brought (owing to punctual political bargains) to the EU's primary law, the Commission started to act quite determinedly in order to introduce 'social' elements into 'all policies' of the EU and at all levels, in the name of a full market integration – seen as the apex of all Union's efforts. To this purpose, it combined elements of economic adjustment with political arguments, with the aim to entice actors from the entire political spectre.[21] Thus, armed with several tools – among which the close monitoring, the coordination and the harmonization of the relevant national legislations

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'The European Semester in action: Strenghtening economic policy coordination while weakening the EU social dimension?', LPF Working Papers, Centro Einaudi, 5/13, at http://www.centroeinaudi.it/lpf/working-papers.html, 9).

[19] C Barnard, '*The substantive law of the EU: the four freedoms'*, Oxford University Press, 2016, 27.

[20] More info, at https://aeidl.eu/docs/bsi/index.php/bsi-buying-for-social-impact.

[21] In other words, 'The European Union's quiet revolution was the product of an innovative political strategy by an actor that used market ideas as a way to compensate for a lack of power resources. (…) This political strategy was invented within the European Commission, the central administrative body of the European Union. These early promoters of Europe found in market ideas a way to compensate for their relative weakness and to overcome institutional inertia. Compared with the leaders of the member states, Commission officials were in a relatively weak position. By playing "the market" as part of a broad integrationist political strategy, they essentially found a way out of their quandary. Depending on the venue, they sold Europe either as a straightforward process of economic adjustment to new market conditions or as a more political and managerial approach to market globalization. They were thus able to build Europe without choosing clearly between these two very different rationales for the push toward greater European integration. At a time of rapid economic change, "Europe" provided a formula to overcome the continuing political struggle between supporters and critics of the free market. This fundamental ambiguity was never clarified because it was the necessary glue for putting together a winning coalition in favour of European reforms. Generally speaking, the strategy was designed to draw support from the most powerful political clienteles—the German, the French, and the British governments, but also the Left, the Right, and the business community. All these actors were given a stake in the European Union's quiet revolution and thus encouraged to reframe their interests around the achievement of Europe's market and monetary integration agenda. (…) In essence, the market served as a conveniently broad repertoire of justifications. The Commission's goal and guiding motivation was to reform the economy, but it was also to build political power at the European level—although not necessarily in its own hands. This explains, in turn, the contrast between the rather loose programmatic coherence of EU reforms and the consistent reinforcement of EU powers.' – see N Jabko, '*Playing the Market: a political strategy for uniting Europe, 1985–2005*' Cornell Studies in Political Economy, Cornell University Press, 2012, Kindle Edition, 140 to 165.

adopted in the areas left in the competence of the Member States, or the complex bundle of financing mechanisms which the Union has put (directly or indirectly – by for example encouraging private financing) at the disposal of various actors involved in the delivery of various social objectives[22], it appealed, smartly, to several explicit provisions of the Treaties according to which fundamental social values and concrete social objectives *must* be integrated into the definition and implementation of all Union's policies and activities[23] (in line with, of course, the principle of conferral) and, in an effort to crack the door open for social values and let them invade the economic dimension of the internal market, it also made use, smartly and sometimes aggressively, to both instruments specific to social policies (like the OMCs – open methods of coordination, or the flexicurity tools) and specific soft law mechanisms.[24] Traces of these efforts are clearly visible also in the public procurement area. This actually justifies the so many – and occasionally mandatory – references to social aspects contained in the latest package of Directives on public procurement, but also explains the importance of the mechanisms dedicated to the pursuit of values stemming from current social policies.

In parallel, the CJEU has become more and more bold and sassy in forcing the limits of the internal market rules and invading the realm of national competences, while encouraging, rather feebly, Member States to push back via measures both justified and proportional. It however did so in a rather incoherent manner.[25] For example, it appears to have used (although not in the early years, when it began to test the elasticity of the Community rules in the face of a more and more pushy measures coming from the Member States, especially in the social field) different recipes when dealing with internal market versus those involving free competition. Nor did it use the same benchmark when assessing the conformity of various national measures adopted under other Articles of the Treaties (then in force) that bore a social load. A pragmatic comparison of the case law to do with Articles 36, 52, 106 and 107 TFEU would just confirm this conclusion. A possible explanation for this might be offered by the political contexts in which such case law has developed (for example, where the Court scented a strong political interest, it simply chose to

[22] For a comprehensive presentation of the opportunities and instruments promoted or made available at the EU level with purpose to facilitate social enterprises' access to social finance markets, see the EC's guide "*A recipe book for social finance - A practical guide on designing and implementing initiatives to develop social finance instruments and markets*" (January 2016), available at http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7878.
[23] See, for example, Articles 7, 8, 9, 10, 11, 12 and 13 TFEU.
[24] More on these, in Chapter IV below.
[25] Chapter III is entirely dedicated to this case law.

arm the Commission with adequate policy instruments and legal support, even if, by doing so, it breached in some cases Member States' legitimate sovereignty hence decisional freedom. This is, for example, the case of Article 106 TFEU, where at stake was the Community's interest to fight efficiently for liberalization and against national monopolies[26]).

2. Scope. Methodology

The recent momentous changes in the primary law of the Union caught EU public procurement in a delicate position. Unfortunately, although the keys to decode the latest set of Directives lie, for sure, in both the extraordinary transformations occasioned by the adoption of the Treaty of Lisbon[27] and the Europe 2020 Strategy[28], neither these political avowals, nor the legislative, policy, or judicial initiatives taken or developed thereunder brought the so needed answers. Unlike the models developed under various international treaties and organizations (such as the UN – with its UNCITRAL law model, the WTO – with its GPA or the World Bank – with its specific procurement rules), which preserve the elemental instrumentality of public procurement by crafting a holistic, integrated framework around it,[29] the European procurement model apparently remains, in spite of all these constitutional changes and the otherwise propitious political pressure behind them[30], still trapped in the original paradigm of the Treaties. This is largely explained by the unusually complex, *sui generis* nature of the European Union and the rather rigid position of the Court of Justice of the Union, a real watchdog of the internal market freedoms.

However, the latest economic crisis left deep furrows on the social face of Europe. It pushed to the surface serious social problems and inequalities. Social values not long ago ignored started to crop more and more often in the internal market context. The

[26] For a discussion, see J Burke, '*A critical account of Article 106(2) TFEU: Government failure in public service provision*', Hart Studies in Competition Law, Bloomsbury Publishing, 2018.
[27] OJ C 306 of 17.12.2007.
[28] As set out in the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" (the "Europe 2020 Strategy"), COM/2010/2020 final.
[29] 'Public Procurement [regulated by these instruments] seeks to provide *positive interaction between economic, social and political policies, which are mutually reinforcing*. *These policies cannot be compartmentalized, as public procurement is an action that results into diversified usages and implications*. *Economic* progress and *social* development go hand in hand. *Political* actions are needed to achieve these goals.' – S Kashap, '*Public procurement as a social, economic and political policy*', (2004) International Public Procurement Proceedings 3, 135 (emphasis added).
[30] We will try to capture the essence of these changes in the original paradigm of the EU's internal market in Chapter II below, in an attempt to explain how this structural transformation changed, inevitably, the nature of EU public procurement as well, raising it to the status of a genuine policy tool.

political pressure put by Member States on the European institutions led to determined changes in the Union's own *constitutional* structure. 'In defining and implementing its policies and activities, the Union [must now] take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.'[31] This means that at least *some* social values (apparently the closest to the core of the internal market and which are *sine qua non* for the completion of the integration process) must be present in basically *all* internal market contexts.

Thus, urged by this *political* pressure, the European Commission started, after a period of passivity and expectation (as it will be shown below), an active social *policy* assault. In coordination with Member States, it began to act on two fronts: a hard-law one (contributing to the adoption, in a relatively short period of time, of over seventy pieces of legislation of relevance for the *social* field, thus contributing to the consolidation of a veritable European social model) and a soft-law one (which led to the implementation of various and surprisingly ingenious mechanisms such as the Open Method of Coordination – 'OMC', the flexicurity or the Memoranda of Understanding – MoUs – concluded with the Member States in the context open up by the *cohesion* policy *etc*).

Faced with these pressures and efforts, the balance in the internal market itself has, obviously (and definitively) changed. So, as the new Treaties speak of a 'social market economy'[32], many social values are now on a par with the traditional economic ones. In spite of this, the TEU, just as the TFEU, fail to clarify the meaning of this key phrase. Or its purport. Also, while *some* social values are explicitly referred to in the two Treaties, others, so many and so important for the EU citizens, are *not*. The fate of those *other* values remains therefore still obscure. Anyway, according to Court of Justice of the Union, the most ardent protector of the fundamental market freedoms, not *all* social values may *legally* tip the scale but, in general, only those that have a legitimate public policy background or which are destined to respond, punctually, to some overriding public interests (that is, interests which, depending on the concrete context, require the sacrifice of economic values). We therefore dedicated a distinct chapter to the relevant CJEU case law, in an attempt to understand how the Court is charting the internal market and where it sees public procurement on this map. The conclusions are surprising: they will show that, in spite of the undisputable *political* evolution of the Union and the evident social character of the internal market, the CJEU

[31] Article 9 TFEU.
[32] See Article 3(3) TEU.

remained, in general, a faithful defender of its initial values, crashing all the enemies of the cross-border trade (like many protectionist social-policy measures) and pushing these values deep into areas traditionally left at the discretion of national governments. And, while offering a rather restrictive interpretation of the derogations allowed in Articles 36, 45, 52 and 62 TFEU (*ie*, precisely those granting an official way out of the rigours of the internal market rules, on which many derogatory national public policies are based), it developed a complex 'mandatory requirements' test for all those measures not caught under the European social model or not having a solid public policy justification. In this context, the discussion about 'fundamental' values and rights became crucial. Unfortunately, too few social values passed the test. Furthermore, the Court, in an inexplicable *modus ponens*, went up to the point where, while acknowledging the *fundamental* nature of some *social* rights, still gave priority to the correlative fundamental *economic* freedoms.[33] All these decisions hence left stakeholders groping in a grey, foggy area, very hard to grasp.

So, on the one hand, it is the political pressure (from the Member States but also from the political majorities formed in the European Parliament and the Council) that pushes for more room for social values in the economy of the internal market, in an attempt to save what's left of the electorate and eventually rein in the surging national and nationalistic movements. On the other hand, it is the Court of Justice of the Union, an institution not (yet) politized, which pushes back fiercely (up to the point where the internal market rules are goring, and leaving obvious dents in the national sovereignty of the Member States). And, trapped in the very middle of this conflict, stands public procurement. It is however obvious that, due to some late compromises (in principal from the Court) which are generally caught in the latest set of Directives, at least *some* key social values have now a reserved room in any procurement contexts. But the answer is not so clear with others. This is specifically why the intensified its efforts from the European Commission, which is currently trying, as we will show below, to bring (or extend the use of) the mechanisms developed in the specific realm of social policy (like the OMC) in other areas traditionally falling within the scope of the internal market rules – such as public procurement, are so important. Its intensive guidance, communications or awareness-raising and good-practice-spreading projects ran at a Union scale are just a few conclusive examples in this regard. Unfortunately,

[33] See, for example, the *Laval* or the *Rüffert* judgements cited (and discussed in more detail) below.

not endorsed by firm hard law[34] and consistently clear case law, the viability and efficiency of these efforts remain debatable hence, to a great extent, dud.

Owing to the determined input from the Commission, stakeholders became (at least theoretically) aware of the huge potential offered by public procurement while the instrumentality of public procurement and its role in the implementation of various social goals are now common ground. However, in practice, this awareness is still a hollow concept as all recent statistics show that too few contracting authorities are building consistent arrangements and use, smartly, public procurement to implement social policy goals. Those who do, are often crossing the borders of the safety zone and test to the maximum the elasticity of the internal market rules through some disputable measures, while those who don't usually adduce as arguments for their reluctance the still too unclear legal framework and a serious fear of censure (from various control bodies and courts). Moreover, even the dedicated literature is strikingly divided – as some praise the shift while others deplore the harm caused to competition and the structural arrangement of the internal market. Things are therefore, (also) in this area, far from settled, with too many strings pulling backwards.

Thus, in the knotty European legal and political framework, public procurement is *still* (even after the Lisbon transformations and the array of ensuing political and policy actions from the European institutions) on the cusps between falling back to its initial station – as a simple economic mechanism – and completing the metamorphosis to a multifaceted policy instrument. Its future evolution depends on a huge compromise which entails, first of all, departing from the usual discourse 'it's either the trade and the market, or the people'. Because, in the current EU's political (and constitutional) context, that's an impossible choice to make… The 'social market economy' postulated in the TEU asks for an inclusive approach: 'it's both the market *and* the people'! But abandoning old principles is not easy. Sacrificing them for some still wobbling ideals is even harder. The process is even more complex as the legal principles that should define and ensure the coherence of the two levels of governance that characterize the *sui generis* European construct and the relationship between the Union and the Member States and, further, between the internal market and competition rules, on the one hand, and the protectionist, measures taken at national level, on the other, are still unacceptably ambiguous. One thing is certain, though: social values and

[34] The lack of hard law in this respect is mainly due to the lack of conclusive answers and, consequently, of a strong *political*, but also *doctrinal*, endorsement. At the European level at least, not enough political factors are ready yet to dispense with the original values and hierarchies and push for a definitive axiological capsizing.

policies have already, and irreversibly, invaded the economic dimensions of the internal market and tend to engulf a larger and larger hunk thereof.

This research paper tries to capture precisely the tensions behind this clash (and transformation altogether). It will focus on the changes that have taken us to this fork in the road of integration and will try to analyse each of the three dimensions of the process (the *political* one, as reflected in the changes in the Treaties themselves; the *policy-related* one, reflected in the evolution of the social dimension of the internal market and the specific mechanisms devised for its implementation; and the *judicial* one, defined by the contorted development of the CJEU case law, with a concrete focus on public procurement). We will thus seek to understand how the (in)stability brought about by the interplay of all these dimensions is reflected in, and inevitably influences, the latest pieces of legislation adopted, in 2014, in the area of public procurement. We will also argue that the (legal and efficient) use of public procurement as a policy implement essentially depends on the striking of the right balance between the economic and the social dimensions of the internal market and, further than this, that the stability of this rapport is (still) essentially contingent upon the nature and characteristics of the *social* elements put on the plates. Along the line of arguments, we will show that, thanks to the steadfast *political* (and then *policy*) shift to a 'socially responsible' Union, considerations to do with the protection of fundamental (social, or human) rights, but also other elements pertaining to a more and more complex and stable European social model, appear to serve as a strong justification for many national policies that, in law or in fact, hinder the cross-border trade, whereas other measures bearing a social load, which are merely sporadic, ad-hoc or even with a certain legal (or even public policy) background but not necessarily falling within the ambit of the *European social model* are quite hard, if not impossible, to defend, especially due to the so-hard-to-pass 'mandatory requirements' test developed by the Court. In this context, we will evince that, owing in principal to the Court's penchant for neoliberalism, not even the hardcore social models proposed under various international value chains[35] — like the ILO Conventions — are forthrightly acceptable under the EU law, unless validated by the latter as an *EU* social model (see especially the *Rüffert* judgement)! This solution was explicitly embraced by the European legislature through the latest package of directives on public procurement (as an expression of the rapport of forces specific for the constitutional structure of the EU which

[35] In principle, 'social considerations (…) are a central part of [any] sustainable procurement – whether with a *domestic* focus or along *international value chains'* – see T Stoffel, '*Socially responsible public procurement (SRPP) in multi-level regulatory frameworks. Assessment report on policy space for SRPP regulation and implementation in Germany and Kenya'*, Deutsches Institut für Entwicklungspolitik gGmbH, 2020, 1.

places any legislative initiatives under the strict control of the Court) which translates, again, into a lost opportunity for the delivery of social value through public procurement. Moreover, starting from the assertion that social public procurement is essentially a 'price v. quality' issue, as social elements contain, indubitably, an inherent 'quality' factor, we will also explore how can a *socially advantageous* tender be(come) the *most economically* advantageous tender within the current EU framework.

On the other hand, we noted, during our research, that dedicated literature fails, in general, to approach *unitarily* and *multi-dimensionally* all these inter-dependent forces and tensions. With a few notable exceptions, scholars are either evaluating public procurement in its *own* context discussing, punctually, and 'from the inside', the possibilities offered by the new directives (while ignoring the general perspective), or approaching the subject narrowly, in rather *technical* terms focusing, limitedly, on procurement niceties or, upon the case (and interest), on social policy, or social and labour law details and nuances. Finally, even if there is an important number of papers dealing with the balancing of forces in general, in the internal market, they are not discussing its specific implications for *public procurement*. We therefore decided that it is opportune to study public procurement on a sufficiently-small-scale map in order to see how it fits the *general* landscape of the internal market as, in our opinion, this is the most appropriate way of getting to the essence thereof. We will hence begin our study with the clash between the political, social and economic tensions within the internal market and then move to see how these tensions are reflected in, and off, public procurement. In doing so, we will not seek to explain the – still – cautious use of the new instruments in practice (at least not outside this context). We will thus try to establish if the opportunities now offered by the new Directives are as effective as touted and whether, beyond the concrete public policies or mandatory requirements enumerated in the Directives, there are others that, under the actual EU legal and judicial framework, may equally justify a restriction to the cross-border trade.

In this attempt, we will try to take no statements for granted. We will consequently not fall immediately prey to the enticing argument that the latest public procurement legal package offers, arguably more than ever before, effective breaches through which social considerations to be effectively pursued. Instead, we will argue that, seen from afar, this possibility seems more theoretical as, in practice, the original internal market limitations are still present and the Court, still vigil and unwilling to make concessions too quickly. Even more, we will show that the Directives adopted in 2014 are in fact shedding a far too pale light on precisely those grey zones which need more attention / regulation (that

is, those areas which *allegedly* permit restrictions on competition but on which neither the existing hard law nor the unpredictable CJEU case law has offered clear guidance so far), limiting to just warm over some already tested recipes. Key concepts like 'discrimination', 'disability' or 'disadvantaged people' are still devoid of any definitions and clarifications. On another level, relying on vague concepts such as the 'general good' could prove even more detrimental to the so necessary legal certainty.[36] Moreover, a too short Annex X (to Directive 24) and the obsessive condition to stay linked to the subject matter of the contract make the pursue of many social policy goals rather problematic. Finally, we will contend that the fact that the new Directives appear to imply that contracting authorities may act as 'regulators' and impose social goals with no legal or policy background still unsettled is not only a source of legal instability but also of great disturbances in practice.

This thesis is however not about social policies. Nor is it about politics and political science. Or about the internal market and competition rules or principles *per se*. Nonetheless, as it is now evident that the social dimension of the internal market stands on the same footing with the economic one, a special chapter will be dedicated to the European social policies and the European social model – the principal generator and source of justifications for the most national policies and restrictions to competition in the EU's internal market – as well as to the way in which they changed the EU's state of play. Moreover, since key notions and institutions (such as 'social market economy', or 'social economy' and 'social economy enterprises'), which are specific to social politics and social policies, eventually percolated the very core of the internal market (at which is also public procurement!), we will also try to grasp their purport and influence. On the other hand, since employment and labour law considerations are prevalent in the 2014 package, we reserved an ample discussion for them, with a special focus on the posting of workers and the ILO Conventions, especially Convention No.94 (an issue still left unresolved). And, although it is not our purpose to discuss the regime of public services, which is an extenuatingly complex domain, or to study the regions where public procurement and state aid osculate, we felt it is important to touch upon the public services obligations (PSOs - specific to services of general interest) as many elements that characterize this institution have been, under a guise or another, brought to the front, to justify measures taken in other areas (which make the 'common ground' of public procurement).

[36] M Tønnesson Andenæs, *'Services and Free Movement in EU Law*', Oxford University Press, 2002.

Finally, for the sake of simplification, although we refer, in general terms, to public procurement, most references are made to, and the discussion revolves around, the provisions and notions contained in Directive 2014/24, ignoring the rest of the 2014 legislative package. Also, when dealing with the innovations and instruments proposed under this law, we avoided, to the largest extent possible, any technical assessments thereon, as these are quite plenty in the already available literature. Instead, we focused on their effectiveness from the *internal market* point of view. As such, when discussing for example, the inclusive potential of public procurement, we did not narrowed the discussion down to the two main tools at hand for this purpose (namely, the obligation to ensure accessibility for the disabled and the possibility to reserve contracts for social economy enterprises), but went significantly farther, linking them to (and decoding them through the prism of) the corresponding determinants present in (or missing from) the EU social and labour law. We thus discovered that, behind the rapture around these instruments manifested by many public procurement pundits (we, too, admit that the two institutions are an important step ahead as compared with the previous sets of Directives), the gaps and holes in the relevant European *social* model(s) combined with a rigorous application of the internal market rules in also the public procurement area are in fact shrivelling significantly their – theoretical – potential.

Inasmuch as our research method is concerned, it is evident that, given the multifarious perspectives analysed hereunder, this research paper is *multi*disciplinary (but also *inter*disciplinary) in essence, being inevitable caught at the interface between politics / policy, law and jurisprudence. It is therefore juggling with concepts and contrivances specific to EU and international public law in general but also, in particular, to EU public procurement law, and/or social and labour law. Many of these concepts have an also substantial *political* and *policy* load. So, given this complexity, our main approach will be first and foremost *doctrinal*.[37] We will in principal try to establish the main characteristics of the internal market (as the key playing field), describe the balance between the economic and the social dimensions thereof, and see if these features and tensions are present (or absent) in public procurement. We will also try to determine, and discuss, the specificities thereof in this particular area, in an attempt to spot the eventual breaches. Or breaks. This, certainly, involves an also *diachronic* assessment. We will in particular check how the internal market

[37] 'Doctrinal exegesis remains important, as scholars map the relevant legal and quasi-legal terrain, seeking to identify points of consistency and coherence, as well as inconsistencies and incoherencies in legal regimes" - see J Shaw and J Hunt, 'Fairy tale of Luxembourg?: Reflections on law and legal doctrine in European integration' in D Phinnemore and AWarleigh (eds), '*Reflections on European integration: 50 years of the Treaty of Rome*', Palgrave Studies in European Union Politics, Palgrave Macmillan 2009, 99.

has become a 'social market economy' and how this new constitutional arrangement (defined not only by the Treaty of Lisbon, but also by other, very important pieces of public policy adopted at the EU level such as the Europe 2020 Strategy which some consider a veritable constitution of the Union) prompted changes downstream, to the EU public procurement level. Finally, our study involves a *critical* approach. Many key concepts that now define the EU's internal market (such as the already cited 'social market economy') are empty of substance and hard to make out while many pieces of secondary EU law are inconsistent with each other (see for example the crossroads between the public procurement Directives, the Posted Workers Directive, the Acquired Rights Directive, the Fixed Pay Directive and the Services Directive *etc*) or fail to offer the so needed definitions and guidance. Moreover, a very slippery and occasionally paradoxical CJEU case law makes this environment even harsher and harder to chart. All these lead to the conclusion that, overall, the pursue of social policy goals through public procurement is, owing in principal to the rigors of the internal market and competition rules (which remained, by the care of the Court, essentially unbendable) and to the so small room left for concessions, still uncertain. Basically, it remains, even after 2014, a mere desideratum.

3. Structure. Logic

Considering the internal logic of this dissertation, as well as its multidisciplinary configuration, we are proposing a six-chapter structure (with a concrete number of sub-sections under each chapter, corresponding to the specific issues on which we focused our research). We feel this structure may help us best ensure and preserve the cursiveness of the logical connectiveness and interconnectedness of our discourse and prevent any potential syncope that may fracture it. Of course, most of the ideas contained herein could have been presented in a variety of forms. We believe, however, that this particular arrangement reflects most accurately our vision of the issues discussed hereunder.

The first chapter includes three sections and starts with a presentation of the general (political and legal) context that has occasioned this paper. Its second section contains a number of useful clarifications with regard to the scope thereof and also to the methodologies applied in our research.

The main body of the thesis consists of four discrete chapters. The first one, encompassing three distinct sections, describes the constitutional evolution of the EU's

internal market up to the today's *social* market economy, and shows how each stage of this transformation has influenced the EU soft law but also the CJEU's case law, including that to do with public procurement. Along its lines, it will be shown that, piecemeal but irreversibly, the political transformation of Europe changed not only the face but also the heart of the Union and, most importantly, of its internal market. Especially the social market economy ushered in by the Treaty of Lisbon, together with the 'strategic' onus contained in the newly introduced Article 9 TFEU, have opened the door for an important number of changes in the original paradigm and has brought a number of key social policy goals and values on the same footing with the traditional economic goals. This led to a significant intensification of the Commission's efforts towards a more social Europe, which culminated with the adoption of the Europe 2020 Strategy, a genuine constitution of the European Union (for which we have reserved a special section), in which public procurement has been offered a central place. The main conclusion of this chapter is that, owing to all these transformations and changes in the original paradigm, social policies and social policy goals have gained an indisputable place in the economy of EU public procurement.

The third chapter of our thesis attempts to discuss the crucial role of the Court of Justice of the European Union in shaping the margins of the internal market (in line with or, in many cases, in spite of, the political and the constitutional evolution described in Chapter II). In doing so, we first follow the traces left by the most relevant CJEU judgements just to elucidate how this case law tested, *in concreto,* the elasticity of the four freedoms and based on what principles it has decided to endorse some of the breaches created in their walls. A particular attention is paid to the movement of workers. The last part of the first section of this chapter is a concentrated run-through of the two principal categories of exceptions which the Court approached in its case law (namely, those based on public policies and the others, on certain mandatory requirements), in an attempt to find comfortingly sufficient recurring patterns and constants that may contribute to the development of a conclusive taxonomy and the drawing of a clear map of 'exceptions'. We have chosen to do so since we are aware that on the spotting of such a constant vein, in each of these two areas, essentially depends the foundation of a general 'theory of exceptions' which would further enable an *ex-ante* assessment of the legitimacy and effectiveness of *any* potentially restrictive social measures taken (or implemented) in a public procurement context, thus contributing to the consolidation of the stability of the entire juridical construct of the internal market. This could also offer a concrete response to the main question of this thesis (*ie,* how much social can public procurement take in in the current internal market legal framework?). Our research

points however to the conclusions that, unfortunately, the studied case law does not offer enough elements based on which to identify a sufficiently clear contour within which *any* restrictive measure to be considered safe, but rather a number of punctual indications which may, at most, offer some punctual escape doors. For example, it seems that, even if public policies (especially those crafted in accordance with Articles 36 45, 52 or 62 TFEU) have, in general, the potential to offer a solid justification for any restrictive measures, not *all* public policies falling within the scope of those Articles are, according to the relevant CJEU case law, effectively safe harbours, but only those devised in line with the general EU principles. On the other hand, even if *some* social policies have indeed been accepted as conform, the test on the basis of which they have been sorted out (or, rather, its application) is rather tenuous hence instable, which makes the replication thereof (in other cases not yet tested by the Court) simply irrelevant.[38] The same goes for the most solutions offered based on the running of the *mandatory requirements* test. We finally discuss, in the second section of this chapter, the most important decisions rendered by the Court in the area of public procurement, in an attempt to understand how the Court applied, in this particular area, the test discussed in the previous section. The findings, which are disturbing as they emphasise a seriously inconsistent approach, will be commented in the last section of Chapter III.

The next chapter (*ie*, Chapter IV) is dedicated to the European social model and its role in the shaping of the internal market, with a focus on the *fundamental rights* and the concrete possibility that they could be used as justifications in a mandatory requirements test as developed by the Court (and discussed, in detail, in the next Chapter). We try to identify the main determinants that prompted (especially at a political level) the shift from a straight neoliberal approach to a social market economy model, and show the crucial role played by the Commission in unveiling (and enhancing) the social face of Europe. We also assert that, in the development and consolidation of a genuine European social model, the Commission has ended up using not only elements of hard law but mainly specific instruments of soft law and policy which it has, later on, tried to use in also other areas traditionally sitting at the core of the internal market (such as the area of public procurement), where the fundamental freedoms are still hard to constrain (or circumvent), in order to instill, through the 'back door', concrete elements of social policy into the fundamentally economic kernel thereof. Thus, specific OMC-resembling instruments are nowadays increasingly used to convince stakeholders that, in spite of the restrictive tests developed by the CJEU (as

[38] We will however argue, in Chapter IV, that the policies developed around the European social model are the most likely to pass the justification test.

described in Chapter III), many social elements may still be safely pursued via, for example, public procurement. Our discussion then moves to expose the potential of the European social model and of the policies developed thereunder to offer strong justifications for at least *some specific* restrictions to the cross-border trade. We explain, on the other hand that, due to a very restrictive approach by the Court, hardcore social models proposed under various international law vehicles — like the ILO Conventions — are not, even if they refer to key social rights and bear an undeniable endorsement stamp, forthrightly acceptable *under the EU law*, unless validated by the latter as an *EU* social model. We will therefore conclude that such inconsistencies make the use of public procurement as a social policy instrument even more questionable. Last (but not least), two institutions with a huge impact on the coherence and the functionality of the EU's social market economy (namely, the fundamental social rights and the EU's social economy and social economy enterprises) will receive a special attention. We will eventually close this chapter with a short discussion on the specificities that characterize public services obligations (PSOs), as these elements are often used to justify measures taken in also other areas (closer to 'traditional' public procurement).

The fifth chapter contemplates and evaluates the *real* possibility offered by the current EU legal, political and judicial context – as analysed in the preceding chapters – to transform public procurement, from a mere scope, to a powerful policy tool. Beyond an analysis of the reflections of the paradigms discussed in Chapters II, III and IV in (and off) this specific area, we concentrate on several particular features that are, in our opinion, pivotal for the *complete* transformation of EU public procurement into a genuine, powerful policy instrument. We maintain that on the way these aspects are clarified and (legally) adjusted depends the successful unleashing of the full potential of public procurement in the pursue of social policy goals. We will nevertheless conclude that, in the current framework, these elements constitute more a hindrance rather than an opportunity.

Finally, in the sixth, and last, chapter we try to summarize our findings and draw some enlightening conclusions.

CHAPTER II
THE CLASH BETWEEN THE ECONOMIC AND THE SOCIAL DIMENSIONS OF THE EU'S INTERNAL MARKET. CONSTITUTIONAL PREMISES

The repeated waves of transformations that took place, along the years, at the very core of the EU's constitutional structure levelled the field and brought about new and more and more complex models of social solidarity. Moreover, the traditionally exclusive competence of the member states over social policies and measures was, as a result of all these reforms, curtailed and hollowed out, as those states realised that they have in sooth become "semi-sovereign welfare states" whose policy choices are subject to an increasing scrutiny under Community law. But, as the assault of 'the social'over the traditional economic values of the internal market surged in intensity with each wave of reforms, the clash between values at the very EU's constitutional order has remained unsolved until today.[39]

More importantly, each wave of changes to the constitutional structure of the European Community (and then, Union) had at its core the idea of preserving the existing '*aquis communautaire*' while building on it.[40] This is why it is essentially important to understand the dramatic transformation of Europe in an evolving perspective (instead of isolating each stage and studying it separately).

1. A diachronic assessment

As, for the fathers of the European integration, the freedom of movement of persons, goods and money and the freedom to provide services across the then European Community had necessarily to be secured through an as open an economy as possible, they took a number of measures to ensure that all barriers to the free trade based on national

[39] See M Dougan and E Spaventa (eds), *'Social welfare and EU law'*, Volume 9 of Essays in European Law, Bloomsbury Academic, 2005.

[40] 'The *acquis communautaire* is a technical term which refers to *past* agreements which are considered *irreversible*. In practice this construes *the development of the Union as a political one way street*' – K von Moltke, *'The Maastricht Treaty and the Winnipeg Principles on Trade and Sustainable Development*', a Study prepared for the International Instutite for Sustainable Development (IISD), IISD, 1995, 10 (emphasis added).

discrimination and an unfair treatment of the persons or economic entities coming from another Member State were abolished, or at least rendered inefficient.[41]

The principal aim of the Treaty of Rome was the extension of European integration to include general economic cooperation. Or, in a nutshell, the setup of a *common economic market*.[42] This led to the establishment of the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) and entailed a combined set of actions, interconnected and structured on several tiers. Among them, the creation of a customs union, the abolition (subject, of course, to several exceptions) of all restrictions to the four fundamental freedoms, the build-up of a strong competition policy and a closely regulated playing field for state interventions in the economy (via, for ex., state aid and public undertakings).[43] Thus, Article 7 TEEC stated, in very clear and imperative terms, that, in all areas falling within the ambit of that Treaty, any forms of discrimination based on nationality grounds were strictly forbidden. The footprint left by Article 7 was deep and visible throughout the entire text of the Treaty, as it was acknowledged to be the first notable milestone in the evolution of the common market and a benchmark for all European actors (not only private entities and traders but, as Article 90 clarified throughout its first two paragraphs, also governments, public authorities and institutions, including those charged with the management and the delivery of services of general economic interest or having the characteristics of a fiscal monopole).

According to the text of the original Treaty, the very existence of the Community lied on four fundamental sets of (economic!) values.[44] The economic policy (including transports and competition) constituted the core thereof, whereas the social policy occupied a barely marginal place.[45] In fact, the two only met, exceptionally, in the area which

[41] For details, see C Barnard, '*The substantive law of the EU: The four freedoms*' (6th ed.), Oxford University Press, 2016, esp. 4 *et seq*. See also P Craig and G De Búrca, '*EU Law: Text, Cases and Materials*' 5th ed, Oxford University Press 2011.

[42] P Craig, 'The evolution of the Single Market', in C Barnard, '*The law of the Single European Market. Unpacking the premises*', Hart Publishing, 2002, 1 *et seq*.

[43] D Chalmers, G Davies, G Monti (eds), '*European Union law. Texts and materials*', Cambridge University Press, 2014, 14.

[44] Respectively: (i) the freedom of movement of goods (which entailed a common set of rules on customs and import duties), (ii) a common agriculture policy, (iii) the freedom of movement of people and capital and the freedom to provide services, plus (iv) a common set of rules governing the transport across the Community area. The third part of the TEEC was dedicated to the policies falling within the Community's competence and one may easily notice that the economic policy (including transports and competition) constituted the core of its entire arrangement.

[45] This 'double-track model' was meant to consolidate the legitimacy of the common market, by ensuring that economic integration that it promoted was pursued without harming the national social security systems (far too important for the member states). In this arrangement, the benefits generated by an economic integration at supranational level should have even used to 'reinforce national social security systems, by increasing member states' capacity to engage in redistributive functions'. For discussion, see F Costamagna, '*The European*

concerned the rights of migrant workers.[46] More concretely, after first establishing (through Articles 100 and 101) that the Council had the power (and therewithal the obligation) to intervene, by way of a Directive, for the purpose of harmonizing the national legal frameworks with direct incidence on the setup or the functioning of the common market but also to take any other measure it may deem fit in order to eliminate any disparities between such national legislations that may have distorted the competition within the same common market, the TEEC clarified, in Title III of the second part thereof, that social policies remained in the full competence of the Member States, while the improvement of working conditions and, in general, the wellbeing of workers, were supposed to accrue as a direct result of the evolution of the common market (and not vice-versa!) which, as such, would have also bolstered the harmonisation of the national social systems (see Article 117 TEEC). Article 128 TEEC however allowed the Council to "*set the general principles for the establishment of a common policy in the area of professional training which could contribute to the harmonious development of both the national economies and the common market*". (emphasis added).

With regard to the seven policy areas listed in Article 118 TEEC, the Commission had just a general obligation to monitor the relevant national legal frameworks and promote collaboration between Member States.

This approach was not new, as the TEEC built on the General Agreement on Tariffs and Trade (GATT 1947) – a precursor of the World Trade Organisation, and on the principles of the Organisation for European Economic Cooperation (OEEC 1948), two institutions priorly set up by the same member states. Thus, according to its Preamble, the GATT had been '*directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.*' (emphasis added). In fact, as wittily commented by D Edwards, *'[a]ll the negotiators of the new EEC Treaty were conscious that its terms must, as regards goods, be compatible with the GATT and, as regards goods and capital, be consonant with the direction of travel of the OEEC. The programme set out in the Spaak Report[47] envisaged the creation of a Common Market*

Semester in action: Strenghtening economic policy coordination while weakening the EU social dimension?', LPF Working Papers, Centro Einaudi, 5/13, at http://www.centroeinaudi.it/lpf/working-papers.html, esp. 6 *et seq*.

[46] Somewhat explainable, considering that the surge in the migration of employees (which followed the abolishing of barriers to the free movement of the workforce across Europe and the subsequent waves of enlargement to the poorer East) was expected to bring about some serious social inbalances. For more on this, see, for ex., K Boerner and S Uebelmesser, *'Migration and the welfare state: The economic power of the non-voter?*', in (2007) 14 International Tax and Public Finance, 93 *et seq*.

[47] Rapport des chefs de délégation aux ministres des Affaires étrangères (Bruxelles, 21 April 1956).

based on a customs union with no internal tariffs and a common external tariff.'[48] (emphasis added).

Consequently, many of the articles that were supposed to consecrate, via the TEEC, the fundamental freedoms, were memes of the corresponding texts of respectively the GATT (see for ex. Articles 34 and 36 TEEC vs. Articles XI.1 and XX GAT) and the OEEC, which they actually replicated (even if, sometimes, in an inconsistent manner[49]). The integration process foreseen by the TEEC, which was *essentially economic*, followed in reality a path which was to be stomped many times in the following waves of reforms of the constitutional provisions of the European construct, with a fine balance between negative and positive measures. It basically comprised three stages, namely, the provision of a general rule of freedom of movement accompanied by a specific transitional period up to which it must have been transposed or implemented, the imposition of a standstill clause prohibiting any further restrictions and, finally (but probably most importantly), the adoption of a set of secondary norms (in principle regulations or directives) aimed at the removing of all existing barriers (to trade) – by the end of the transitional period.[50]

Anyway, as interestingly pointed out in the dedicated literature, 'the attainment of social goals was pursued [in the Treaty of Rome] by making provision for the needs of *workers*, enjoyed through their status as *economic* actors, and framed, initially at least, in terms of the negative impact, on economic integration, of ignoring the fact that workers are also human beings.[51] Thus, regardless of whether the Rome Treaty can be said to have contained social as well as economic aims these would chiefly be shaped by, and built upon, the narrow economic foundations and legal structures of the internal market.'[52] In this

[48] D Edwards, 'The exceptions to the four freedoms: The historical context', in P Koutrakos, N Nic Shuibhne and P Syrpis (eds), '*Exceptions from EU Free Movement Law, Derogation, Justification and Proportionality*', Hart Publishing, 2016, 2.
[49] For discussion, see Edwards (n 46), 4 *et seq*.
[50] Ibidem, 5.
[51] According to some recent comments circulated by the European Commission in the media, it appears that, in spite of the fact that it's been as many as 60 years since the equal pay principle was written into the European Treaties, women across Europe still don't see the laws matching the reality of their daily lives, as they still need to work for 2 months for free compared to their male colleagues. The conclusion of that twit was that progress is (still!) too slow - see https://twitter.com/EU_Commission/status/1193468339051327488/video/1). It is therefore not inadvertent that the push for social measures in the recent years intensified in a collective effort to redress these imbalances and that public procurement is seen as one of the most powerful instruments in this context.
[52] S Reynolds, '*Tipping the scales: exploring structural imbalance in the adjudication of interactions between free movement and fundamental rights'*, at https://livrepository.liverpool.ac.uk/2009399/1/ReynoldsSte_Feb2015_2009399.pdf (last visited December 3, 2019), 191.

embryonic stage, labour rules were, thus, just a matter of 'market constituting' and a means to achieve the *economic* goals set in the original Treaties.[53]

The Single European Act of 1986[54] ('SEA') had already brought substantial changes[55] to the TEEC 1957, especially by adding new substantive areas of Community competence of which some already "asserted by the European institutions and supported by the Court without any express Treaty basis"[56]. Among them, the *social policy* (where the shift from the mere monitoring postulated by the TEEC to a concrete intervention of the Community was reflected in Article 21 thereof – which empowered the Council to issue directives by which to set "minimum requirements for gradual implementation") and the economic and *social* cohesion, which was supposed to tackle the disparities between various regions of the Community[57].

The Single European Act was in reality the first major revision of the 1957 Treaty of Rome after a long period of political stagnation and bickers among the members of the Community due to the artificiality of the free trade postulated by the TEEC.[58] Its purpose was to reform the institutions in anticipation of Portugal and Spain's accession and speed up decision-making in preparation for the single market. It thus set an objective for the Community to establish, by no longer than 31 December 1992, a single market which it defined as "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured* (…)" (Art.13). Moreover, it introduced, via the new Article 202 TEEC, the so-called 'comitology' procedure which basically allowed the Council to delegate powers to the Commission under a number of specific conditions.

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[53] L Rodgers, '*Labour law and employment policy in the EU: conflict or consensus?*', (2011) 27 International Journal of Comparative Labour Law and Industrial Relations 4, 387, 390.

[54] OJ L 169, 29.6.1987, p. 1–28.

[55] One of the most important reforms referred to the Council, which could thenceforth adopt its decisions with a qualified majority, as opposed to the unanimity rule that governed its functioning until then. The reform went even further, and, in 1992, the debates of the Council (in particular those dealing with legislative acts) became public. This change proved crucial for the evolution of the Community and the consolidation of its single market. As J H H Weiler concluded in the wake of the 1992 European Council of Edinburgh which actually launched the practice of public debates, in his material on "*The Transformation of Europe*" ((1991) 100 Yale Law Journal 8, 2403-2483), "1992 changes this in two ways. The first is a direct derivation from the turn to majority voting. Policies can be adopted now within the Council that run counter not simply to the perceived interests of a Member State, but more specifically to the ideology of a government in power. The debates about the European Social Charter and the shrill cries of 'Socialism through the backdoor', as well as the emerging debate about Community adherence to the European Convention on Human Rights and abortion rights are harbingers of things to come. In many respects this is a healthy development, since the real change from the past is evidenced by the ability to make difficult social choices and particularly by the increased transparency of the implications of the choice." (p.2477).

[56] P Craig and G de Búrca, "*EU Law – Texts, Cases, and Materials*", 5th edition, Oxford University Press, 2011, 12.

[57] As per Article 13 SEA.

[58] A Dashwood, D Wyatt, M Dougan et al, *'Wyatt and Dashwood's European Union Law'*, Bloomsbury Publishing, 2011.

All in all, the Single European Act's two main achievements, namely the establishment of the single market (the essence of which is best described in Article 46(2) TFEU) and the cooperation procedure devised for the Council (now adopting its decisions with a qualified majority) and the Parliament (who thus became more influential in the decisional process), although seen by some as a victory of the supporters of the minimalism[59], proved to be 'the most important treaty reform in the Union's history.'[60]

Another notable merit of the Single European Act was that of departing from the so narrowly defined scope of the TEEC to include new provisions, such as those on the social and regional policies of what was then the Community, which bestowed new, autonomous[61] competences on the EC's institutions and sparkled an endless debate between the neo-liberal supporters and the adepts of the European social model on the (non)supremacy of the economic values versus the social ones. This debate still grinds on the EU's legal and political structure, although things changed fundamentally since the adoption of the Single European Act.[62]

But the first truly major step in this direction was taken by the Treaty on European Union signed at Maastricht in 1992 (TEU 1992)[63] which, building on the inchoate provisions of the Single European Act, put significantly more weight on the importance of the social factor in the economy of the Community integration.[64] This document laid the basis of the European Union as we know it today, on three key pillars: (a) the single European market; (b) the common foreign and security policy; and (c) the cooperation in the field of justice and home affairs. Its main purpose was to establish a European Monetary Union and to introduce certain strategic elements of a *political* union (such as the citizenship and a common foreign and internal affairs policy)[65].

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[59] See for ex. G Bermann, '*The Single European Act: A New Constitution for the European Community?*' (1989) 27 Columbia Journal of Transnational Law, 529.

[60] D Chalmers, G Davies, G Monti (eds), '*European Union law. Texts and materials*', Cambridge University Press, 2014, 22.

[61] P Craig, 'Development of the EU', in C Barnard and S Peers (eds), "*European Union Law*", Oxford University Press, 2017, 19.

[62] '*The only way that any social policy could be brought into the European arena was to demonstrate its repercussions for the functioning of the market*.' (R R Visinsky, *'History of European Social Policy - The social dialogue from Rome through the Single European Act (SEA) and the Treaty of Maastricht (TEU)'*, 2000, at https://www.pitt.edu/~heinisch/eu_integ2.html, emphasis added).

[63] OJ C 191 of 29 July 1992.

[64] For details, see for ex. M Colucci, E De Smijter, C Engels *et al*, "*Institutional changes and european social policies after the Treaty of Amsterdam*", Kluwer Law International, 1998.

[65] 'Maastricht treaty was the successor to both the Common Market launched in 1958 and the integrated customs union created by the Single European Act of 1987. By modifying the previous treaties - Paris, Rome and Single European Act, the initial economic objective of the Community, building a common market, was outstripped and, for the first time, a distinctive vocation of political union was claimed' - S G Shenoy, '*Treaty of Maastricht: A positive step towards integration?*', (2012) 2 Jindal Journal of International Affairs 1, 3.

A new set of measures, aiming to strengthen the role of the Union in this area, was thus proposed. According to Article B from Title I of the TEU 1992 (the source of inspiration of which was, without any doubt, Article 130a introduced by the Single European Act of '87), one of the main objectives of the new "Union" was "*to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union (...)*", but also to "*strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union*" (emphasis added).

Additionally, Article F made for the first time reference to the rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms as genuine "*principles of Community law*".

An important boost in the evolution of the internal market was nevertheless brought by Article G TEU 1992 – which, altering quite substantially the initial wording of Articles 2 and 3 TEEC, referred (in an attempt to acknowledge the importance, for the Community and the integration process, of the promotion of social values in the economic context of the common market) specifically to the role of the Community in the "*promot[ion] throughout the Community (...) [of] a high level of employment and of social protection, [as well as in] the raising of the standard of living and quality of life, and [for the] economic and social cohesion and solidarity among Member States*" (emphasis added). For this purpose, said Article G, the activity of the Community must include "*(i) a policy in the social sphere (...)" and "(j) the strengthening of economic and social cohesion", as well as "(o) a contribution to the attainment of a high level of health protection" and "(p) a contribution to education and training of quality and to the flowering of the cultures of the Member States*" (emphasis added).

Moreover, building on the principles already set forth in the Single European Act, the TEU 1992 came with an entire new chapter on the European economic and social cohesion (which actually constituted the foundation of the general Cohesion Policy[66] of the Union) and another one on the Union citizenship (where the right to move and reside freely within the territories of the Member States occupied a central place).

The TEU 1992 came with also two new Titles (VIII and X) dedicated respectively to "Social Policy, Education, Vocational Training and Youth" (which

[66] More on this, at http://ec.europa.eu/regional_policy/en/faq/#7.

strengthened to a certain extent the role of the Community by allowing the Council to set, by the means of directives, minimum standards and requirements which all Member States ought to have observed) and "Public Health".

Meanwhile, the Protocol on Social Policy and the Agreement on social policy[67], as well as the Protocol on Economic and Social Cohesion[68], which accompanied the Treaty of Maastricht, provided, in clear terms, for the active implication of the Community in several areas of social interest, among which "*the integration of persons excluded from the labour market, without prejudice to Article 127 of the Treaty establishing the European Community*" (emphasis added), and pointed to the need for a "proper social protection". According to the Agreement on social policy, the Community was bound to gain full competence (through its Council) in the following areas: (i) social security and social protection of workers; (ii) protection of workers where their employment contract is terminated; (iii) representation and collective defence of the interests of workers and employers, including co-determination; (iv) conditions of employment for third-country nationals legally residing in Community territory; and (v) financial contributions for promotion of employment and job-creation, without prejudice to the provisions relating to the Social Fund, while the Protocol on Economic and Social Cohesion acknowledged outright that "the promotion of economic *and social cohesion* is vital to the full development and enduring success of the Community", and underlined "*the importance of the inclusion of economic and social cohesion in Articles 2 and 3 [TEU 1992]*" (emphasis added).

However, under the TEU 1992, the principle of an open market economy with free competition remained dominant (see Article 3a and all the references to it in the text of that Treaty) while the core social policies remained an *internal* matter of the Member States.

All in all, starting with 1992, the "internal market" concept started to gain substantial traction and the integration process that characterizes the internal market moved to other areas than those of a purely economic nature.[69] Piece by piece, this process engulfed

[67] For a detailed discussion, see G Falkner, '*The Maastricht Protocol on Social Policy: theory and practice*', in (1996) 6 Journal of European Social Policy 1.

[68] More on it, in J Mortensen (ed), '*Improving economic and social cohesion in the European Community'*, Springer, 1994.

[69] The creation of a single, internal market and the repeated waves of EU enlargement are, in general, assessed as the main drivers of change (that is, evolution) in the social sphere, as the significantly increasing (free) movement of peope – especially workers – and businesses across the EU, which was a direct effect thereof, has not only generated specific social problems but also offered incentives and opportunities for many actors to contest the existing social status and fight for its reformation. For discussion, see M Bernaciak (ed), '*Market expansion and social dumping in Europe'* (Routledge Advances in European Politics), 1st Edition, Routlege, 2015. See also E Spaventa, *'Free movement of persons in the European Union. Barriers to movement in their constitutional context*', Kluwer Law International, Alphen aan den Rijn, 2007.

punctual non-economic objectives[70], such as the promotion of fundamental social rights and labour policies.[71]

On a larger scale nonetheless, once the Treaty of Amsterdam[72] was adopted, the social initiative postulated by the Treaty of Maastricht and the accompanying Protocols, where social protection and social cohesion shared a place in the front line, became a concrete full objective of the Community while employment, culture and health, areas of concern for all Community policies and actions.[73]

The Treaty of Amsterdam made, again, explicit reference to the European Social Charter of 1961 but also to the Charter of Fundamental Social Rights of Workers of 1989. A discrete new recital was thus added to the Preamble to TEC to "confirm" "[the] attachment [of the Member States] to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers" and to reaffirm their *"[determination] to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.*" (emphasis added). This last paragraph only anticipated the future even stronger changes in the initial paradigm postulated by TEEC by hinting at the idea of an integration that goes beyond the purely economic zone to engulf also social policy aspects and environmental issues.

[70] M Ross, '*Promoting solidarity: From public services to a European model of competition?*', in (2007) 44 Common Market Law Review 4, 1057 et seq.

[71] For a dense presentation of this evolution, see P Craig and G de Búrca, "*EU Law – Texts, Cases, and Materials*", 5th edition, Oxford University Press, 2011, 605-609.

[72] OJ C 340 of 10.11.1997.

[73] These changes to the original Treaty framework made, slowly but determinedly, room for the enacting of a substantially growing EU social policy, bringing the role of the social partners to the fore and facilitating the adoption of an important set of secondary legislation which has only reaffirmed the role of the EU in promoting employees' rights and in combatting social dumping or aspects of social exclusion, as well as in challenging sensitive issues like discrimination, racism and xenophobia – see, for details, J Shaw (ed), *'Social law and policy in an evolving European Union*', Hart Publishing, 2000. Under the new EU regulatory framework, domestic and incoming workers were soon to be subjected to the same standards. As a result, they became engaged in 'a process of merit-based competition, in which superior merits [were able to bring net advantages]. To that extent, national treatment [started to generate] (…) extra competitive pressures on domestic workers, who [could] (…) be displaced by incoming workers showing superior merits. However, [in the new EU constitutional arrangement,] these extra competitive pressures are likely to be limited and not be felt as 'unfair', since they arise on a level-playing field.' (A Saydé, 'Freedom as a source of constraint: Expanding market discipline through free movement', in P Koutrakos and J Snell (eds), *'Research Handbook on the Law of the EU's Internal Market'*, Edward Elgar, 2017).

Unfortunately, this was not accompanied by a much-needed clarification as to the meaning of that "sustainable development" while the economic and social progress seemed to be still "parallel".

Anyway, according to the Treaty of Amsterdam, one of the new main objectives of the Union was "[*the promotion of an*] *economic and social progress and* [*of*] *a high level of employment and* [*the achievement of a*] *balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion* (…)." (emphasis added). To this purpose, Article 2 TEEC was reworded accordingly: "*The Community shall have as its task, by establishing a common market (...) and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, (...) the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States*." (emphasis added).

The evolution from the TEEC 1957 to the Treaty of Amsterdam is obvious, social progress and social protection and cohesion walking now hand in hand with the economic development towards full integration. More importantly, to Part I of the TEEC was added a new Article, 7d, of an evident import in the equation of the single market: "*Without prejudice to Articles 77, 90 and 92, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions*." (emphasis added).

Basically, the Treaty of Amsterdam made, in and through this Article, for the first time, reference (at *this* level) to a possible shift in the balance between economic and social aspects caught in the functioning of the common market stating that, at least inasmuch as the services of general economic interest are concerned, their mission should take precedence over any other purposes and principles, including, for example, the internal market and competition rules. This idea has been perpetuated throughout all the ensuing stages of the EU's evolution, to be carried over to Article 16 TEC and now included as such in Article 14 TFEU.

What's even more, the Treaty of Amsterdam introduced a whole new chapter (Title VIa), dedicated to "Employment" as a distinctive policy at the Union level.[74] According to this chapter, "Member States and the Community shall, in accordance with this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article B of the Treaty on European Union and in Article 2 of this Treaty" (Article 109n) while, *nota bene*, "*The Community shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected. The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Community policies and activities*." (Article 109p – emphasis added).

Similarly, the new Article 128(4) stated that "*The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures*.", while, according to the revamped Article 129(1), "*A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities*." (emphasis added).

So, although the substance of the social policies (including those to do with employment) was left on the shoulders of the Member States, the Community was now effectively empowered to intervene and support national initiatives and measures by, for example, facilitating an active cooperation between Member States and the exchange of good practices, by issuing guidelines or setting minimum standards and requirements or, more importantly, by intervening *directly*, via secondary laws issued in those areas falling into its direct competence (such as the functioning of the common market and competition). To this extent, the second paragraph of Article 109p cited above is of an essential importance, as it not only encourages, but even *obliges* the European institutions to shape their policies and actions in line with this particular desiderate. This, on the other hand, means that the same institutions cannot take (in those areas of direct competence) measures which to impinge on the reaching of a high level of employment by, for example, leading instead to businesses closure or job losses etc.

[74] Essentially, '[t]he introduction of a separate employment chapter in the Treaty of Amsterdam has to be understood not so much as a 'functional' spill over, bust as an effect of "political" spill over of EMU. (…) In a political sense, this employment policy can therefore be seen as a "correction" of Maastricht.' – see A Hemerijck and J Berghman, 'The European social patrimony – deepening social Europe through legitimate diversity', in T Sakellaropoulos and J Berghman (eds), '*Connecting welfare diversity within the European social model*', Intersentia, 2004, 40.

Moreover, the Treaty of Amsterdam took over the aim expressed in the Protocol on Economic and Social Cohesion which accompanied the Treaty of Maastricht, changing its Article 118 to refer specifically to "*the integration of persons excluded from the labour market, without prejudice to Article 127*" (emphasis added) as one of the key areas where the Community undertook to support and complement the efforts made at national level by the Member States.

Maybe not surprisingly, in the same year (1997) the Commission released a comprehensive Single Market Action Plan[75] in which the delivering of a single market for the benefit of all citizens was one of the four main goals defined thereunder.[76] This strategic target was to be achieved through actions directed towards protection of social rights, consumer rights, health and environment, and the right of residence[77].

The Treaty of Nice[78] came, in turn, with an updated Social Policy Chapter where the "modernisation of social protection systems" and "the combating of social exclusion" were added to the list of measures which the Council could have adopted in order to encourage the cooperation between Member States (under Article 118 TEEC and then TEC).

In the revamped Article 137 TEEC, it was thus added that the Council "may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. *Such directives shall [however] avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.*" (emphasis added). The Treaty of Nice came nonetheless with a disclaimer: "*The provisions adopted pursuant to this Article: - shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof; [and] - shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.*" (emphasis added). It was hence once more underlined the fact that social policies and, in particular, those on the social security systems, were the competence of Member States, the Community having just the role of a coordinator.

[75] Action Plan for the Single Market SEC(97) 1 final.
[76] The enabling of "the single market [in order for it] to function fully and effectively by setting out in detail the priority measures to be taken to improve the functioning of the single market by 1 January 1999" was the prime objective of this Plan.
[77] Action Plan, p.9-11.
[78] OJ C 80 of 10.3.2001.

Not much later, in 2000, the Lisbon European Council[79] insisted on the fact that "*the European social model, characterized in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based, beyond the diversity of the Member States' social systems, on a common core of values.*"[80] The same Council stressed that it is essential that the Union becomes "the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion" and insisted on the need to modernize the European social model through an "active welfare state" as a measure to ensure that "the emergence of this new economy does not compound the existing social problems of unemployment, social exclusion and poverty". This was, insisted the Council, to be done by a better access to education, a more active employment policy as well as through the modernization of the relevant social protection systems and an enhanced promotion of social inclusion. In fact, scholars define the set of principles launched during the Council of Lisbon - and which marked the future evolution of the single market - the "social-investment approach", a shift which practically ended the supremacy of the 'neo-liberal regime' which dominated hitherto the EU's political environment and consolidated the instauration of the social policy values at the highest EU level.[81]

Meanwhile, a long array of Council meetings averred the importance of social values and social cohesion in the economy of the single market. It is worth mentioning here the Feira European Council of 19-20 June 2000, or the Nice European Council of 7-9 December 2000 (which unveiled a "[n]ew Impetus for an Economic and Social Europe" and approved the European Social Agenda crafted by the Commission that pointed to an "*indissoluble link between economic performance and social progress*" where economic growth and social cohesion were seen as "*mutually reinforcing*" – emphasis added), or, finally, the Stockholm European Council of 23-24 March 2001 which addressed the same issues and restated that there was "*full agreement that economic reform, employment and social policies were mutually reinforcing*" while "*a dynamic Union should consist of active welfare states*" (emphasis added). The Commission's Review of the Internal Market Strategy

[79] Lisbon European Council, 23-24 March 2000.
[80] Council, Presidency Conclusions, Nice European Council 7-9 December 2000, SN 400/00, Annex I - European Social Agenda.
[81] See F Martinelli, "Social services, welfare states and places: an overview", in F. Martinelli, A, Anttonen, M. Mätzke (eds.), '*Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity*, Elgar Publishing, UK, 2017, 19.

(2000)[82] gathered all these ideas and concluded that "the internal market should be made economically effective, but it should also foster job creation, social cohesion, and safety".[83]

This was doubled by a sustained effort from the European Commission which, during a short period of time, gathered together a coherent set of ideas which were further concretised in several materials of great import for the future development of the new European social-economic order. Among them, the Social Agenda of 2005[84] and the Community Lisbon programme (issued in the same year)[85].

It is only natural that the Treaty of Lisbon[86] picked up on all these ideas and, building on the actions already mentioned, took the reform to a new, much deeper level[87], changing the original paradigm in its very substance.[88] It actually capsized the rapport between economic and social values[89] (departing thus from the traditional liberal constitutionalism postulated by the Treaty of Maastricht), referring *in concreto* to a "highly competitive social market economy" and insisting on the role of solidarity[90] in the new EU context. Thus, according to Article 2(3) TEU, "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. (...). It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States.*", while pursuant to Article 2(5), "*In its relations with the wider world, the Union shall (...) contribute to (...) the sustainable*

[82] COM(2000) 257 final.
[83] P Craig and G de Búrca, "*EU Law – Texts, Cases, and Materials*", 5th edition, Oxford University Press, 2011, 607.
[84] COM(2005) 33 of 9.2.2005.
[85] SEC(2005) 981 of 20.7.2005.
[86] OJ C 306 of 17.12.2007.
[87] F Costamagna, '*The European Semester in action: Strenghtening economic policy coordination while weakening the EU social dimension?*', LPF Working Papers, Centro Einaudi, 5/13, at http://www.centroeinaudi.it/lpf/working-papers.html, 7.
[88] As rightly said in the literature, 'The Treaty of Lisbon 2009 heralded a re-calibration of the social-economic balance of values in the EU Treaties' – see A Sánchez-Graells and E Szyszczak, 'Modernising social services in the single market: putting the market into the social', in L M Beneyto and J Maillo (eds), '*Fostering growth: reinforcing the internal market'*, CEU Ediciones, 2014, 2.
[89] According to the newly introduced Article 5a, "In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.". This Article later became Article 9 TFEU.
[90] For the place of solidarity in the new European environment and its role in the shaping of the Social Europe, see A Biondi, E Dagilytė and E Küçük (eds), "*Solidarity in EU Law: Legal Principle in the Making*", Edward Elgar Publishing, 2018.

development of the Earth, solidarity (…) among peoples, free and fair trade, eradication of poverty and the protection of human rights (…)" (emphasis added).

These provisions have been complemented by a set of other functional considerations later gathered into what today is the Treaty on the Functioning of the European Union (TFEU). Thus, according to Article 7 TFEU, "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.*" In the light of this text, Article 8 TFEU explains that "*In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.*" while, according to Article 9 TFEU, "*In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*"[91] Moreover, according to Article 10 TFEU, "*In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*"

And, as a proof of the importance of the social policies in the context of the internal market and the economic structure that it entails[92], the Treaty of Lisbon was accompanied, and soon followed, by a number of highly important Protocols, of which it is worth mentioning Protocol (No 26) on services of general interest (SGIs)[93], Protocol No. 27

[91] This Article is construed by some to compel '*the EU legislator to perform, already during the legislative phase, the same balancing exercise that has been mainly used by judges in the application of EU law*.' - F Costamagna, '*The internal market and the welfare state after the Lisbon Treaty*', 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 13 (emphasis added). If so, it may be seen as a sufficient justification for the inclusion, in the 2014 Directives on public procurement, of the so many provisions concerning the possibility to pursue of social policy goals.

[92] The repeated waves of transformations that took place, along the years, at the very core of the EU's constitutional structure levelled the field and brought about new and more and more complex models of social solidarity. Moreover, the traditionally *exclusive* competence of the member states over social policies and measures has, as a result of all these reforms, been gradually curtailed and hollowed out, and these states realised that they have in sooth become "*semi-sovereign* welfare states" whose policy choices are subject to an increasing scrutiny under Community law. But, as the assault of 'the social'over the traditional economic values of the internal market surged in intensity with each wave of reforms, the clash between values at the very EU's constitutional order remained unsolved. Today, this clash is a hot topic more than ever before. For a discussion, see M Dougan and E Spaventa (eds), *'Social welfare and EU law'*, Volume 9 of Essays in European Law, Bloomsbury Academic, 2005.

[93] Where its signatories insisted on the importance of these services in the new European arrangement. On the other hand, Protocol 26 clarified that "The provisions of the Treaties [on SGIs] do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest. [NESGIs]." and insisted that "The shared values of the Union in respect of services of general economic interest (…) include in particular: [i] the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the

on the internal market and competition[94] and Protocol No. 28 on economic, social and territorial cohesion[95]. All these texts are ordained to give substance to the coherent social policy consecrated at the primary law level and to offer a powerful tool for the promotion of a well-defined set of fundamental social values across all areas of action and on all tiers, ensuring a proper implementation of this policy[96] (even if to the detriment of other fundamental values that sit at the foundation of the functioning of the Single Market and bear an economic nature[97]).

But the greatest innovation (and also conundrum) proposed by the Treaty of Lisbon is, undeniably, the so elusive '*social market economy*' construction. Forged during the political negotiations that took place around the Treaty of Lisbon and born as an alleged alternative to the 'social state' consecrated by Article 20 of the German Constitution[98], neither the TEU nor the TFEU offer a proper definition of the concept of this term, or at least leave sufficient indications on how to construe and apply it. Nor has the CJEU touched so far

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needs of the users; [ii] the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; [iii] a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights."

[94] Ascertaining the crucial importance of undistorted competition for the evolution and functioning of the internal market as set out in the Treaty on European Union.

[95] Which recalled that the objective of promoting economic, social and territorial cohesion and solidarity between Member States lies deep within the core of the Treaty on European Union, although such cohesion figures among the areas of *shared* competence of the Union, and also that the provisions of the Treaty dedicated to, specifically, economic, social and territorial cohesion *as a whole* "provide the legal basis for consolidating and further developing the Union's action in the field of economic, social and territorial cohesion".

[96] One of the greatest tools in the implementation of this policy is social innovation, which has of late been promoted and supported via a surging number of channels. And, as the European Commission has witnessed in its study "Social Innovation – A Decade of Changes" (available at https://espas.secure.europarl.europa.eu/orbis/document/social-innovation-decade-changes), "The recent dynamic combination of interests, institutions and ideas for the promotion of social innovation has been embedded in wider political, technological and economic changes which have affected and will continue to affect the development of social innovation in the current decade".

[97] In spite of these ambitious goals, the single market remains an arena for political fights. Its completion is therefore problematic, especially owing to the inevitable clash between the social and the economic dimensions thereof. In this context, more and more voices affirm (and confirm) that, 'Judging by the politics (…), there is not much of a commitment to deepen the Single Market. National governments are unwilling to conform their national legislation to basic Single Market rules. Member states, without any exceptions, still retain many protectionists and discriminatory provisions. Likewise, EU policymakers enact legislation that contradicts the Single Market Program and quite often fail to propose reforms that conform to the basic design of a market. (…) [On the other hand,] the European economy has undergone profound structural changes, and as the economy has shifted profile, it has moved further into sectors and areas where there is very little of the Single Market.' - F Erixon and R Georgieva, '*What is wrong with the Single Market?*', European Centre for International Political Economy, Working Paper No.1/2016.

[98] J Joerges, F Rödl, "*Social Market Economy" as Europe's Social Model?"*, European University Institute, Florence, 2004, 10 et seq. For an in-depth discussion on the possible sources thereof and many possible interpretations of its pith and purport, see M von Hauff, '*From a social to a sustainable market economy. A new paradigm for the 21st century*', The Development and Peace Foundation, Policy Paper 31, May 2009, J Mulder, *'(Re)Conceptualising a social market economy for the EU internal market'*, in (2019) 15 Utrecht Law Review 2, 16 *et seq* or A Gerbrandy, W A Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: how 'social' is public economic law?'*, in (2019) 15 Utrecht Law Review 2, 32 *et seq*.

on this issue throughout its case law. Yet it continues to be heavily used in the official documents coming from the EU institutions and assumed as such by academia and practitioners.[99]

Notwithstanding this lack of guidance at the primary (or even the secondary) law level, the material elaborated by the European Commission in 2013 under the name "Social economy and social entrepreneurship - Social Europe guide"[100] insists on the essential role played by social enterprises in the context of the recent economic crisis but also on the true pith of the Europe 2020 Strategy[101], underlining the importance (for the EU and its internal market) of the shift to an essentially social economy and the innovative potential of such enterprises. The Social Europe Guide tries to demonstrate that, in the context offered by Article 3(3) TEU (ex Article 2(3) in the Lisbon version), one of the most effective ways to facilitate the access of social enterprises to the EU markets of goods and services is to open up the public procurement market to this kind of enterprises. Nonetheless, it concedes that a full use of the instruments offered by the public procurement legal framework with the purpose to facilitate the access of social enterprises to public contracts is somewhat hindered by, on the one hand, a generalized lack of know-how among CPOs – who cannot integrate in a functional manner concrete social criteria into the procurement equation – and, on the other hand, a lack of skills, time and resources among bidders – especially social enterprises who often are SMEs or NGOs[102]. In fact, this only evinces the need for even more additional guidance from the Commission.[103]

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[99] See for example, Mario Monti's message contained in his letter to President Barroso, published in "A New Strategy for the Single Market at the Service of Europe's Economy and Society. Report to the President of the European Commission Jose Manuel Barroso, By Mario Monti", 9 May, 2010 - Ref. Ares(2016)841541 - 17/02/2016, which considered that "*The crisis has induced some critical reconsideration of the functioning of markets. It has also enhanced concerns about the social dimension. The Treaty of Lisbon (…) make[s] it explicit for the first time – though the principle was already clearly set out in the preamble of the Treaty of Rome – that 'the Union (…) shall work (…) for a highly competitive social market economy.' All this calls for a fresh look at how the market and the social dimensions of an integrated European economy can be mutually strengthened*".

[100] Vol.4 - ISSN 1977-2343, available la http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7523 (further referred to as the 'Social Europe Guide').

[101] Europe 2020 Strategy, set out in the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" (the "Europe 2020 Strategy"), COM/2010/2020 final.

[102] The Social Europe Guide, 94.

[103] In reality, the Commission *did* released, in 2010, a rather comprehensive handbook on how to use social considerations in public procurement. The document, named "*Buying Social: A guide to taking account of social considerations in public procurement*" - SEC(2010) 1258 (Luxembourg: Publications Office of the European Union, 2011, ISBN 978-92-79-18738-4), was drawn up on the basis of the older Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement - COM/2001/0566 final, and is available at http://europa.eu/rapid/press-release_IP-11-105_en.htm. This document is currently undergoing a substantial reformation.

Anyway, according to the Social Europe Guide, the term "social market economy" used in the Treaties has deep roots in the specific "socially just"[104] model of German origin born after WWII to respond to a stringent need for trust in the new democratic regime built on the ashes of the former National Socialism structure.

Recent studies show that 'the "social market economy" as it actually exists is 'based on free markets but, at the same time, includes elements of social balancing'[105] as it 'has drawn more on social democratic than ordoliberal influences'[106]. That system was originally devised to appease the clash of two fundamentally antagonistic principles, *ie*, that of free competition (of a clear economic nature - and *sine-qua-non* in a young democratic economy that was about to burgeon, especially owing to the trade and procurement rules imposed by the U.S. under the Marshall Plan) and that of social security (so much needed after the war). The harmonization of the two principles in the original social market economy scenario should have taken place by an active involvement of the State (a particular form of interventionism) both in the promotion of a free trade (in fact, competition) and in the insurance of a well-balanced social development. This approach is now seen as the "third way", between the capitalist "laissez faire" (based on a minimum intervention of the State) and centralized economies (where the State dictates and controls the entire economic development)[107].

Most of the principles that characterize and define social market economy have become an integral part of the European social model which, in turn, sits on the idea of "social cohesion" and lays at the foundation of the new Treaty on European Union. And, over time, this concept evolved (together with the European social model itself) to a much comprehensive meaning and a much larger ambit, decisively influenced by the recent economic crisis and its severe consequences which necessitated the ambitious recovery (not just economic, but also – to at least the same extent – social) plan laid down in the Europe 2020 Strategy[108]. As the Commission said in its Social Europe Guide, "*Over twenty years after the creation of the single market and ten years after the introduction of the euro, restoring economic growth in Europe requires the rethinking of the founding social pact, also*

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[104] A Heise and Ö G Heise, '*The Social Market Economy revisited. The German variety of capitalism in retrospect*', (2013) 1 Izmir Review of Social Sciences 1, 11.
[105] K D John, '*The German social market economy – (still) a model for the European Union?*', Theoretical and Applied Economics Series, 2007, 3.
[106] Heise and Heise, (n 87) 10.
[107] For more on this "third way", see also M E Porter and M R Kramer, "*Creating shared value*", Harvard Business Review, January-February 2011, or D Ferri and F Cortese (eds), '*The EU Social Market Economy and the law. Theoretical perspectives and practical challenges for the EU*', Routledge, 2018.
[108] Social Europe Guide, 14.

in the context of new global developments. The new Europe 2020 strategy originated from this need and recognised that, in order to overcome the current economic crisis, the recovery cannot be based on a 'business as usual' approach, as simply going back to the way things worked before the crisis is not possible." (n 45, emphasis added).

On the other hand, it is important to note that, at both the (EU and national) institutional and the academic levels circulates another term, similar but not identic to that of social market economy. It is that of "social economy". The realms of the two concepts overlap only partially (social economy appears to be actually a part of the larger social market economy concept or, at their very essence, an instance thereof) yet the use, especially in the area of public procurement, of the instruments comprised in either one or the other became of late interchangeable and as flexible as possible. A study prepared in 2016 for the European Parliament's Committee on Internal Market and Consumer Protection (and named "Social Economy")[109] acknowledged that "*the potential of the social economy to be an effective driver of social cohesion, productivity through jobs and more generally of sustainable economic development through the provision of services cannot only rely on social economy actors' internal motivation, organisational structures and entrepreneurial capacities. Multilevel public authorities' interventions, directed at reducing the comparative disadvantages that still prevent social economy actors from fostering entrepreneurship and competitiveness, are crucial for the development of the social economy. Different examples of (replicable) public authorities' good practices have been identified at different levels of the EU system of governance and in respect to different typologies of interventions*." (emphasis added). Among them, the "improvement of legislative environment". In this regard, the study underlines that "Tailored normative interventions at both EU and national levels are essential to create an eco-system conducive to social economy growth and able to strengthen the economic and social impact of the sector. While comprehensive sets of legislation on social economy are still lacking in many Member States, as well as at the EU level, specific measures have been adopted in order to support the work of social economy entities in Europe. *In particular, normative advancements have been made by EU institutions and some EU countries, aiming towards the promotion of a strategic approach to 'social value' procurement. Especially in times of spending reviews, the principle of value for money is an over-riding factor for all public-sector procurement decisions. Embedding social value (i.e. the wider social and economic benefits that can be secured through public sector purchasing)*

[109] IP/A/IMCO/2015-08, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578969/IPOL_STU(2016)578969_EN.pdf

in public procurement contributes significantly to the implementation of the value for money principle, because it ensures that public money is used in a way that achieves the most sustainable and widest possible impact."[110]

Anyway, while shunning a clear definition of the "social economy", the authors of the study conclude that "the social economy in Europe is made up of private socio-economic initiatives that, regardless of their specific legal status: a) produce goods and services for both market and non-market purposes and redistribute and/or reinvest revenues and incomes; b) are based on values of sustainability, solidarity, trust, reciprocity, local development, social cohesion and inclusion; and c) aim at the reinforcement of social cohesion, awareness and citizenship, through internal and external collaboration and collective efforts. These indicators do not only allow the description of the traditional social economy organisations, but also permit the identification of brand-new social economy operators, on the basis of both their internal dynamics and their external productive aims"[111].

Moreover, the Study ascertains that the 2014 package Directives on public procurement "*introduced improved rules, requiring public authorities to take social and environmental aspects into consideration, in specifications and when assessing tenders. New important possibilities are offered to social firms within the new European directive on the award of public procurement. These include: a provision on reserved contracts in national law, offering contracting authorities the choice to restrict some tendering procedures for the purchase of some goods, works or services to economic operators whose main aim is work integration of disadvantaged or disabled people. This new proposal is expected to offer a more effective and sustainable integration of disadvantaged persons and persons with disabilities; a Social Clause, requiring that bids are evaluated not only on the basis of price, but also on the basis of other criteria, such as social and environmental considerations; and a reserve for social services contracts*."[112] – emphasis added.

Finally, there is another concept that has recently started to gain traction, that of "shared value", where "value" must be understood as the ratio between costs and benefits, both assessed on a macro scale, that is, with the inclusion of *all* the consequences which the actions of any undertaking actually deliver for the community in which that entity activates[113].

[110] Social Economy Study, 61, 62 - emphasis added.
[111] Ibidem, 27.
[112] Ibidem, 61.
[113] See, for ex., the Social Europe Guide, 18 *et seq*. The concept of shared value comprises "policies and operating practices that enhance the competitiveness of a company *while simultaneously advancing the*

To conclude, one may say that a structural feature of the social market economy postulated by the Treaty of Lisbon is the fact that it pursues economic development by promoting open economy and free competition, but not at any costs (or, at least, only to the extent where fundamental social values are not harmed). And, vice-versa, the economic development entailed by the social market economy is bound to be nurtured and reached on an essentially social basis, *ie*, social policy objectives are an intrinsic part thereof so that the shared value of economic relationships to be effectively reflected in strong community benefits. Even under the social market economy structure, the tensions between economic and social are evident. What is, however, certain, is that the primary law of the Union now offers generous leeway for non-market values (such as health, safety and employment or other fundamental *personal* rights) even within the internal market legislation[114], subject however to the pre-existence of a purpose which is in the general interest.[115]

In the post-Lisbon era[116], social aspects are no longer 'exceptions' to the internal market rules (to the contrary, they have become an element placed on a par with the competition values) and should not be measured against the traditional 'rule of reason'. Moreover, national rules and practices have become measurable against the "social" elements that defined the social market economy just as much as they are measurable against the specific market liberalisation criteria.[117]

Moreover, owing to the decisive changes that took place within the primary laws of the Union ― as pointed above ― which were enriched with more and more chapters that gave the European institutions important attributions in key social areas, the European legal framework got new shapes and dimensions. One of the consequences of these changes is the consolidation of a substantive European social model (on which we will elaborate in

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economic and social conditions in the communities in which it operates. *Shared value creation focuses on identifying and expanding the connections between societal and economic progress*." (emphasis added).

[114] B de Witte, "Non-market values in internal market legislation', in N. Nic Shuibhne (ed) - "*Regulating the internal market*", Edward Elgar, 2006, 75.

[115] Craig and de Búrca, '*EU law: Text, cases and materials'*, 5th ed., Oxford University Press, 2011, 607.

[116] Characterized by a repeated, yet still hesitant, assault of the 'social' into the 'economic'. This was, in principle, occasioned by the creation, in 2010 of the European Semester (a genuine 'code of conduct for the implementation of the Stability and Growth Pact', later consolidated by the adoption of the so-called 'six-pack') which engendered more substantial insights into the social dimension of the integration process (or, rather, into the *social* effects of the *economic* integration process) – see for ex. F Costamagna, '*The European Semester in action: Strenghtening economic policy coordination while weakening the EU social dimension?*', LPF Working Papers, Centro Einaudi, 5/13, at http://www.centroeinaudi.it/lpf/working-papers.html, 9 *et seq*. For a general discussion, see also M Hallerberg, B Marzinotto, G B Wolff, '*An assessment of the European Semester'*, a Study for the European Parliament's Committee on Economic and Monetary Affairs, IP/A/ECON/ST/2010-24, Brussels, 2012.

[117] M Ross, "SSGIs and solidarity: constitutive elements of the EU's social market economy?" in U Neergaard, E Szyszczak, J W van de Gronden and M Krajewski (eds), '*Social services of general interest in the EU*', T.M.C. Asser Press, 2013, 99.

the ensuing chapters). According to the European Commission's '*Buying Social*' guide, '*One of the major benefits of SRPP, as already seen, is that it can be used by public authorities to further the European social model.*'[118]

Based on these integrated efforts, the evolution of the internal market chart actually moved in two directions, undermining on several levels the competence of the Member States in the crafting of their social policies: on the one hand, the scope of the rules adopted at the EU level on single market and competition policy (as an expression of the EU's "most enduring and high profile (…) positive legislative competences"[119]) has been extended by the CJEU, throughout a constant and decisive case law, beyond the traditional economic borders, to foray into the uncharted realm of the services of general interest which include many social services left in the competences of the Member States[120]; and, on the other hand, an ever-growing interest for the instituting of a minimum but necessary level of control and intervention, at the EU level, in the social field which, again, subversively, left Member States an even smaller room for manoeuvre.

In parallel, on a micro scale, many stakeholders and policy makers are still trapped in the "principal" versus "secondary" dichotomy when talking about considerations / objectives in public procurement[121]. The consequence is that they tend to remain faithful to the idea that contracting authorities should aim at value for money and efficiency in public spending while dispensing with all elements (especially those "secondary" considerations and objectives) that have the potential to discourage competition, render the whole tendering process unnecessarily complex and raise the overall costs, thus compromising the "principal" scope of procurement.[122] This standpoint unfortunately focuses on just the tip of the iceberg.

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[118] European Commission Staff Working Document, "Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement", (19 May 2010) SEC(2010) 1258 final (the Buying Social Guide), p 10, emphasis added.

[119] See M Ross, "SSGIs and Solidarity: Constitutive Elements of the EU's Social Market Economy?" in U Neergaard, E Szyszczak, J W van de Gronden and M Krajewski (eds), '*Social Services of General Interest in the EU*', T.M.C. Asser Press, 2013, 99.

[120] As key components of their national welfare systems. For a general discussion, see F Costamagna, "The internal market and the welfare state: anything new after Lisbon?", in M. Trybus, L. Rubini (eds), 'The Treaty of Lisbon and the future of European law and policy', Edward Elgar, 2011, 382-384.

[121] Habitually, social, as well as green considerations or those to do with innovation and SMEs are referred to, in the relevant literature, as either "secondary" or "horizontal" (S Arrowsmith and P Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in S Arrowsmith and P Kunzlik (eds), '*Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*', Cambridge University Press, 2009), "strategic" (EU Commission), "sustainable" objectives, or just "green and social procurement" (R Caranta & M Tyrbus (eds) "*The law of green and social procurement in Europe*", Djøf Publishing, 2010).

[122] M Trybus – Supporting social considerations through public procurement: a legal perspective", in G Piga, T Tatrai (eds.) "*Public Procurement Policy (The Economics of Legal Relationships)*", Routlege, London, 2016, p.9. The author witnesses a sad, yet explicable, difference of approach vis-a-vis various secondary considerations: "While it could almost be argued that environmental considerations and the promotion of SMEs

In reality, the social market economy on which the Union is propping today is the result of a long evolution which started with the assumption that the mere functioning of the EU cannot sit on, exclusively, competition values, without observing and settling the *social* needs of the EU citizens. In fact, it is exactly the role of public procurement in the Union's economy that has the potential to change the general behaviour, *eg*, by shaping trends, creating industry practice[123] and in the end leading to economies of scale (see for ex. the explanations and numbers offered by the contracting authority in the *Concordia Bus* case[124]).

The truth is that, before changing the law, it is necessary to change traditions. And also stereotypes since, historically speaking, social rights have always raised suspicions, from both an ideological (in terms of the scope and fundamental principles of an internal market based on free competition) and a pragmatic (seen as a burden on public budgets) point of view.[125]

Public procurement is obviously an area of direct intervention (since it is a crucial element of the internal market and is essentially based on competition) and, given its importance in the EU's economy, it may potentially have a huge impact on the evolution of things. We however depart, on this issue, from the standpoint shared by some authors that social preferences should be treated distinctively from all other aspects to do with sustainability and handled with due care as only developed systems (in terms of public procurement traditions and culture) can successfully implement sustainability through public procurement.[126] We consider that, especially in the context opened by the new set of Directives, all contracting authorities should be helped to comprehend the true gist of the shift in the evolution of the single market since the adoption of the Treaty of Lisbon and

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are (no longer) secondary objectives, social considerations clearly still are." The same conclusion was reached by several recent studies ordered by the European Commission – see for ex W Kahlenborn, C Moser, J Frijdal, M Essig, '*Strategic use of Public Procurement in Europe. Final Report to the European Commission*' (MARKT/2010/02/C) - https://op.europa.eu/en/publication-detail/-/publication/05d1e581-571e-43ad-8597-649a7b655bd9/language-en/format-PDF/source-search, who assessed that ''Policy approaches integrating environmental objectives in public procurement generally date back longer, are far more elaborate, and are furnished with more supportive programs than those for socially responsible procurement' (p 48).

[123] Industry practice may be created either directly (via law or policy) or indirectly (via procurement practices). For an in depth analysis of the role of governments and, in general, public purchasers, as buyers and regulators (in and through public procurement), see S Arrowsmith and P Kunzlik, "Public procurement and horizontal policies in EC law: general principles" (in particular, Section 4: "Government as purchaser and government as regulator under EC law"), in S Arrowsmith, P Kunzlik (eds) "*Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*", Cambridge Univ. Press, 2009.

[124] C-513/99, *Concordia Bus Finland*, [2002] ECR I-07213 (see for ex. para 46 *etc*).

[125] A Kornezov, 'Social Rights, the Charter, and the ECHR: Caveats, austerity, and other disasters', in F Vandenbroucke, C Barnard, & G De Baere (eds), '*A European Social Union after the crisis*' Cambridge University Press, 2017, 407.

[126] See for ex. T Tartai, G Piga, "Supporting social considerations through public procurement: economic perspective", in G Piga, T Tartai (eds), "*Public Procurement Policy (The Economics of Legal Relationships)*", Routledge, N.Y., 2016, 12.

became aware of the potential of, and take advantage of, the tools offered by these Directives in that regard. Only a unitary approach and an active involvement in the implementation or use of these tools may bring the sought benefits. Otherwise, the gap between various states and regions of the Union will grow even wider, to the detriment of the whole integration purpose and the very functioning of the single market.

Meanwhile, the concrete weight to be attached to social values and how the "social" and "economic" elements (in terms of competition within the internal market) are to be balanced and prioritized in specific cases remains to be further tested and eventually assessed by the CJEU.

In theory, at least, as Social Europe is on the rise, the provisions included in the new Directives are perfectly fitting the paradigm. Nevertheless, the pursue of such intrepid goals at the EU level[127] has remained, due to the small room for action reserved for the Union in the social policy field, limited to either the soft law (including *ad hoc* forms of OMC - open method of coordination, bilateral accords like MoUs and other specific financing mechanisms *etc*) or some *indirect* pieces of hard law (*ie*, that adopted in those areas of direct competence or other isolated harmonization instruments), owing to an explicit obligation deriving from the Treaties[128] to pursue core social goals throughout all its policies). An extensive discussion on all these aspects is comprised in the following Chapters (especially Chapter IV, on the European social model and Chapter V, on the concrete instrumentality of European public procurement).

2. Changes in the constitutional paradigm brought about changes in the public procurement area: echoes in the CJEU's case law and determined interventions from the European Commission via soft law and hard law

Since public procurement constituted (it still does) one of the most important components of the internal market, the European legislature created (starting with 1971, when

[127] J L Gomez-Barroso, S Barilla and I Harslof, "The European Union policy framework for social services: agendas, regulations and discourses", in F Martinelli, A Anttonen, M Mätzke (eds), "*Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity"*, Elgar Publishing, UK, 2017, 49 *et seq*, or M Matzke, A Antonnen, P Brokking and J Javornik, "Public policy conceptions: priorities of social service provisions in Europe", in F Martinelli, A Anttonen and M Mätzke (eds), "*Social Services Disrupted: Changes, Challenges and Policy Implications for Europe in Times of Austerity*', Elgar Publishing, UK, 2017, 71 *et. seq*.

[128] In particular, Article 9 TFEU.

the first secondary legislation was adopted in this field)[129] a set of mechanisms and instruments which to ensure that all principles that governed the functioning thereof applied as such to also this field.[130] Thus, as public procurement was – and still is one of the areas most threatened by the risk of local favouritisms – the Preamble to Directive 77/62 referred in concrete terms to the "*restrictions on the free movement of goods in respect of public supplies [which] are prohibited by the terms of articles 30 et seq. of the Treaty"* and to the need that *"that prohibition (..) be supplemented by the coordination of the procedures relating to public supply contracts in order, by introducing equal conditions of competition for such contracts in all the member states, to ensure a degree of transparency allowing the observance of this prohibition to be better supervised.*" (emphasis added).

The scope of this Directive was hence limited to the need to secure the free competition in order to safeguard the fundamental freedoms enshrined in the TEEC, and transparency was thus for the first time acknowledged as one of the most important guarantees for the freedom of movement principle, beside the non-discrimination already enshrined in Article 7 TEEC.

Surprisingly though, both the Directives of respectively '71 and '77 contained some embryonic buds of social protection. Thus, Article 23 (E) from Directive 71/305 and Article 20 (E) from Directive 77/62 provided, each, for the possibility reserved to any contracting authority to exclude from "participation in the contract' "*has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority"* (respectively *"the authority awarding contracts*"). In addition to this, Article 28 from Directive 71/305 referred to 'official lists of recognized contractors' as both a general source of information and a means of proof (certified registrations in such lists generating a strong, yet not irrefutable, 'presumption of suitability'), clarifying therewithal that "information which can be deduced from registration in official lists may not be

[129] The Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts - OJ L 185 of 16.08.1971, p.5–14. This was followed, a few years later, by the Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts OJ L 13, 15.1.1977, p. 1–14.

[130] These laws built on the already adopted Directive 66/683/CEE of 7 November 1966 eliminating all differences between the treatment of national products and that of products which, under Articles 9 and 10 of the Treaty, must be admitted for free movement, as regards laws, regulations or administrative provisions prohibiting the use of the said products and prescribing the use of national products or making such use subject to profitability (OJ 220, 30.11.1966, p. 3748–3750), and essentially copied the French legislation, being predominantly concerned with procedural aspects – see for details H Handler, '*Strategic public procurement: an overview'*, WWWforEurope Policy Paper No 28 (2015) (at https://www.researchgate.net/publication/284725763_Strategic_Public_Procurement_An_Overview), 7 *et seq*.

questioned. *However, with regard to the payment of social security contributions, an additional certificate may be required of any registered contractor whenever a contract is offered.*" (Paragraph (3), emphasis added).

But the whole integration project devised by the TEEC was soon challenged by a surging number of serious social issues burgeoning across the whole European area, the overcoming of which seemed rather impossible, owing in particular to the allegedly insurmountable dichotomy between the sacred free movement and competition rules (which felled into the competence of the EC institutions) and those to do with social policies (left in the Member States' realm) on which the Commission had a too week influence (see for ex. Article 118 TEEC). In the meantime, the economic integration pursued by the TEEC was far from completion, as 1969 (which the TEEC had marked as the end of the transitional period) proved a too optimistic deadline.

The dichotomy that burgeoned between the economic integration desiderate (set at the Community's level) and the need to adopt stronger and more efficient measures in the social field (which to respond to acute national tensions) actually put serious pressure on national lawmakers, but also on the courts of law. So, as the absolute economic openness and free trade postulated by the TEEC had to be countered, especially in the social services area, by bulk sets of measures adopted at national level with purpose to secure the free and equal access for all nationals to social services and adequate welfare for those (more and more) in need, the concept of "welfare state" grew to become a concrete reality and started to occupy a significant place in the European context. Member States became thus prone to protecting the delivery of such services (even if liberalized) and, in general, of all services, from the full market rules[131] in order to ensure equal opportunity, equitable distribution of wealth, and public responsibility for all *national* citizens unable to avail themselves of the minimal provisions for a good life.[132]

The Commission had already come up (even before the adoption of the Single European Act) with several pieces of original fragmentary legislation in the social policy area. These had mainly to do with the fight against discrimination in employment[133], the rights of workers (or the self-employed) and their families[134], the right of residence (even

[131] U. Neergaard, E. Szyszczak, J. W. van de Gronden, M. Krajewski (eds.), '*Social Services of General Interest in the EU*', T.M.C. Asser Press, 2013, 5.
[132] "Welfare state", in Britannica Online Encyclopedia.
[133] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, p. 2–12.
[134] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257, 19.10.1968, p. 13–

after employment has ceased)[135] *etc*. But the most important initiative ― in the context of this thesis ― is Directive 64/221 on derogation on grounds of public policy, public security or public health[136]. It concerned all measures restricting or otherwise forbidding the entry into their territory or the issue or renewal of residence permits, as well as the expulsion, from their territory, taken by Member States on grounds of public policy, public security or public health' (Article 1). Such grounds could in any case 'not be invoked to service *economic ends*' (Article 2) but all such restrictive measures (*ie*, taken on grounds of public policy, public health or of public security) should have been based *exclusively on the personal conduct of the individual concerned*' (Article 3, emphasis added). This approach actually had palpable echoes in CJEU's own interpretation (as exposed in *van Duyn*[137] and, after that, more nuanced, in C-67/74 *Bonsignore*[138] and the joint cases C-115 and C-116/81, *Andoui and Cornuaille*[139]) that it is for Member States to determine concepts of public policy but limitations on free movement (of persons in particular) has to be based on *personal conduct* and a *present threat* and have to be *proportionate*.

In parallel, the change of vision at the highest political level (as reflected in the changes of the Community's primary laws) made waves also in the CJEU's case-law on public procurement.[140] Almost immediately after the adoption of the Single European Act

16; Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services OJ L 172, 28.6.1973, p. 14–16; these were further replaced by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123.

[135] Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity OJ L 14, 20.1.1975, p. 10–13.

[136] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 56, 4.4.1964, p. 850–857.

[137] Case C-41/74, *van Duyn*, [1974] ECR 1337.

[138] Case C-67/74, *Bonsignore*, [1975] ECR 00297.

[139] Joint Cases C-115/81 and C-116/81, *Andoui and Cornuaille* [1982] ECR 01665.

[140] Even since the very early years of the European economic integration, the Court elaborated on the specific conditions to be met by national governments and contracting authorities when they were about to take measures that would have impinged on the sacred freedoms of the internal market. Cases like *Dassonville* (C-8/74), *Cassis de Dijon* (C-120/78), *Keck* (Joined Cases C-267/91 and C-268/91), *University of Cambridge* (C-380/98), *Omega* (C-36/02), *Contse* (234/03) or *PreussenElektra* (C-379/98) *etc* – all cited and discussed in detail in Chapter III below – marked some key turns in the evolution of the Union and created beaches through which national discretionary initiatives could breathe. In time, the Court added a number of other significant breaches, thus drawing the map of the so-called 'mandatory requirements' exceptions – see J Hettne, "*Strategic use of public procurement: Limits and opportunities*", Swedish Institute for European Policy Studies (SIEPS) 2013, 8.

(*i.e.*, in 1988), the European Court of Justice handed down its famous decision in *Beentjes*[141]. In resolving the case, the Court first clarified that, in order to be accepted as valid, 'such a condition must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty [*ie,* the TEEC, as just amended by the SEA] in regard to the right of establishment and the freedom to provide services'.[142] So, the primacy of the economic values (in the single market context) was (still) undisputable, as was the discriminatory potential of the obligation to employ long-term unemployed[143]! This stance was in full accord with the decisions already rendered by the Court in the freedom of movement area (see for example the equally famous *Dassonville* and *Cassis de Dijon* cases,[144] on which we will elaborate later, in Chapter III), so this conclusion was only normal.

Fortunately, instead of stifling such national restrictions, the European legislature went for a shift in the balance of these values at the EU primary law level, as the EU's economy became more and more social and the social aspects thereof continued to gain terrain in the common market. It therefore soon decided, probably encouraged by the solutions rendered by the European Court of Justice in *Van Gend & Loos*[145], *Stauder*[146], *Nold*[147] or *Defrenne* II[148] and III[149] and, later but even more emphatically, in *Deutsche Telekom*[150], that it is essential that, limitedly and under a strict control, to give occasional

[141] Case C-31/87, *Beentjes* [1988] ECR 4635.
[142] *Beentjes*, para.29.
[143] See *Beentjes*, paras. 29 and 30.
[144] Case C-8/74 *Dassonville* [1974] ECR 837; Case C-120/78 Rewe-Zentral (*Cassis de Dijon*) [1979] ECR I-649;
[145] C-26/62 *Van Gend en Loos* [1963] ECR 1, where it stated that 'individual rights 'arise not only where they are expressly granted by the Treaty' but also from unwritten principles and 'independently of the legislation of Member States', since these rights 'become part of their legal heritage'.
[146] C-26-69, *Stauder*, [1969] ECR 419, where the Court concluded that 'social rights should be included among the "fundamental rights enshrined in the general principles of Community law and protected by the Court' as well as in the 'fundamental rights recognized and protected by the Constitutions' of Member States.
[147] C-4/73, *Nold v. Comm'n*, [1974] ECR 491, where the Court reiterated the conclusions in *Stauder* and added that, 'similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law'.
[148] Case C-43/75, G*abrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena* ECLI:EU:C:1976:56.
[149] Case C-149/77, *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*. [1978], ECR -01365.
[150] Case C-50/96 – *Deutsche Telekom AG v. Lilli Schröder*, ECLI:EU:C:2000:72. In this case, the CJEU was called to render a decision on the interpretation of Article 119 TEC and the Protocol referring to it (in the meantime, Articles 117 – 120 TEC have become Articles 151 – 161 TFEU – i.e., Title X – the Social Policy of the Union). In its judgement, the Court held that: "*54. First, in view of the different stages of development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay (Defrenne II, paragraph*

priority to social aspects of particular importance and interest (to the detriment of economic ones), even if such a particular approach may allegedly create restriction in the market, thus hindering the competition hence the very freedom of movement.

Building on this frail basis, but in close connection with the release of the Social Charter, the Commission came up, in 1989, with a comprehensive communication on Public Procurement: Regional and Social Aspects - COM(1989) 400 final, in which it reiterated the economic effects of opening up public procurement to free competition across the internal market the and insisted that 'preference schemes' (destined to redress the economic and social imbalances in the poorer regions of Europe) were not to be accepted. The act discusses the *Beentjes* context at length and points to not less than three limitations which would make the use of public procurement as a (social) policy tool rather difficult.

Sadly though, the first changes brought to the original construct were not reflected immediately, at least not consistently, in the secondary laws or practice to do with public procurement.[151] The first serious adjustment came almost twenty years later, when the new, revolutionary provisions of the Treaty of Maastricht were accompanied by a number of changes at the secondary-law level. The two Directives of '71 and '77 were repealed and replaced by a new set of Directives, namely Directive 92/50/EEC relating to the coordination

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9). 55. Secondly, the Court has stressed that Article 119 forms part of the social objectives of the Community, which is not merely an economic union but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasized in the Preamble to the Treaty. That aim is accentuated by the insertion of Article 119 into the body of a chapter devoted to social policy whose preliminary provision, Article 117 (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), marks the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained (Defrenne II, paragraphs 10 and 11). 56. However, in later decisions the Court has repeatedly held that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure (see, to that effect, Case 149/77 Defrenne III [1978] ECR 1365, paragraphs 26 and 27, Joined Cases 75/82 and 117/82 Razzouk and Beydoun v Commission [1984] ECR 1509, paragraph 16, and Case C-13/94 P. v S. and Cornwall County Council [1996] ECR I-2143, paragraph 19). 57. In view of that case-law, it must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right". (emphasis added).

[151] 'In the founding Treaties, Community action was not supported by any explicit competence in the social fields. For this reason, the secondary legislation on social matters adopted within the original European Communities was [, at least until Maastricht,] based on the doctrine of 'implied powers' deriving from Article 235 TEEC (then Article 308 TEC and now the so-called 'flexibility clause' of Article 352 TFEU), with the aim of harmonising the laws of Member States concerning the internal market (ex Article 100 TEEC, then Article 94 TEC, now Article 115 TFEU). Such legal basis implied putting into practice the unanimity rule. Later on, the Single European Act conferred explicit powers to European institutions by moving from unanimity to qualified majority rule.' This facilitated substantial changes in the social policy area at the EU level and accelerated the process that led in the end to the reformation of the EU public procurement legal framework itself (L J Quesada, *'The asymmetric evolution of the social case-law of the Court of Justice: new challenges in the context of the European pillar of social rights'*, (2017) 3 UNIO - EU Law Journal 2, 12).

of procedures for the award of public service contracts[152], Directive 93/36/EEC coordinating procedures for the award of public supply contracts[153], and Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts[154]. The biggest revolution was, hence, the setup of a brand-new framework for the procurement of public services, which the Commission wanted fully liberalized.

Nonetheless, in terms of sustainability and the promotion of social values, all the three laws cited above just resumed to reiterate, as such, the relevant provisions contained in the previous Directives. They basically confirmed, similarly to Directives 71/305 and 77/62, the possibility reserved for contracting authorities to exclude from the tender any bidder who "*has not fulfilled obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority.*"[155] (emphasis added). The possibility to request additional certification (as previously provided by Article 28(3) from Directive 71/305 was also kept in the new corresponding Directive 93/37 (the passage dedicated to the official lists of recognized contractors being transposed, integrally, into Article 29 (3) of the new law). However, as a novelty, Articles 28 from Directive 92/50 and 23 from Directive 93/37 implied (in practically identical wording), and probably under the effect of the political (and juridical) debates that just started around what was soon to be the Posted Workers Directive[156] which will have given priority to the principle of *lex loci laboris*[157], that public services (and works respectively) contracts fell under the scope of the legislation relating to the employment protection provisions and the working conditions in force in the Member State, region or locality in which the services (or works) were to be performed, *which was supposed to apply as such to all the services and works provided on site during the performance of the relevant contract*. Directive 93/36 (on the award of public *supply* contracts) on the other hand, contained no reference in that regard (although many

[152] OJ L 209, 24.7.1992, p. 1–24
[153] OJ L 199, 9.8.1993, p. 1 - 53
[154] OJ L 199, 9.8.1993, p. 54–83.
[155] Art.20(1)e) from Directive 93/36.
[156] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ L 18, 21.1.1997, p.1.
[157] For more on this, see K Maslauskaite, '*Posted workers in the EU: State of play and regulatory evolution*', Policy Paper, Jacques Delors Institute, 2014, at http://www.institutdelors.eu/wp-content/uploads/2018/01/postedworkers-maslauskaite-ne-jdi-mar14.pdf?pdf=ok, last visited 7 November 2019. See also N Tekin, '*The concept of the free movement of workers within the European Union under the case law of the European Court of Justice'*, at https://dergipark.org.tr/download/article-file/155622 or N Büttgen, '*Which mode(s) of governance for a floor of rights of worker protection?'*, presented in June 2013 at the ILERA congress in Amsterdam, and available at: http://ilera-europe2013.eu/uploads/paper/attachment/294/Article_ILERA_congress_final_paper_Buttgen.pdf.

supply actions were, in fact, accompanied by some ancillary installation services or construction works). But that was all…

So, although touted as a big reform,[158] the new Directives failed to bring the much-sought flexibility in the public procurement area. They practically contained no references to the possibility that public procurement be used in the implementation of other policy objectives, so that its 'strategic' role remained unassured.

In practice, the problem became acute when, confronted with a systemic net of policy goals which they pledged to pursue, and in the silence of either the primary or the dedicated secondary legislation, contracting authorities started to resort to the opportunities offered by other instruments, not related to public procurement (such as the Poster Workers Directives[159] or the Equal Treatment and Equal Pay Directives[160] *etc*, but not the Services Directive[161] which, since its, adoption, has been considered to be a strange political compromise made to the chagrin of all restrictive national initiatives[162]) the main goal of which was (it still is!) to protect *national*/*local* social values placed in an open conflict with those defining the EU's internal market (and, thus, indirectly, with the rules on public procurement). In connection with these practices, the CJEU has repeatedly ascertained that the use of such instruments in public procurement is anomalous hence should be done with great rigor.[163]

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[158] See J M Hebly (ed), '*European Public Procurement: Legislative History of the 'Classic' Directive 2004/18/EC*', Kluwer Law International B.V., 2007.

[159] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ L 18, 21.1.1997, p.1, together with Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') OJ L 159, 28.5.2014, p.11.

[160] The last in the series being Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.7.2006, p.23.

[161] Directive 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376/36 of 27.12.2006.

[162] See for ex. J Loder, '*The Lisbon Strategy and the politicization of EU policy-making: The case of the Services Directive*', 2011 18 Journal of European Public Policy 4 , or J Loder, '*Redefining the aims of the Lisbon Strategy: The case of the Services Directive*', presented in the ECPR Joint Sessions Workshop 7 - The politics of governance architectures: Institutions, power, and public policy in the EU Lisbon Strategy, and available at https://ecpr.eu/Filestore/PaperProposal/46b737bd-c602-42a7-ad5b-93523312e90d.pdf. See also U Stelkens, W Weiß and M Mirschberger (eds) '*The Implementation of the EU Services Directive: Transposition, problems and strategies*', TMC Asser Press, 2012, or the Advisory report on '*The Directive on services in the internal market*' published in 2005 by the Dutch Social and Economic Council (Sociaal-Economische Raad, or the SER), and available, in English, at http://www.ser.nl/~/media/Files/Internet/Talen/Engels/2005/2005_07_volledig%20pdf.ashx.

[163] For a more detailed discussion on this aspect, see C McCrudden, 'The Rüffert case and public procurement' in M Cremona (ed), '*Market integration and public services within the EU*', Oxford University Press, 2011.

Notwithstanding this trend, just a few years after the adoption of the '92 and 93 Directives, contemporaneously with the Spring Lisbon European Council of 2000 and in anticipation of the Treaty of Lisbon, but building on the changes already implemented via the subsequent Treaties – up to the just adopted Treaty of Nice, the Court rendered a new decision in one of the most cited cases to do with public procurement, *ie*, the *Nord-Pas-de-Calais* case,[164] where it clarified that 'the use of an *additional* [award] criterion relating to local employment'[165] (emphasis added) is lawful hence possible. According to this decision, an additional criterion, of a social nature, *may* be used in a public procurement procedure in order to single out the winning bid between two or more bids which had been declared the most economically advantageous tenders and could not have been otherwise differentiated.

Immediately after that, in an attempt to consolidate the frail structure founded by the European Court of Justice through the two cases cited above, the European Commission came up with its very ambitious (for that time) Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement[166]. The Commission explained very clearly that its release came in the context of the Social Policy Agenda adopted by the European Council of Nice a few months earlier, in December 2000.[167] According to this Communication, '[t]he expression "social considerations" (…) covers a very wide range of issues and fields. It can mean measures to ensure compliance with fundamental rights, with the principle of equality of treatment and non-discrimination (for example, between men and women), with national legislation on social affairs, and with Community directives applicable in the social field (…). The expression "social considerations" also covers the concepts of preferential clauses (for example, for the reintegration of disadvantaged persons or of unemployed persons, and positive actions or positive discrimination in particular with a view to combating unemployment and social exclusion).'

The Interpretative Communication of 2001 was crafted based on the previous Communication from the Commission on "Public procurement in the European Union" of 11 March 1998[168] which had anticipated, in general terms, that *'[i]t is (...) necessary to lay down clear guidelines to purchasers on how (...) environmental and social criteria can be taken into account in their contract award procedures, while complying with Community law,*

[164] Case C-225/98 *Nord-Pas-de-Calais* [2000] ECR I-07445.
[165] *Nord-Pas-de-Calais*, para.20.
[166] COM(2001) 566 final. This was accompanied by another Interpretative Communication on environmental concerns and the possibility to include them in public procurement – COM(2001) 274.
[167] Social Policy Agenda, COM (2000) 379 of 28.6.2000.
[168] COM(l998) 143 final.

particularly as regards transparency and non-discrimination and the public procurement rules. Such guidelines are necessary if European suppliers are to be placed on an equal footing' – emphasis added, and had insisted on the effective possibility to include the obligation to comply with existing social legislation, especially Community social legislation and, where appropriate, that emerging from the International Labour Organisation (ILO), pointing therewithal at the two main instruments already included in the Directives on public procurement then in force, *ie*, the possibility to exclude tenderers who breached national social legislation and that (which had been endorsed by the European Court of Justice in the *Beentjes* case) of laying down, 'as a condition of execution of public contracts, compliance with obligations of a social character'[169].

The Interpretative Communication of 2001 went even further and identified, in explicit terms, several new and more complex ways to include social considerations in the public procurement context. It acknowledged, thus, as perfectly possible, the inclusion of social criteria in the definition of the subject-matter of the contract, or in the technical specifications, or as selection or exclusion criteria, or as award criteria or, finally, as a condition of the execution of the contract. And, while listing the main *social* laws (then in force) applicable to also public contracts, it insisted on the fact that such criteria may as well be facilely used in the case of contracts *not* covered by the Directives.

With specific regard to the necessity to link all requirements to the subject matter of the contract, the Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement just anticipated the CJEU solutions rendered a few months later in *Concordia Bus*[170] and *Wienstrom*[171] and considered that the recruitment of staff from certain groups of persons (ethnic minorities, disabled persons, women) would not qualify as technical specifications inasmuch as such a requirement concerned the *general policy* of that entity.[172] On the other hand, the same Communication made (for the first time at length and in actual words) explicit reference to the possibility of using social considerations as contract performance conditions and clarified, a few pages later, that the obligation to recruit unemployed persons, and in particular long-term unemployed persons[173], or to set up training

[169] COM(l998) 143 final, p 28.
[170] Case C-513/99 *Concordia Bus* [2002] ECR I-7251.
[171] Case C 448/01 *Wienstrom* [2003] ECR I-14558.
[172] COM(2001) 566 final, 8, n 25.
[173] So the Commission made, again, a bold move to assume that the main purpose of such a requirement is not necessarily economic, but rather social, so that it should not be refused as such but openly accepted (as already clarified by the Court in *Beentjes*), provided however that 'it does not (contrary to the position in *Beentjes*)

programmes for the unemployed or for young people *during the performance of the contract*; or the obligation to implement, *during the execution of the contract*, measures that are designed to promote equality between men and women or ethnic or racial diversity; or the obligation to comply with the substance of the provisions of the ILO core conventions *during the execution of the contract*, in so far as these provisions have not already been implemented in national law; or the obligation to recruit, *for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer* etc, are perfectly possible and even recommendable.[174] As it may be easily noted, the Communication contains a puzzling wording. It refers, explicitly, to the duration of the contract, but not necessarily to the link with the subject matter of the contract (as, for example, based on the paragraphs cited above one may very well conclude that the implementation of any measures 'designed to promote equality between men and women or ethnic or racial diversity' may refer to *all* employees, and not only to those effectively involved in the delivery of that contract, even if the obligation to do that would be in force just 'during the execution of the contract'). Moreover, the Communication of 2001 fails to explain how would a measure such as that requiring bidders to 'recruit, for the execution of the contract, a number of disabled persons over and above what is laid down by the national legislation in the Member State where the contract is executed or in the Member State of the successful tenderer' be justified in the context of the EU internal market rules.

En fin, one of the most important merits of the Communication on social considerations of 2001 is that it confirmed (based on Article XXIII of the Agreement on Government Procurement which had *not* been transposed, at least not explicitly, into the text of the directives then in force[175]) that practices that reserve contracts to certain categories of persons, 'for example to disabled persons ("sheltered workshops") or to the unemployed, *are permitted*' under the condition that they do not 'constitute direct or indirect discrimination as

require [, limitedly,] *recruitment through a local office*' – see S Arrowsmith, 'Application of the EC Treaty and Directives to Horizontal Policies: A Critical Review' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law New Directives and New Directions* (Cambridge University Press) 2009, Kindle Edition, 5686 (n 65).

[174] COM(2001) 566 final, 17.

[175] Namely, Council Directive 92/50/EEC of 18.6.1992 relating to the coordination of procedures for the award of public service contracts, Council Directive 93/36/EEC of 14.6.1993 coordinating procedures for the award of public supply contracts and Council Directive 93/37/EEC of 14.6.1993 concerning the coordination of procedures for the award of public works contracts, as amended by European Parliament and Council Directive 97/52/EC; Council Directive 93/38/EEC of 14.6.1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by European Parliament and Council Directive 98/04/EC.

regards tenderers from other Member States, or constitute an unjustified restriction on trade.'[176]

In parallel, the CJEU continued its march and, in the next couple of years, offered two other landmark decisions, in the *Concordia Bus*[177] and the *Wienstrom*[178] cases respectively. They were not directly related to the social field, but the conclusions drawn there (in terms of the instrumentality of public procurement in the pursue of sustainability and the creation of substantial benefits for communities in general) marked irreversibly the path to the current state of play. It was in these cases that became clear that: (i) contracting authorities have a quite wide freedom of choice when it comes to choosing the relevant award criteria, as such criteria need not necessarily have an economic nature (the 'aesthetic' merits referred to in the relevant Directive were explicitly cited in that regard; the Court however hinted at the idea that green and social criteria, although not mentioned in the law, may as well be included in the award equation); (ii) the weight of such non-economically elements may be even greater than that of the economic elements – such as the price, depending on the concrete goals that the contracting authority intends to reach; (iii) these criteria must nevertheless be proportional with the declared goals; (iv) they must also be linked intrinsically to the subject matter of the contract – even where they cannot, by themselves, serve to the fulfilment of the scope; (v) must not bestow an unlimited freedom of choice on the contracting authority; (vi) must be made public via the tender documentation (and the transparency, ensured in each and all stages of the procedure, including at the evaluation of tenders) and must not collide with any of the fundamental principles of Community law; (vii) based on Article 11 TFEU, which compels the Commission to integrate environmental protection into all its policies and activities, all Directives on public procurement must, as a matter of principle, be interpreted in the sense that they do not preclude the use of environmental merits as award criteria (applying this interpretation *tale e quale* to Article 9 TFEU, it is obvious that also the use of social criteria should be permitted, at least to the extent allowed by the relevant EU policies or, upon the case, national laws and policies adopted in line with the EU law); and (viii) maybe most importantly, a green (or social) criterion, even if apparently restrictive to the extent that 'only a comparatively small number of tenderers are able to satisfy [it]'[179], may in fact be used in the award of a public contract.

[176] COM(2001) 566 final, 18.
[177] Case C-513/99 *Concordia Bus* [2002] ECR I-7251.
[178] Case C 448/01 *Wienstrom* [2003] ECR I-14558.
[179] *Concordia Bus*, para 76. The Court however clarified that, as already settled in Case 45/87 *Commission v Ireland* [1988] ECR 4929, if the criteria applied restrict the market for the services or goods to be supplied to the

This positive trend was reflected with much vigour in the 2004 set of Directives on public procurement, which took up many of the conclusions served by the Court in its previous case law.[180]

According to Recital 46 from the Preamble to Directive 2004/18[181], 'In order to guarantee *equal treatment*, the criteria for the award of the contract should enable tenders to be *compared* and *assessed objectively*.' (emphasis added). This idea built on the conclusions already rendered by the Court of Justice in its previous decisions, of which it is worth mentioning *Commission v Denmark*[182] and *Concordia Bus* (where it set forth quite explicitly that 'the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition.')[183] The same decisions clarified that this condition is satisfied where the criteria '*are objective and applied without distinction to all tenders*.'[184] (emphasis added). Such criteria must nevertheless be (as explicitly ruled by the CJEU in its decisions cited above) linked to the subject-matter of the contract, must not confer an unrestricted freedom of choice on the contracting authority, must be expressly mentioned in the tender notices and documents and must comply with the fundamental principles mentioned in Recital 2.[185]

As a novelty (as compared with the preceding set of Directives, from which the new package took over basically all the relevant provisions), Directive 2004/18 contained ─ especially as a result of the efforts of the social economy organizations ─ two new important instruments for the pursue of social goals, namely the reservation of contracts (for, limitedly, sheltered workshops concerned with the integration of 'handicapped persons') and the possibility to set social considerations as conditions for the performance thereof (Articles 19 and 26 respectively). Moreover, according to Recital 34 from Directive 2004/18, non-compliance with the obligations arising from the Posted Workers Directive could have been

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point where there is *only one* tenderer remaining, they are colliding with the fundamental rules of the internal market, hence not lawful. This is not the case, continued the Court, where even if there is *only one* bidder who effectively meets the conditionalities imposed by the contracting authority, it would be possible, given the concrete market conditions, for any other similar trader to meet the same conditions with a negligible diligence. In such a case, those conditionalities are *not* discriminatory and may be applied.

[180] In fact, its first Recital specifically referred to the *Concordia Bus* case.

[181] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ L 134 of 30.4.2004, p. 114-240.

[182] Case C-243/89 *Commission v Denmark* [1993] ECR I-3353. See for ex. para.33.

[183] *Concordia Bus*, para. 81.

[184] *Concordia Bus*, para. 83.

[185] Recital (1) of the Preamble to Directive 2004/18.

considered to be 'grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract.' Finally, pursuant to Article 55 of Directive 18, abnormally low tenders justified by the non-compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed had to be rejected.

A few years later however, this encouraging trend suffered a setback when, in a case lodged on its dockets two years after the adoption of the 2004 Directives on public procurement[186], the Court, in a rather restrictive interpretation of the Posted Workers Directive (and, in any case, in total disagreement with the ILO Convention No. 94 (of 1949) on labour clauses in public contracts[187] and with Article 27 of Directive 18), resolved that '*Directive 96/71/EC* of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *interpreted in the light of Article 49 EC, precludes* an authority of a Member State, (…) from *adopting a measure of a legislative nature requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees, in return for performance of the services concerned, at least the remuneration prescribed by the collective agreement the minimum wage in force at the place where those services are performed* [except where that collective agreement is of a general application]' (emphasis added). In a nutshell, the Court concluded in *Rüffert* that (as anticipated in *Laval*[188], in a much commented interpretation of the Posted Workers Directive which many saw as capsized and askew) the host Member State cannot make the provision of services in its territory conditional on the observance of terms and conditions of employment '*which go beyond the mandatory rules for minimum protection* [set forth by Directive 96/71/EC]'.[189] Basically, in both *Laval* and *Rüffert*, the Court acknowledged that the national authorities dealt with 'fundamental social rights'. It however considered that the use of those rights was done in a way which was hardly justifiable.

Anyway, the Court redressed much of the harm done in *Rüffert* in two new cases, *ie*, *Max Havelaar*[190] (where it clarified the circumstances in which social labels may be

[186] Case C-346/06 *Rüffert* [2008] ECR I-01989.
[187] The provisions contained in the Landesvergabegesetz of the Land Niedersachsenat, at stake in the *Rüffert* case, were an accurate reflection of Article 2 from ILO Convention 94, and it is presumed that it was only the fact that Germany had not ratified the Convention that prevented the Court from referring to it in that case.
[188] Case C-341/05 *Laval* [2007] ECR I-0000.
[189] *Rüffert*, para.33, emphasis added.
[190] Case C-368/10, *Commission v the Netherlands* (*Max Havelaar*) ECLI:EU:C:2012:284.

used in public procurement) and *Regio Post*[191] (where it eventually ruled that, even if the imposition, by a national norm, of a minimum wage to be paid to their employees by the bidders and their subcontractors established in a Member State where such wages are set at a lower level, *is* an additional *economic burden which has the concrete potential to narrow competition by restricting the access thereof to that contract, the overriding objective of protecting workers and, in particular, posted workers, may justify such a discriminatory measure*, provided that the norm establishing that rule is of *general* application). All these decisions are discussed in detail in the following chapter.

Anyway, these efforts culminated with the 2014 legislative package which contains a record number of references to, and instruments dedicated to, the use of public procurement for the attainment of various social goals. All these instruments are discussed in the last two chapters.

In the meantime, the European Commission tried to fill the legislative gap with an impressive number of administrative instruments and pieces of soft law.[192] One of the most important acts on this list is the Commission Communication of 3 March 2010 entitled "Europe 2020, a strategy for smart, sustainable and inclusive growth" (the "Europe 2020 Strategy"), a genuine 'economic Constitution'[193] of the European Union. The latest set of Directives on public procurement (the first draft of which was released by the Commission in 2011, just after the adoption of the Europe 2020 Strategy, based on a comprehensive survey ran by the Commission earlier in the same year[194] which had concluded that '*Public authorities can make an important contribution to the achievement of the Europe 2020 strategic goals, by using their purchasing power to procure goods and services with higher*

[191] Case C-115/14, *Regio Post*, ECLI:EU:C:2015:760.

[192] These intense efforts came in the context where the newly modified provisions of the Treaties failed to bring much clarification on the scope of the internal market, which stopped many legislative initiative dead and made more and more strong voices raise to the effect that '[p]olitical forces have to engage in a search for a solution, in line with the Treaty objective of a social market economy' – see M Monti, '*A new strategy for the Single Market: at the service of Europe's economy and society*' (the 'Monti Report' of May 2010), at 68–69, http://ec.europa.eu/internal_market/strategy/index_en.htm. Moreover, since the force of these 'travaux preparatoires, arguments presented in legal dogmatics, large number of Commission Communications and other guidelines and anticipated social consequences' as feasible sources of law is debatable, they are not featured in the jurisprudence of the ECJ on public procurement cases. However, as 'Lenarets and Gutierrez-Fons have argued (…), as the public access to the travaux préparatoires of EU law has been improved, the Court has started to take them into account.' These documents 'hold a quite low level of structural axiology and have low level of legal formality. They lack institutional justification grounds with references only to the material, noninstitutional justification grounds.' (M Ukkola, '*Systemic interpretation in EU public procurement law'*, Unigrafia, Helsinky University, 2018, 69). Nonetheless, they are concrete indicators of the evolution of the EU''s policies, revealing strong EU ideological and political veins, which should (or must) drag along also national actions.

[193] As so pertinently assessed by Prof. Christopher Bovis in his interventions.

[194] See the '*Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market* - COM/2011/0015 final.

"societal" value in terms of (…) *improving employment, public health and social conditions, and promoting equality while improving inclusion of disadvantaged groups*.' – p.33, emphasis added) has been explicitly elaborated based on the Europe 2020 Strategy.

In fact, in an attempt to remain as close to the market as possible and to measure the impact of its measures on a true-to-life basis, the Commission ordered several studies and surveys, but also released a number of valuable guides. These studies were in principal aimed at revealing the extent to which public procurement was used, in practice, in the implementation of various social policy goals in the revolutionary context ushered in by the structural changes agreed in Lisbon and the Europe 2020 Strategy. Among them, are worth mentioning the Study on the 'Strategic Use of Public Procurement in Europe: Final Report to the European Commission' - MARKT/2010/02/C delivered in 2011 by a group of experts from Adelphy and the PPRC with the support of the University of Munich[195], the Study on 'Public procurement in Europe: Cost and effectiveness' developed, in 2011, by PricewaterhouseCoopers ('PwC')[196], the Study on 'SMEs access to public procurement markets and aggregation of demand in the EU' prepared in 2014 by PwC, ICF GHK and Ecorys[197] as a follow-up of the Study on the same subject matter firstly ran in 2007 and updated in 2009[198], or the Study on "Strategic use of public procurement in promoting green, social and innovation policies" (2015) prepared for the EC by PwC[199].

Among the guidelines, we need to mention the Buying Social Guide of 2011[200] (crafted on the foundation already laid down by COM/2001/0566 final), the Social Europe Guide of 2013, or the guide on 'Supporting social responsibility in the economy through public procurement' published by the European Commission in 2016[201] *etc*. We will return to the conclusions of some of these studies and guides in the following Chapters.

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[195] Available at https://op.europa.eu/en/publication-detail/-/publication/05d1e581-571e-43ad-8597-649a7b655bd9/language-en/format-PDF/source-search, last visited November 4, 2019.

[196] Available at https://op.europa.eu/en/publication-detail/-/publication/0cfa3445-7724-4af5-8c2b-d657cd690c03/language-en/format-PDF/source-search, last visited November 4, 2019.

[197] Available at https://op.europa.eu/en/publication-detail/-/publication/c0681db7-e56e-11e5-8a50-01aa75ed71a1/language-en/format-PDF/source-search, last visited November 4, 2019.

[198] See https://op.europa.eu/en/publication-detail/-/publication/96730d63-3078-4912-89b6-5083c32607a1/language-en/format-PDF/source-search, last visited November 4, 2019.

[199] Available at https://op.europa.eu/en/publication-detail/-/publication/6a5a4873-b542-11e7-837e-01aa75ed71a1/language-en/format-PDF/source-search, last visited November 4, 2019.

[200] European Commission Staff Working Document, "Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement", (19 May 2010) SEC(2010) 1258 final.

[201] Available at https://ec.europa.eu/growth/content/supporting-social-responsibility-economy-through-public-procurement-0_en, last visited November 4, 2019.

In parallel, the Commission intensified its efforts to adapt the internal market to the new realities so, after two successive Single Market Acts[202] (aimed at giving a new boost to the sustainable growth postulated by the Europe 2020 Strategy[203] and seeking to make public procurement one of the core levers in this regard[204]) it came out, in 2015 (after long consultations with the Member States, public authorities and stakeholders), with a comprehensive Single Market Strategy - "Upgrading the Single Market: more opportunities for people and business"[205] which took the ambitious goals set by the Europe 2020 Strategy to an even higher level. This document was in fact adopted after long consultations with the Member States, public authorities and stakeholders. Its Section 3.2 (p.13) witnessed 'a major overhaul of the EU procurement framework, simplifying procedures, making the rules more flexible and adapting them to better serve other public sector policies'.

This latter Strategy was soon followed up by many other related actions and legislative packages. Thus, two years later, in October 2017, the Commission came up with a thick package containing a punctual strategy on public procurement[206]. The Commission explained therein that it identified "*six priority areas, where clear and concrete action can*

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[202] Respectively Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 'Single Market Act - Twelve levers to boost growth and strengthen confidence "Working together to create new growth"' – COM(2011) 206 final and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Single Market Act II - Together for new growth', COM(2012) 573 final.

[203] As underscored by the European Parliament in its *Resolution of 25 October 2011 on modernisation of public procurement* (2011/2048(INI)), '*public procurement, if used effectively, could be a real driver in promoting quality jobs, wages and conditions as well as equality, in developing skills and training, in promoting environmental policies, and in providing incentives for research and innovation; [to this purpose, the Parliament] calls on the Commission to encourage governments and contracting authorities to increase the use of sustainable public procurement, supporting and promoting high-quality employment and providing quality services and goods in Europe; invites the Commission to scrutinise how public procurement has contributed to achieving the EU's wider goals and to outline what should be done to improve these objectives in the future*' (para 14, emphasis added).
OJ C 131E , 8.5.2013, p. 25–34

[204] A Sanchez-Graells, '*Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?*', presented at the UACES 45th Annual Conference, Bilbao, Spain, September 2015, at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638466, last visited 14 November 2011, 2. See also C Bovis, '*The challenges of public procurement reform in the single market of the European Union*', (2013) 14 ERA Forum 1, 35 *et seq*, at https://link.springer.com/article/10.1007/s12027-013-0286-z. According to the latter, '[t]he 2011 Single Market Act has recognised the strategic importance of public procurement for the European integration process. Within 2013, the European Union will have seen another set of reforms to the EU Public Procurement framework. These reforms aim at linking the Euro 2020 Strategy and public procurement from a macroperspective which focuses on growth and competitiveness. The significance of liberalised and integrated public procurement as an essential component of the Single Market is well documented. (…) The vision and aspirations of European Institutions towards a Single Market Act have identified public procurement reforms as essential components of competitiveness and growth and as indispensable instruments of delivering public services.' (p 35, 56).

[205] COM(2015) 550 final.

[206] Communication from the European Commission *'Making public procurement work in and for Europe'*, COM(2017) 572.

transform public procurement into a powerful instrument in each Member State's economic policy toolbox" (emphasis added - p.7). These areas were:

a) *Ensuring wider uptake of innovative, green and social procurement;*

b) Professionalising public buyers;

c) Increasing access to procurement markets;

d) Improving transparency, integrity and data;

e) Boosting the digital transformation of procurement;

f) Cooperating to procure together.

So, as it may be easily seen, starting with 2017, the increase of the uptake of social procurement was manifestly acknowledged one of the most important goals of the Union.

This document was accompanied by a discrete Communication on 'helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects'[207]

In 2018, the Commission came back with an even thicker Action Plan on Public Procurement,[208] which was prepared in the context of the use of the ESI Funds 2013 – 2020 and endorsed by all relevant Commission services (DG Regional and Urban Policy, DG Internal Market, Industry, Entrepreneurship and SMEs, DG Employment, Social Affairs and Inclusion, DG Agriculture and Rural Development, DG Maritime Affairs and Fisheries). The 2018 Action Plan on Public Procurement set out 'a series of initiatives aimed at helping Member States to improve the performance of both administrations and beneficiaries in applying public procurement for EU investments during the 2014-2020 programming period.' The key actions proposed under this Plan include:

- ✓ *comprehensive reform plans for countries non-compliant with the public procurement ex-ante conditionality in order to redress structural weaknesses*;
- ✓ a stock-taking study on administrative capacity in the field of public procurement with country-specific information and recommendations;
- ✓ *a guide to support public officials across the EU to avoid the most frequent errors and adopt best practices*;

[207] COM(2017) 573 final.
[208] Ref. Ares(2018)2833213 - 31/05/2018, available at https://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/, accessed October 31,2019.

- ✓ piloting Integrity Pacts - a tool to improve transparency and accountability in public procurement in cooperation with Transparency International - in a number of EU-funded projects;
- ✓ *a new index for rating contracting authorities according to their performance*;
- ✓ analysis of data and interoperability of public procurement databases,
- ✓ training courses for Managing Authorities of the EU funds or seminars on error rates;
- ✓ *targeted support to specific Member States and exchange of good practices, e.g. through the Peer 2 Peer platform*;
- ✓ *e-library of good practices in public procurement in the context of European Structural and Investment (ESI) Funds*.

In anticipation of the Action Plan, the Commission had already released a first version of a Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds (February 2018).[209] The document contains a number of very useful examples of best practice on the use of public procurement for a wider social impact.

Later on, in 2019, the same Commission released a Guidance on the participation of third country bidders and goods in the EU procurement market[210] which acknowledged that '*third country bidders, goods and services are not always bound by the same, or equivalent, environmental, social or labour standards as those applicable to EU economic operator*' and proposed concrete measures which to tackle the resulting social dumping.

In parallel, the Commission prepared two electronic tools ordained to gather together and offer integrated access to some valuable information on the European public procurement market and practice, as well as to the relevant initiatives from the European institutions:

a) the Single Market Scoreboard (https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers/public-procurement-eu-countries_en) — set up under the Single Market Strategy, aimed at reflecting the evolution of the implementation of each of the targets set therein in each Member State; and

[209] Available at https://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018.

[210] Communication from the Commission '*Guidance on the participation of third country bidders and goods in the EU procurement market*' - C(2019) 5494.

b) the e-Competence Centre (https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers_en) — which provides tools and information to help public buyers get value for money and better policy outcomes for citizens. Its section dedicated to the social area is particularly focused on the offering of '*updated guidance and awareness-raising to make socially-responsible purchases*'. According to the cited portal, this is supposed to be done via 3 specific instruments:

- ✓ a *Buying Social Guide* (in principal, that of 2011, which is soon to be updated and revamped);
- ✓ a *Consultation on a socially-responsible procurement guide* - targeted consultation on the scope and structure of a Commission guide on socially responsible public procurement (7 December 2017 - 1 March 2018) and
- ✓ an *European accessibility act* – (delivered in the form of a law proposal on the '*[a]pproximation of the laws, regulations and administrative provisions as regards the accessibility requirements for products and services*' drafted in the context of the European Disability Strategy 2010-2020[211].

These concrete measures and instruments were accompanied by significant initiatives in the social area, including the substantial packages on the Circular Economy, the European Pillar of Social Rights, the Labour Mobility and the recent Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. In parallel, the Commission came with a new Investment Plan for Europe[212] which took the Cohesion Policy beyond its initial scope while changing the focus on a number of sensitive social objectives.

Moreover, based on the initiatives anticipated via the e-Competence Centre, the Commission decided, in 2017, to run a very ambitious project focused on the idea of 'buying for social impact' and the promotion of 'social considerations into public procurement procedures for social economy enterprises'. The project, which covered fifteen Member States (based on the scheme of study already used in the 2015 PwC Study on the

[211] COM(2010) 636. This was in the meantime transposed via Directive 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (OJ L 151, 7.6.2019).

[212] COM/2014/0903. More on this, at: https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan-europe-juncker-plan_en, accessed October 31, 2019.

Strategic use of public procurement in promoting green, social and innovation policies[213]) and had a total budget of 750,000.00€, had two main objectives:

a) to raise awareness among contracting authorities about the public procurement potential and to encourage them to use public procurement to pursue social goals; and
b) to increase the capacity of social economy enterprises to take part in public procurement procedures and to access new markets.

This project was supposed to be followed up via three prospected lines of action as follows:

a) releasing an updated / revamped version of the Buying Social Guide (2011) – the publication of which was planned for the beginning of 2020;
b) launching a collection of good practices, which to be disseminated through a dedicated communication campaign (by mid-2020); and
c) promoting the professionalization of public buyers through future projects (e.g. trainings, common library of reference documents).

The importance of this project in the context of promoting the idea of making more and more room for social values in public procurement is evident, and its structural development, just as that of the most action plans developed by the Commission in the recent years, resembles very much to the 'open method of coordination' (OMC) approaches specific to EU's social policies, which we will discuss further in Chapter IV. It is still worth mentioning, that the findings of the survey carried out thereunder revealed an impressively fragmented market (in terms of social procurement best practice) with too few significant examples, a serious lack of know-how among public officers and a reserved if not downright hostile feedback from many local administrations which only mean that, in 2019, and against a background characterized by unclear provisions, too few guiding instruments and a seriously incongruous case law, there still was a major gap between law and practice, hence between theory and reality.

Later on, in December 2019, the Commission released the ambitious "Green Deal' initiative[214] aimed at making Europe climate neutral by 2050 and which the President

[213] Available at https://op.europa.eu/en/publication-detail/-/publication/0cfa3445-7724-4af5-8c2b-d657cd690c03/language-en/format-PDF/source-search.

[214] Communication from the Commission, 'The European Green Deal', COM(2019) 640 final, Brussels, 11.12.2019, Brussels, 11.12.2019. On 15 January 2020, the European Parliament voted in favour of the deal as well, nevertheless asking for the setting of even higher targets – see, for more details, https://www.europarl.europa.eu/news/en/press-room/20200109IPR69902/parliament-supports-european-green-deal-and-pushes-for-even-higher-ambitions.

of the European Commission called, at its launching, a 'man-on-the-Moon moment'.[215] 'The European Green Deal provides a roadmap with actions to boost the efficient use of resources by moving to a clean, circular economy and stop climate change, revert biodiversity loss and cut pollution', outlining therewithal the investments needed and the financing tools available, and explaining how to ensure 'a just and inclusive transition.' It covers all sectors of the economy[216], including transport, energy, agriculture, buildings, and key industries ― such as steel, cement, ICT, textiles and chemicals[217] and revolves around several key policy areas as follows:

- ✓ clean, affordable and secure energy[218];
- ✓ sustainable industry;
- ✓ building and renovation (in an energy and resource efficient way) ― with a special focus on social houses;
- ✓ farm-to-fork (a fair, healthy and environmentally-friendly food system)[219];
- ✓ zero pollution;
- ✓ sustainable and smart mobility[220]; and
- ✓ biodiversity[221].

[215] S Frédéric, "*EU Commission unveils 'European Green Deal': The key points*", at www.euractiv.com.

[216] As a follow-up to the 2018 Action Plan on sustainable finance, the Regulation on the establishment of a framework to facilitate sustainable investments (the "Taxonomy Regulation") agreed by the EU co-legislators in December 2019 (see the Council of the European Union of 17 December 2019, 14970/19 ADD1) set out the legal provisons that defined "sustainable investment". It also established an EU-wide classification system for sustainable economic activities, with the purpose to facilitate the defined sustainable investments (the so-called "EU Taxonomy"). The EU Taxonomy represents in fact one of the most important tools in the delivery of the Green Deal. It focuses on classifying economic activities that are environmentally sustainable, covering six objectives: (a) climate change mitigation; (b) climate change adaptation; (c) sustainable use and protection of water and marine resources; (d) transition to a circular economy; (e) pollution prevention and control and (f) protection and restoration of biodiveristy and ecosystems. The Commission's declared plan is to extend the EU Taxonomy further to the *social* dimension of sustainability – for details, see https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200309-sustainable-finance-teg-final-report-taxonomy_en.pdf. The cited report explains (see in particular Section 3 - *Taxonomy in practice*) how companies and other entities can integrate the social standards set in the OECD MNEs Guidelines (https://www.oecd.org/corporate/mne/) and in the UN Guiding Principles (UNGPs) on Business and Human Rights (https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf).

[217] https://ec.europa.eu/commission/presscorner/detail/en/ip_19_6691.

[218] https://ec.europa.eu/commission/presscorner/detail/en/fs_19_6723

[219] For a discussion of the effects of such a policy on public procurement (especially in the context where the purchasing of fresh food usually entails buying from *local* farmers), see Chapter V. Section 4 below (and the comments under n 1322 *et seq*).

[220] Which, in the public procurement context (usually involving the movement of businesses and, even more importantly, of workers across the EU) may play an interesting role – in the sense of curbing (at least in the earlier phases of the transition process, which is expected to involve important investments in the needed infrastructure) the access of *foreign* suppliers.

[221] In line with the EU Biodiversity Strategy for 2030 (COM(2020) 380 final) – see https://ec.europa.eu/environment/nature/biodiversity/strategy/index_en.htm

The Commission nonetheless acknowledged that, 'while all of these areas for action are strongly interlinked and mutually reinforcing, *careful attention will have to be paid when there are potential trade-offs between economic, environmental and social objectives*' (emphasis added).[222]

The Green Deal proved in fact a good opportunity for the Commission to propose a Just Transition Mechanism including a Just Transition Fund, as part of the Sustainable Europe Investment Plan, purported 'to leave no one behind' ― as the 'transition can only succeed if it is conducted in a fair *and inclusive* way' (emphasis added) and 'the most vulnerable are the most exposed to the harmful effects of climate change and environmental degradation'.[223] According to the cited Communication, 'citizens, depending on their social and geographic circumstances, will be affected in different ways [as] [n]ot all Member States, regions and cities start the transition from the same point or have the same capacity to respond. The prospected challenges will therefore require 'a strong policy response *at all levels*'[224] (emphasis added) ― hence also in the social sphere and, inevitably, the public procurement field[225] (which, according to the Green Deal, must be one hundred percent climate-friendly and *fair-trade oriented*[226]).

Finally, in March 2020, the European Commission launched a 'Long term action plan for better implementation and enforcement of single market rules'.[227] Its core mission is to help Member States: (i) transpose EU law timely and accurately, refraining from unjustified "gold plating", and ensure a level playing field; (ii) *ensure that national legislation is proportionate and non-discriminatory*; (iii) ensure sufficient and proportionate administrative checks and controls so that any breaches are identified; (iv) *avoid any national*

[222] COM(2019) 640 final, section 2.1, the second paragraph.
[223] COM(2019) 640 final, section 2.2.1, the sixth paragraph.
[224] Ibidem. Along the same line of arguments, the Commission also stressed that '*[t]he need for a socially just transition must also be reflected in policies at EU and national level*. This includes investment to provide affordable solutions to those affected by carbon pricing policies, for example through public transport, as well as measures to address energy poverty and promote re-skilling. (…) *For companies and their workers, an active social dialogue helps to anticipate and successfully manage change*. *The European Semester process of macroeconomic coordination will support national policies on these issues*.' – emphasis added (section 2.2.1, the tenth paragraph).
[225] In this context, the Green Deal insists that 'public authorities, including the EU institutions, should lead by example and ensure that their procurement is green', a purpose for the attainment of which 'the Commission will propose further legislation and guidance on green public purchasing.' – see COM(2019) 640 final, section 2.1.3, the ninth paragraph.
[226] COM(2019) 640 final, section 3, the tenth paragraph.
[227] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions named 'Long term action plan for better implementation and enforcement of single market rules', COM(2020) 94 final. Its adoption has been urged by the fact that, more than ever before, 'it appears that *Member States breach agreed single market rules, or create and tolerate obstacles in national law, with the aim of creating additional protection in their market and deriving advantages for national businesses*.' (p 2).

measures that contradict or hamper the application of EU law; and (v) cooperate effectively to ensure compliance with EU law. Moreover, to strengthen cooperation on enforcement of single market rules, the document proposes the setup of a joint Single Market Enforcement Task-Force (SMET), composed of Member States and Commission. Its mission is supposed to be buttressed by a continuous monitoring under the Single Market Scoreboard which is expected to deliver, timely, useful data on the concrete application of single market rules across the Union. The action plan includes several avenues of action, among which:

(a) **increasing knowledge and awareness of the single market rules —** via several concrete interventions (including the *updating of the Handbook on the implementation of the Services Directive*[228]; the setting up a of central information point on practical questions that civil servants in Member States have in their daily work applying single market law; the updating of the Guidance on the application of Articles 34-36 TFEU[229]; *the issuing of a Guidance on strategic (social, innovation, green) and other aspects (collusion) of public procurement and proposing a Recommendation on Review systems*; the ensuring of adequate support for Member States on the transposition of the European Accessibility Act[230]; the *setting up of platforms for exchange with Member States such as the one used for Public Procurement Directives*, for detailed exchanges between the Commission and Member States authorities on specific issues; improving access to information on rules and requirements for users, *eg*, via the development / enhancement of the Single Digital Gateway[231]; *training and exchange of practice for national judges and practitioners*; straightening the capacity building for national public administrations (in line, among others, with *the 4th update of the Public Procurement Action Plan 2020*[232];

(b) **improving the transposition, implementation and application of EU rules —** via the insurance of a structured dialogue for better

[228] Handbook on implementation of the Services Directive: https://op.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715

[229] https://op.europa.eu/en/publication-detail/-/publication/a5396a42-cbc8-4cd9-8b12-b769140091cd

[230] Directive 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (OJ L 151, 7.6.2019, p. 70).

[231] Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012 (OJ L 295, 21.11.2018, p. 1).

[232] https://ec.europa.eu/regional_policy/sources/docgener/informat/2014/action_plan_pp.pdf .

transposition of single market directives; and the setup of a implementation partnership for all single-market Regulations;

(c) **making the best use of preventive mechanisms —** by *improving ex-ante assessments of restrictive regulation under the Proportionality Test Directive*[233]; the *streamlining the operation of the single market Transparency Directive*[234] (in line with the more strategic approach for the Commission´s enforcement actions[235]); or the prevention of new barriers to providing services in the single market (with the adoption of a Services Notification Directive[236] as spearhead initiative); or

(d) **detecting non-compliance inside the single market and at the external borders —** by, among others, the development of labelling and traceability systems, *etc*.

3. The Europe 2020 Strategy

The Europe 2020 Strategy came in the aftermath of the recent global economic crisis, one of the most severe in history. By this document, the Commission, which acknowledged that 'the economic realities are moving faster than political realities', decided to take the reins and jump-start the recovery of the European economy on a fundamentally restructured basis, using all the levers that the Treaty of Lisbon had just offered.

According to its Preface, the Commission's short-term priority was 'a successful exit from the crisis.' But, acknowledged its authors, '[t]o achieve a sustainable future, we must already look beyond the short term. Europe needs to get back on track. Then it must stay on track. *That is the purpose of Europe 2020. It's about more jobs and better lives. It shows how Europe has the capability to deliver smart, sustainable and inclusive*

[233] Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions (OJ L 173, 9.7.2018, p. 25).
[234] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1).
[235] Communication from the Commission "EU law: Better results through better application". C/2016/8600 (OJ C 18, 19.1.2017, p. 10).
[236] Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System. COM(2016) 821 final.

growth, to find the path to create new jobs and to offer a sense of direction to our societies.' – p.1 (emphasis added).

At the heart of the Europe 2020 Strategy there are three 'mutually reinforcing priorities' which qualify even further the social market economy postulated by the Treaty of Lisbon. According to this Strategy, the economy in the internal market should necessarily be characterized by:

- ✓ *Smart growth*: developing an economy based on knowledge and innovation;
- ✓ *Sustainable growth*: promoting a more resource efficient, greener and more competitive economy;
- ✓ *Inclusive growth*: *fostering a high-employment economy delivering social and territorial cohesion*.

To reach this objective, the Commission set a series of headline targets to be reached by 2020 in a number of selected areas, of which not less than three to do particularly with the social field:

- ✓ *Employment* (under which at least 75 % of the population aged 20-64 should have been employed by 2020);
- ✓ *Research & Development* (where 3% of the EU's GDP should have been invested in R&D by the same time);
- ✓ *Climate change & energy* (aiming at the implementation of the "20/20/20" climate/energy targets and an increase to 30% of emissions reduction);
- ✓ *Education* (under which the Commission promised that, by 2020, the share of early school leavers should have remained under 10% while at least 40% of the younger generation should have obtained a tertiary degree); and
- ✓ *Poverty and social exclusion* (with 20 million less people at risk of poverty).

To achieve these goals, he Europe 2020 has devised seven 'flagship initiatives', namely:

- ✓ "Innovation Union"
- ✓ "Youth on the move"
- ✓ "A digital agenda for Europe"
- ✓ "Resource efficient Europe"
- ✓ "An industrial policy for the globalisation era"
- ✓ "An agenda for new skills and jobs"
- ✓ "European platform against poverty".

What is however worth underlying is that the Europe 2020 Strategy must be grasped and assumed not as a mere leaflet or a general, hollow political declaration, but as a strong commitment and a binding document, a genuine economic Constitution of the Union[237]. The seven flagship initiatives are thus ordained to *compel*, both the Union and the Member States. Inasmuch as the first is concerned, all European institutions are bound to intervene via specific EU-level instruments, notably the single market implements (including hard law, that is internal market and competition rules plus a series of strong policies, soft law, actions and other administrative tools, in line with Articles 7 and 11 TFEU), but also various financial levers and external policy tools. In turn, Member States are expected to complement the efforts coming from the European Union with own measures and actions, in line with their constitutional powers and attributions (including those deriving from the principle of sincere cooperation stipulated in Article 4(3) TFEU) and the shared competences stemming out from the EU treaties.[238]

The Europe 2020 Strategy requires, to this purpose, a close monitoring from the European Commission and permanent and continuous reporting by Member States. Only through a close and permanent monitoring will be possible to fine-tune the evolution of the internal market in accordance with the goals set via the Europe 2020 Strategy. To this purpose, a dedicated scoreboard has been created on the Eurostat page (see https://ec.europa.eu/eurostat/web/europe-2020-indicators/europe-2020-strategy/overview). Unfortunately, recent statistics (available on the dedicated portals, such as https://ec.europa.eu/eurostat/web/europe-2020-indicators/europe-2020-strategy/headline-indicators-scoreboard or the Single Market Scoreboard, but also on the relevant portals developed by the national administrations of the Member States – a list of which may be found at https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers/public-procurement-eu-countries_en) reveal that the Member States' evolution is not uniform and that some countries are lagging behind.

With regard to public procurement, in particular, the Europe 2020 Strategy contains a number of strategic, even if just general, references. Such references may be spotted in each of the chapters describing the actions which both the Commission and the

[237] See C Bovis, 'The social dimension of EU public procurement and the 'social market economy'', in D Ferri and F Cortese (eds), '*The EU social market economy and the law. Theoretical perspectives and practical challenges for the EU'*, Routledge, 2018.

[238] For an in-depth discussion, see J Wandel, '*The role of government and markets in the Strategy "Europe 2020" of the European Union: a robust political economy analysis'*, (2016) International Journal of Management and Economics 49, 7 *et seq*.

Member States have assumed as part of their mission towards a smart, sustainable and inclusive growth respectively.

The Commission has thus undertook, in consideration of the role reserved to it under Articles 7, 9 and 11 TFEU, to '*make full use of demand side policies, e.g. through public procurement and smart regulation*' (p.10, emphasis added) but also to 'enhance a framework for the use of market-based instruments' — among which a 'wider use of green public procurement' (p.14) and respectively to '*develop a horizontal approach to industrial policy combining different policy instruments* (e.g. "smart" regulation, *modernised public procurement*, competition rules and standard setting) – p.15, emphasis added.

In turn, Member States are expected to 'deploy market-based instruments such as fiscal incentives and procurement to adapt production and consumption methods' (p.14), to 'use regulation, building performance standards and market-based instruments such as taxation, subsidies and procurement to reduce energy and resource use and use structural funds to invest in energy efficiency in public buildings and in more efficient recycling' (p.15), and to 'improve the business environment especially for innovative SMEs, including through public sector procurement to support innovation incentives' (p.15).

In terms of sustainability on the other hand, in spite of all these ambitious declarations and plans, the Europe 2020 Strategy could not depart too far from the prime objective of the Treaties. The Commission has hence took one prudent step back, by acknowledging that '*Public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide*' – see Section 4.3 'Pursuing smart budgetary consolidation for long-term growth' from Chapter 4 – 'Exit from the crisis: First steps towards 2020', p.26, emphasis added), thus failing, once more, the strike a clear, stable balance between the economic and the other, 'horizontal' dimensions of the internal market.

4. Conclusions

The transformations described above show that there is no way back. The Union has determinedly (and irreversibly) turned social, in the aftermath of several crises (not just economic) which unveiled the serious deficiencies of the original political arrangement.

Owing to these transformations, the instrumentality of public procurement in the pursuing of social policy objectives is now openly acknowledged and widely promoted,

but mainly at a declarative level, as the EU both primary and secondary legislation is still meagre in offering concrete solutions, leaving the burden on the shoulders of Member States and contracting authorities. Moreover, the handful of cases where the Court tried, in a wide (and bold) interpretation of both the old and new texts of the Treaties, to clarify the role of public procurement in the pursue of various sustainable objectives justified by concrete public policies or overriding general interests, was continuously undermined by a very stubborn case law developed in the internal market area. It is in fact there where it continued, quite determinedly, to protect the fundamental freedoms from various constraints and obstacles, pushing the scope of the internal market rules far beyond its traditional margins and building the so-called 'mandatory requirements' theory[239] through the sieve of which many 'social procurement' did not, or could not, pass.

In any case, the legal and political evolution discussed in this Chapter shows beyond any doubt that the principles that, even since the prime age of European integration, have been revolving around, or gravitating to, the four sacred (economic) freedoms, are not (and cannot be) *absolute*. The political actors understood that, if these rules and principles were to be absolutized, the internal market would eventually collapse under the pressure of the multitude of national interests. A certain balance was / is hence necessary. This is why there were created some breaches, outlets through which the pressure in excess to come out and Member States to be able to exercise their sovereign powers, especially in sensitive areas such as those pertaining to national social policies. Concrete provisions, like Article 36 TEC (now Article 36 TFEU), or Article 39 TEC (now Article 45 TFEU) and so on offered thus Member States a little room for manoeuvre. Their actual aim was to provide for the possibility to restrict the free movement of goods or people, or the freedom to provide services within the single market, in the name of some overriding interests (that is, in those cases where a full, 'literal' application of the internal market rules would bend the stability thereof to the point of breaking it). But the Court of Justice went even farther and, apart from clarifying that all those provisions must be interpreted restrictively and all measures taken thereunder must, in order to be validated, be justified (based on a case-by-case assessment) but also proportional, came out with the very ingenious mechanism of mandatory requirements. The Court had the chance to verify these theories, in the specific area of public procurement, on several (not many) occasions and the handful of decisions that followed confirmed that at least *some* fundamental social rights, or policy objectives, *could* fall into

[239] On which we will insist more in Chapter III below.

either the 'public policy' or the mandatory requirements categories of exceptions and, *ergo*, justify concretely restrictive national measures.

In parallel, the Commission started a vivid campaign aimed at covering the holes in the primary legislation (which, owing to their rather political nature, preserved a too wide degree of generality ― hence vagueness) with concrete instruments (of soft law) and initiatives, or actions.

The social connotations that accompanied some of these transformations were however severely detrimental to their successful use and the rather tenuous case law of the Court led to significant *political* blockages. A very good case in point is the aggressive campaigns which trade unions carried out in Ireland in connection with the ratification of the Treaty of Lisbon. They practically used the *Laval* and, more insistently, the *Rüffert* cases to convince the Irish electorate to vote against it ― under the pretence that the EU was in fact undermining national social protection. This stratagem proved surprisingly successful. Moreover, an impressive number of high-profile think-tanks such as Notre Europe and the European Trade Union Institute organized endless discussions and round tables on the most intriguing decisions of the Court, such as, again, those handed down in the *Viking*, *Laval* and *Rüffert* cases (which, after a long line of other frustrating decisions, appear to have pushed the furry of the European labour market to an apex), while the European Parliament itself intervened in the process via several channels, asking the European Commission and the Council of Ministers to deliver clear opinions on the implications of these decisions[240], publishing own-initiative reports[241] and even adopting critical resolutions[242].

Even more, in the lack of determined and clear political and legislative measures, the fallout of the latest decision of the Court on the conflict between the internal market rules and the national social measures led in fact to far severer developments. They went even to the point where a convincing number of actors placed on the left side of the political spectrum, encouraged by the enthusiastic support offered by trade unions, proposed ― based on the not-so-crazy assumption that the main issues in *Viking* and *Laval* but mainly in *Rüffert*, *Luxembourg* and *Bundesdruckerei*, were *political* ― several radical legislative changes. One of them involved the amendment to the Posted Workers Directive in a way that would have made impossible decisions such as those rendered in the cited cases while other,

[240] See for ex. the written questions Nos. P-2404/08, E-4129/08 and E-29963/08.
[241] *Eg*, the Report of the Committee on Employment and Social Affairs on Challenges to collective agreements in the EU of 30 September 2008 (A6-0370/2008).
[242] Such as the European Parliament Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085 (INI)).

more ambitious but far harder to transpose, entailed the modification of the Treaties themselves.[243] These proposals were greeted with a dense political scepticism and were eventually dropped.

The conflict between the basic internal market rules and various basic social rights has hence started to unveil, more aggressively than ever, its ingrate political face, evidencing grave political implications. In the face of an imminent deadlock, a compromise — which to give the social factor a prominent role in the internal market context — must necessarily be reached sooner rather than later. Anyway, as already shown above, the political factor has already started to act. It remains to be seen how this compromise will be dealt with in the public procurement area, a territory guarded by very determined partisans of the economic values in the internal market. The Court of Justice of the European Union will definitely have a strong say in the process but this very much depends on how it will interpret the evasive texts of the Treaties and the rather incoherent secondary legislation that touches upon the values of a European social model and gropes for the margins of the EU's social market economy. All these will be discussed in detail in the ensuing Chapters.

[243] For a detailed discussion on these aspects, see M Höpner, '*Political answers to judicial problems? Europe after Viking, Laval and Rüffert*', in the collection of texts published following the debates organized by Notre Europe and the European Trade Union Institute (ETUI) in 2008 and available, under the title '*Viking-Laval-Rüffert: Economic freedoms versus fundamental social rights-where does the balance lies?*', at https://institutdelors.eu/evenement/debat-viking-laval-ruffert-libertes-economiques-versus-droits-sociaux-fondamentaux-ou-se-situe-lequilibre/?lang=en, or C McCrudden, 'The Rüffert Case and public procurement' in M Cremona (ed.), '*Market Integration and Public Services within the EU'*, Oxford University Press, 2011, 130 *et seq*.

CHAPTER III
JUDICIAL ACTIVISM IN SHAPING THE MARGINS OF THE INTERNAL MARKET

The worsening of the Europe's economic situation in the mid-1970s started to erode, progressively, the original political compromise (dominated by an obtrusive liberalism) on which the Community had been built, up to the point where the imbalance between the 'economic' and the 'social' elements of the European integration reached some upsetting levels. Additionally, the 'original division of labour between the national and the supranational levels' fell prey to the progressive deepening and widening of economic integration, especially after the adoption of the Single European Act and the reformation of the entire internal market agenda, fracturing even more the Community's frail constitutional structure.[244]

Against this backdrop, the Commission was constrained to intervene via indirect instruments (such as framework directives adopted for the mere purpose of harmonization and, upon the case, coordination, OMC tools[245] or MoUs – see Chapter IV

[244] F Costamagna, '*The European Semester in action: Strenghtening economic policy coordination while weakening the EU social dimension?*', LPF Working Papers, Centro Einaudi, 5/13, at http://www.centroeinaudi.it/lpf/working-papers.html, 7.

[245] At least in the social spere, and particularly in the social inclusion area, the relevant models of OMC developed independently of the EMU debate. And, unlike the OMCs set up for the materialisation of the goals set in the Stability and Growth Pact and the Broad Economic Policy Guidelines (corresponding to the Lisbon Agenda), such as the European Employment strategy (EES) — which was officialised through the Treaty of Amsterdam, they remained, for many years, a controversial topic (at least at the European level) especially due to the sensitive issues raised by the subsidiarity principle. As rightly observed in the literature, this principle, together with that of proportionality, determine not only the *content*, but also the *form* of Union intervention (see O De Schutter, 'The implementation of fundamental rights through the Open Method of Coordination', in O De Schutter & S Deakin (eds), 'S*ocial rights and market forces: is the Open Method of Coordination of employment and social policies the future of social Europe?*' Bruylant, 2005, 323, or N Büttgen, '*Which mode(s) of governance for a floor of rights of worker protection?*', presented in June 2013 at the ILERA congress in Amsterdam, and available at: http://ilera-europe2013.eu/uploads/paper/attachment/294/Article_ILERA_congress_final_paper_Buttgen.pdf), 7. For an in-depth analysis of the significance of the so-called Open Method of Coordination in developing 'a new compromise on social Europe', see G de Búrca, '*EU law and the welfare state: In search of solidarity'* (Collected Courses of the Academy of European Law (XIV/2)), Oxford University Press, 1 edition, 2006. It would be, in this context, fit to recall that the principle of subsidiarity was introduced rather late in the EU law, by the Maastricht amendments to the EC Treaty (more concretely, via Article 3b thereof), after a long history of expansive interpretation of the scope of EU competence, most of all under the Treaty provisions governing the *harmonization* of national laws (see K Nicolaidis and S Weatherill, 'Whose Europe? National models and the constitution of the European Union. Introduction', in K Nicolaidis and S Weatherill (eds),'*Whose Europe? National models and the constitution of the European Union'*, European Studies at Oxford, Oxford University Press, 2003). This extension of the lawmaking powers of the European legislature (as part of their duty to ensure the functionality of the Common Market) had been promoted not only at the Council level but mainly by the Court of Justice (for details, see D Wyatt, 'Subsidiarity. Is it too vague to be effective as a legal principle*?*' in K

below), while the CJEU assumed, practically, the role of a genuine lawmaker and, through a sometimes inconsistent case law, initiated a process of de-legiferation and negative integration.[246]

In its attempt to keep the internal market structure intact, the Court tried, throughout its case law on the interpretation of the relevant Treaty articles that consecrate(d) the fundamental freedoms, to retain an as wide a stance as possible, juggling with key concepts like 'discrimination' (a term which is at more common to competition and the competition-related areas) or 'restriction' in very interesting ways. More particularly, in the 'social' field, the Court's efforts reached new levels of intensity. As it was called, since as early as the 1990s, to assess the compatibility of various aspects of national welfare regimes with the functioning of a competitive internal market,[247] the Court proved quite determined to protect the fundamental freedoms from various constraints and obstacles brought about by Member States, pushing the scope of the internal market rules far beyond its traditional margins and building a 'mandatory requirements' theory through the sieve of which many 'social' criteria, including 'social procurement' criteria, did not, or could not, pass. This indirect form of infiltration of internal market law has soon been construed as a major threat to the stability of national welfare systems.[248]

Nicolaidis and S Weatherill (*eds*), '*Whose Europe? National models and the constitution of the European Union'*, European Studies at Oxford, Oxford University Press, 2003, 86). The Maastricht provisions on subsidiarity were preceded by the so-called Edinburgh guidelines, then by the Amsterdam Protocol on Subsidiarity and Proportionality. For more on the harmonization process and its particularities and, most importantly, its blockages, see also S Weatherill, '*The Internal Market as a legal concept*', Collected Courses of the Academy of European Law, Oxford University Press, 2017, esp. Chapters 13 and 14. Due to the intricate structure of the subsidiarity concept and to the fact that, as many scholars noted, social OMCs involve, unlike the EES (which is much more centralised), an experimental dynamic and a substantial involvement of national actors — see for ex. P Pochet, 'The Open Method of Co-ordination and the construction of social Europe', in J Zeitlin and P Pochet (eds), '*The Open Method of Co-ordination in action. The European employment and social inclusion strategies*', Peter Lang, 2005 — they had a rather contorted evolution. Their merits started to be acknowledged only in 2003, starting with the the Greek Presidency of the European Union (when, during the Ioannina conference of 24-25 May 2003, the OMC gained full official recognition as the main tool for the implementation of the European Social Policy) – for details, see T D Sakellaropoulos and J Berghman (eds), '*Connecting welfare diversity within the European social model*', Social Europe Series, Vol.9, Intersentia, 2004. According to the authors of this latter volume, 'through OMC the European Social Model gained a new momentum in terms of effectiveness and legitimacy' (see the preface).

[246] For the multitude of approaches in the CJEU case law, depending on the freedom at stake, and the legal uncertainty that they generate, see J Snell, '*Goods and services in the EU law*'. Oxford University Press, 2002, N Nic Shuibhne, '*The coherence of EU free movement law. Constitutional responsibility and the Court of Justice*', Oxford University Press, 2013 or S Enchelmaier, '*Four freedoms, ever more principles?'*, Oxford Journal of Legal Studies, 2016.

[247] F Costamagna, '*The internal market and the welfare state after the Lisbon treaty'*, 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 4.

[248] F Costamagna, '*The European Semester in action: Strenghtening economic policy coordination while weakening the EU social dimension?*', LPF Working Papers, Centro Einaudi, 5/13, at http://www.centroeinaudi.it/lpf/working-papers.html, 7.

Occasionally though, the Court has taken a different path and, in a bold interpretation of both the old and new texts of the Treaties, made important concessions. It is, for example, the case of the handful of decisions where it tried to clarify the role of public procurement in the pursue of various sustainable objectives justified by concrete public policies or overriding general interests. It is practically in *this* area that the distinction between the legal derogations (from the free movement rules) postulated by the Treaties and the jurisprudential concept of 'mandatory requirements', which it developed and refined throughout a long line of decisions, became of utmost importance.[249]

We will thus try to decode, in the ensuing sections, the CJEU's most relevant internal market case law and see how the concessions it made in the public procurement area fit the general paradigm.

1. The internal market rules and possible exceptions thereto

It is not a secret that, despite the explicit commitment to a 'social market economy' as assumed by the Treaty of Lisbon, social policies have not necessarily evolved, at the EU level, at the same pace as the economic reforms. This is true not only for the EU's traditional legislative process, but also for the case law coming from the Court of Justice of the Union (who demonstrated a high degree of resilience in departing from the traditional approach that was giving the economic element full priority over the social one. The Court's resilience reached high notes in the *Viking, Laval* and *Rüffert* decisions. There, the Court, allegedly applying the market access approach tool developed in *Sager*[250], bended the tests of justification and proportionality up to the point where they became impossible to apply. The imbalance thus became evident as the Court started to apply the market access test to non-discriminatory national laws concerned with *social* issues[251]). It is however true that, in the

[249] E Spaventa, '*On discrimination and the theory of mandatory requirements'*, in A Dashwood, J Spencer, A Ward and C Hillion (eds), Cambridge Yearbook of European Legal Studies, Vol.3, Hart Publishing, 2000, 457.
[250] C-76/90 *Sager* [1991] ECR I-4221.
[251] For an interesting discussion on this, see A Hinarejos, '*Laval and Viking: The Right to Collective Action Versus Fundamental Freedom*s' (2008) 8 Human Rights Law Review 714. According to this author, the fact that the Court reshaped its position in case C-271/08 *Commission v Germany* [2010] ECR I-7091 failed to redress the harm. In that case, a noteworthy point was made by AG Trstenjak according to which '*a conflict exists between the fundamental rights to bargain collectively and to autonomy in collective bargaining and Directives 92/50 and 2004/18. **As those procurement directives give effect to freedom of establishment and to freedom to provide services, that conflict must be resolved first at a primary law level treating the conflict as one between the fundamental rights to bargain collectively and to autonomy in collective bargaining, on the one hand, and freedom of establishment and to provide services, on the other. Subsequently, that resolution***

latest years, and under the fallout of both the recent economic crisis and the even more recent political one – which led to an influx of immigrants throughout Europe – the employment and integration/inclusion reforms have been accelerated. Moreover, the reforms that led to the amendment of the rules set in the Treaty of Rome had already started to evolve (starting early, since the first stages of integrations, probably inspired by the precedent offered the ILO conventions and other international accords) to allow social legislation to be adopted not only by traditional legislatures but also by social partners ― *eg*, via collective agreements of general application ― which have often set a strong trend and have proved very active and efficient in the recent years, including at the adoption of the latest package of directives on public procurement).

On another level, the fact that a number of social values have been put, via Article 3(3) TEU, on an equal footing with the economic values of the internal market is only misleading as an 'equal' status is not at all helpful in the case where two or more values collide with each other. In such cases, the authority called to interpret the law (in this case, the Treaties) has an ingrate role, as it must step out of the constitutional framework and resort to some artifices in order to tip the scale in favour of one value or another.[252] This task is not easy and, if approached less coherently, can lead to surprisingly hieratic conclusions. In fact, the ECJ/CJEU case law is, from this point of view, far from balanced. Judge David Edward identified, as early as 1995[253], four discrete approaches to the relation between the EU internal market and competition rules and Member States' sovereignty on social issues (in particular on the organization and the delivery of services of general interests): an 'Absolute Sovereignty' approach, an 'Absolute Competition' approach, a 'Limited Sovereignty' approach and a 'Limited Competition' approach. This has been perpetuated until today, with an apparent preference shown in recent years for the third pattern.

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achieved at a primary law level must implemented at the level of secondary law through an interpretation of the procurement directives in accordance with primary law.' (see para 177 of his Opinion, emphasis added). For a general discussion on the evolution of the CJEU case law on the clash between the EU's traditional competition rules and the principles governing the 'social market economy', see also V Šmejkal, *'Competition law and the social market economy goal of the EU'*, (2015) International Comparative Jurisprudence 1 or S A de Vries, '*Tensions within the internal market: the functioning of the internal market and the development of horizontal and flanking policies*', Europa Law Publishing, 2006.

[252] N Nic Shuibhne, '*The coherence of EU free movement law. Constitutional responsibility and the Court of Justice*', Oxford University Press, 2013, 47.

[253] D A O Edward, '*Article 90 EC Treaty and the deregulation, liberalisation and privatisation of public enterprises and public monopolies*', Referat im Rahmen der Vortragsreihe 'Europa vor der Regierungskonferenz 1996', Bonn, 18 December 1995, 8.

1.1 *Shaping the free movement of goods*

The free movement of goods (regulated mainly under Articles 34 to 37 TFEU) is indeed one of the keys of the functioning of the internal market. The fact that this represents a non-harmonized area has nonetheless been a source of trouble (generating or, better, encouraging askew national legislation and practice, but also a very hard to grasp case law from the CJEU). According to Article 34 TFEU, 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States' while, pursuant to Article 35 TFEU, 'Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.' Member States and the CJEU however interpreted these provisions in a multitude of ways, while the decoding of the meaning of terms such as 'goods'[254], or 'cross-border / transit trade'[255] or 'quantitative restrictions'[256] etc., but also of the syntagma 'measures having equivalent effect' has raised serious problems and even standoffs.

The scope of the 'measures having equivalent effect' became, in a piecemeal fashion and owing to the vagueness of the provisions containing this phrase, much broader than the quantitative restrictions referred by Articles 34 and 35 TFEU. The first hint on the margins thereof was offered by the Court in *Dassonville*.[257] The *Dassonville* formula proved to be a reliable yardstick, hence a success, so it was used in a considerable number of ensuing cases and remained true to its pith for almost 20 years, even if with small variations from one

[254] According to CJEU, Articles 34 and 35 cover *all* types of imports and exports of goods and products (practically, all goods in existence which have an economic value and 'are capable, as such, of forming the subject of commercial transactions' – see C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, para 53). This includes waste, even when it is non-recyclable, as long as it may be subject of a commercial transaction, electricity, or natural gas, *etc* (see to this end Case C-393/92 *Almelo v Energiebedrijf Ijsselmij* [1994] ECR I-1477 or Case C-159/94 *Commission v France* [1997] ECR I-5815) but not television signals – as decided in C-155/73, *Sacchi* [1974] ECR I-409.

[255] As underscored in *Dassonville* – see para 5, Article 34 TFEU applies to obstacles in trade *between Member States*, therefore a cross-border element is mandatory in the evaluation of a case allegedly falling within the scope of Articles 34, 35 TFEU. So, while national measures affecting only domestic goods should fall out of the scope of the said Articles, all the other measures which are, or may, directly or indirectly, hinder intra-EU trade, should not. On the other hand, the Court decided that re-imports fall within the realm of Article 34 TFEU but, where they are used solely to circumvent the domestic rules, they cannot enjoy the protection offered by that Article, as they are abusive – see to this end Case C-78/70 *Deutsche Grammophon v Metro* [1971] ECR I-487 versus Case C-229/83 *Leclerc and Others* [1985] ECR I-1. The cross-border condition is apparently met even where the goods are just in transit – see Case C-320/03 *Commission v Austria* [2005] ECR I-9871, para 65.

[256] See Case 2/73 *Geddo* [1973] ECR 865, where the Court defined quantitative restrictions as measures amounting to a total or partial restrain on imports of goods in transit. This includes concrete quantitative restrictions such as total or partial bans on imports or just a quota system – as in Case C-13/68 *Salgoil* [1968] ECR I-453.

[257] Case C-8/74 *Dassonville* [1974] ECR 837. According to that decision, 'All trading rules enacted by Member States *which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade* are to be considered as measures having an effect equivalent to quantitative restrictions.' (emphasis added).

case to another. In *Dassonville*, the Court based its decision on the provisions of the Directive 70/50/EEC[258] then in force, reiterating the idea that the syntagma 'measures having equivalent effect' should have caught not only those measures which favoured domestic goods to the detriment of the imported ones, but also all other measures which, without being necessarily discriminatory, were in fact 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. The accent was hence put, even if just incidentally, on the *effect* of those measures (hindrances to trade) and the 'direct discrimination' was brushed aside as irrelevant.

The conclusions reached in *Dassonville* were further confirmed in *Cassis de Dijon*[259], where the Court acknowledged that the differences between the national rules on imports could generate obstacles to intra-Community trade (by setting a dual burden on imports due to the fact that imported goods must have complied with two sets of rules, one of the state were they were manufactured and another, of the state where they were sold, which were in fact 'indistinctly applicable'[260]) and explicitly confirmed that Article 34 TFEU could also catch measures which applied to both domestic and imported goods without any difference. The major contribution of Cassis de Dijon to the theory and practice of intra-EU trade was the possibility acknowledged for Member States to derogate from the rules enshrined in Article 34 and 35 by not only having recourse to Article 36 TFEU, but also to certain mandatory requirements. The *Cassis de Dijon* case is also important as it introduced the 'principle of mutual recognition' which proved to be a key instrument in the removal of some substantial technical barriers to the intra-EU trade. According to this principle, notwithstanding the eventual technical variations between the national rules applying across the EU, Member States of destination cannot forbid the sale on their territories of products which *are not subject to EU harmonisation* and which are *lawfully marketed in another Member State*, even if they were produced under technical and quality rules different from those applicable to domestic products. These Member States may disregard the cited principle only with regard to those measures taken pursuant to Article 36 TFEU or, alternatively, on the basis of some overriding requirements of general public importance (eventually endorsed by the CJEU case law), provided however that these requirements are

[258] Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (OJ L 13 of 19.1.1970, p. 29).
[259] Case C-120/78 *Rewe-Zentral* (Cassis de Dijon) [1979] ECR I-649.
[260] See Case C-110/05 *Commission v Italy* [2009] ECR I-519, para 35.

proportionate to the aim pursued and there is no other solution which to be less detrimental.[261]

The *Cassis* test was further refined in the *Gebhard* case[262], where, with regard to the freedom of establishment, the Court postulated that national regulations that 'are liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the Treaty' must meet *four* conditions in order to be acknowledged as conforming to the European legal framework: 'they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it'.

In fact, acknowledging – with the benefit of hindsight – the great import of the *Cassis* decision and of its reach legacy, and in order to facilitate the implementation of the principles consecrated thereby, but especially to eliminate the ambiguities around the burden of proof, the EU legislature adopted, after more than fifteen years since its publication, Decision No 3052/95/EC establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community.[263] This Decision was eventually, that is after another thirteen years, replaced by Regulation 764/2008 Regulation (EC) laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State.[264]

The *Dassonville* formula was however substantially re-arranged in *Keck*[265], where the Court introduced, rather for practical reasons[266], a number of limitations to the scope of the term 'measures having equivalent effect'. The *Keck* decision clarified that, while

[261] See Case C-24/00 *Commission v France* [2004] ECR I-1277, para 75. Moreover, according to Case 104/75 *De Peijper* [1976] ECR 613, it is the Member State that took that measure who bears the burden of proof that the claimed aim cannot be reached by other means with a less restrictive effect.
[262] C-55/94, *Gebhard*, [1995] ECR I-04165.
[263] Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community, OJ L 321, 30.12.1995, p. 1–5.
[264] Regulation (EC) No 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC, OJ L 218, 13.8.2008, p. 21.
[265] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097. Interestingly, the reasoning offered in *Keck* had allegedly been anticipated in a number of preceding cases such as C-155/80 *Oebel* [1981] ECR 1993; C-75/81 *Blesgen* [1982] ECR 1211; C-23/89 *Quietlynn* [1990] ECR I-3059 or C-148/85 *Forest* [1986] ECR 3449). Nonetheless, until Keck, the Court was rather hesitant in definitively embracing this approach as, in a number of other cases, it adopted a contrasting stance – see for ex. Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] ECR 2605 or Case C-145/88 *Torfaen* [1989] ECR 3851 where it had found it difficult to apply as such the Keck test. For a review of the case-law on Article 28 EC *before Keck* see opinion of AG Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, at I-182, points 23 to 33.
[266] See para 14 from the *Keck* decision. For an interesting discussion on these aspects, see C Barnard, '*Fitting the remaining pieces into the goods and persons jigsaw*' (2001) European Law Review 35, p. 50.

all measures instituting requirements to be met by goods (*eg*, a certain shape, size, composition, method of presentation *etc*, or with the production thereof) remain to fall as such within the scope of Article 34 TFEU and thus be subjected to the *Cassis de Dijon* test[267], regardless of whether they are discriminatory or not, *selling arrangements* (such as those setting certain conditions and methods of marketing[268], or certain periods within which the goods might be sold in shops[269], or some restrictions on the place of selling or on the target audience[270], as well as measures instituting a price control[271] etc.) may fall within the ambit of the same Article only to the extent where they are proved to discriminate based on the *place of origin* of the products at hand, the source of discrimination (law or fact) being nonetheless irrelevant.[272] So, according to *Keck*, requirements to be met by goods fall *per se* within the scope of Article 34 TFEU, while selling arrangements must first be subjected to a 'discrimination test'.[273]

Anyway, it soon proved that the *Keck* formula was not so easy to apply.[274] This is why, in a number of cases, the Court decided that, even if the rules at hand appeared to be selling arrangements, they should, given the context, have been treated as rules concerning the products and *vice-versa*, measures that on their face appeared to have been concerned with the products as such were, after weighting the concrete circumstances, found to be selling arrangements.[275]

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[267] See for ex. Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, para 29 or Case C-389/96 *Aher-Waggon* [1998] ECR I-4473, para 18. See also Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos* [2006] ECR I-8135 or Case C-65/05 *Commission v Greece* [2006] ECR I-10341.

[268] See for ex. Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, para 22, or Case C-6/98 *ARD* [1999] ECR I-7599, para 46. For a case where the Court had to measure the restrictive effect of a law on advertising (as, since *Keck*, the Court apparently started to treat advertising restrictions as selling arrangements), see Joined Cases C-34/95 to C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, as well as Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, Case C-405/98 *Gourmet International Products* [2001] ECR I-1795 and Case C-292/92 *Hünermund and Others* [1993] ECR I-6787 or, finally, Case C-239/02 *Douwe Egberts* [2004] ECR I-7007.

[269] See Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199, paragraph 14; Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355 and Joined Cases C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94 *Semeraro Casa Uno and Others* [1996] ECR I-2975, paragraphs 9 to 11, 14, 15, 23 and 24.

[270] See Case C-391/92 *Commission v Greece* [1995] ECR I-1621, para 15 or Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355.

[271] See Case C-63/94 *Belgapom* [1995] ECR I-2467.

[272] P. Oliver, '*Free movement of goods in the European Community*', Sweet and Maxwell, 2003, 127. Case C-320/93 *Lucien Ortscheit v Eurim-Pharm* [1994] ECR I-5243 is a good example where the Court found that the measures under scrutiny were 'manifestly discriminatory' as the discrimination was the prime scope thereof.

[273] P Oliver, '*Oliver on free movement of goods in the European Union'*, 5th ed., Hart, 2010, 124.

[274] See in this regard the Advocate General's Opinion in Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos* [2006] ECR I-8135, points 27 to 29.

[275] See Case C-416/00 *Morellato* [2003] ECR I-9343, para 36 (in this case, AG Maduro considered that the requirement to do with the alteration of the products at issue was imposed only at the last stage of the marketing thereof and, consequently, that the access to the national market was not, in itself, an issue).

In a nutshell, as later summarized in *Commission v Italy*[276], the main case-law stream on Article 34 TFEU has basically established three principles that are bound to accompany the fundamental freedom of movement of goods: (a) the principle of non-discrimination; (b) the principle of mutual recognition; and (c) the principle of ensuring free access of products to national markets of the other Member States.

Another interesting line of cases[277] dealt with the so-called 'restrictions on use' which, in essence, define those measures taken by a Member State which, while allowing the free *sale* of a product, introduce some restrictions on its *use* (*eg*, by imposing a specific purpose, or method of exploitation, or a certain period or conditions of use *etc*.). The Court found that such restrictions on use may, in certain conditions, be treated as 'selling arrangements' with an effect equivalent to that generated by the imposition of quantitative restrictions on imports/exports.

Moreover, as the Court clarified in *Jägerskiöld*[278], determining whether a case is about 'goods' or 'services' is crucial for a just resolving thereof as, for example, fish are *goods* so that the selling of fish abroad falls within the ambit of Article 35 TFEU, whereas catching fish in the waters of another Member State (including the issuance of angling permits) constitute the provision of a *service* which falls into the scope of Articles 56 *et seq*. TFEU.

According to the CJEU, Articles 34 to 36 TFEU apply regardless of the nature of the originator of the measure under assessment, or of the measure itself. The Court has thus interpreted the term 'Member States' in a very broad way, including in this category not only national governments, but also all the other authorities of a Member State (national, regional or local)[279], as well as administrative, legislative or judicial bodies[280], or even private bodies, under certain circumstances[281]. Moreover, in a recent case, the Court appears to suggest that mere public statements made by an official in rather informal circumstances, even though with no legal force, *can* be assumed as having been made by the Member State itself, as per Article 34 TFEU, and therefore as constituting an obstacle to the free movement

[276] C-110/05 *Commission v Italy* [2009] ECR I-519.
[277] See for ex. Case C-265/06 *Commission v Portugal* [2008] ECR I-2245, Case C-110/05 *Commission v Italy* [2009] ECR I-519, or Case C-142/05 *Mickelsson and Roos*, [2009] ECR I-0427.
[278] Case C-97/98 *Jägerskiöld* [1999] ECR I-7319.
[279] Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151.
[280] See Case C-434/85 *Allen & Hanburys* [1988] ECR I-1245, para 25, or Case C-227/06 *Commission v Belgium*, 2008] ECR I-46, para 37.
[281] See Joined Cases 266/87 and 267/87 *R v Royal Pharmaceutical Society of Great Britain* [1989] ECR 1295, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, or C-415/93 *Bosman and Others* [1995] ECR I-4921.

of goods, provided that the addressees thereof can reasonably assume, owing to that particular context, that they are official positions taken with the authority of the office of the speaker.[282]

As a matter of principle, since Article 34 has been acknowledged to bring forth a 'defence' mechanism destined to protect and preserve the freedom of movement of goods across the internal market, it can be primarily invoked against basically all *binding* provisions of national legislation.[283] However, the Court suggested in several cases that it may as well be adduced in connection with a *non-binding* measure of a Member State — such as administrative practice which is 'of a consistent and general nature' (*eg*, aleatory quota systems set, in practice but not based on a statutory provision, on imports or on exports, or *etc*.).[284]

Moreover, in light of Member States' obligations under Article 4(3) TEU (ex Article 10 EC), which require them to take all appropriate measures to secure the *effet utile* of the EU law, it appears that Article 34 TFEU may, under certain circumstances, also be infringed by the *dormancy* of a Member State, that is, in case that State refrains from adopting the measures required in order to remove concrete obstacles to the free movement of goods (which may even be generated by the actions of private actors, such as those committed by the French farmers in C-265/95[285]). The Court found in that case that the passivity of the French authorities in dealing with the riotous actions of the French farmers equated with an infringement of the obligation emanating from Article 34 TFEU (and, consequently, of that under Article 4(3) TEU). Similarly, in C-309/02[286], the Court pointed to the fact that the obligation generated by Article 34 TFEU is an *obligation of result* so that, even if the implementation of a measure is left to private undertakings, the achievement of the effective result (*ie*, the removal of all barriers to intra-EU trade) remains the responsibility of the Member State itself. The Court found, however, in *Schmidberger*[287], sufficient reasons to revert its decision in C-265/95, concluding that '*the authorisation of that demonstration*

[282] Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749.
[283] See for ex. Case C-249/81 *Commission v Ireland* (Buy Irish) [1982] ECR 4005 or Case C-227/06 *Commission v Belgium*.
[284] Case C-21/84 *Commission v France* [1985] ECR 1355; Case C-387/99 *Commission v Germany* [2004] ECR I-3751, paragraph 42 and case-law cited there; Case C-88/07 *Commission v Spain* [2009] ECR I-1353.
[285] Case C-265/95 *Commission v France* [1997] ECR I-6959, para 31; see also Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 60, especially on possible justifications (freedom of expression and freedom of assembly).
[286] Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, para 80.
[287] Case C-112/00 *Schmidberger*, [2003] ECR I-5659.

did strike a fair balance between safeguarding the fundamental rights of the demonstrators and the requirements of the free movement of goods.' (emphasis added).

The Court also insisted, throughout its case law, that Articles 34 and 35 TFEU are not subject to a certain *de minimis* cap so that they apply even if the hindrance to trade generated by a national measure is of minor importance, and even if that measure is applicable to only a very limited geographical area of the national territory, and even if it affects barely a limited number of imports/exports or economic operators etc.[288] The Court considered nonetheless that a measure that generates a restriction to intra-EU trade which is too uncertain and incidental should fall outside the scope of Article 34 TFEU.[289]

A very long and plump line of CJEU case law has indicated that, in general, measures related to import/export licenses, inspections and controls[290], or setting an obligation to appoint a representative or to ensure storage facilities in the Member State of destination[291], or instituting a control mechanism for the formation of prices (which, since *Keck* at least – which concerned a national legislation prohibiting re-sale at a loss, appears to be treated as a 'selling arrangement')[292], or setting national bans on specific products[293], or

[288] See for ex. Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, Case C-269/83 *Commission v France* [1985] ECR 837, Case C-103/84 *Commission v Italy* [1986] ECR 1759 or Case C-67/97 *Bluhme* [1998] ECR I-8033.

[289] Cases C-69/88 *Krantz* [1990] ECR I-583; C-93/92 *CMC Motorradcenter* [1993] ECR I-5009; C-379/92 *Peralta* [1994] ECR I-3453; C-44/98 *BASF* [1999] ECR I-6269. Similarly, in Case C-20/03 *Burmanjer and Others* [2005] ECR I-4133, the Court held that the national rules under scrutiny, which made the sale of subscriptions to periodicals subject to prior authorisation, had an effect over the marketing of products from other Member States that was '*too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States*' (emphasis added).

[290] See for ex. Case C-54/05 *Commission v Finland* [2007] ECR I-2473, paragraph 31, or Joined Cases 51/71 to 54/71 *International Fruit Company and Others* [1971] ECR I-1107 or, finally, Case C-4/75 *Rewe Zentralfinanz* [1975] ECR I-843.

[291] See Case C-155/82 *Commission v Belgium* [1983] ECR 531, Case C-12/02 *Grilli* [2003] ECR I-11585, Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929 or Case C-13/78 *Eggers* [1978] ECR 1935.

[292] See Cases C-231/83 *Cullet* [1985] ECR 305, C-82/77 *Van Tiggele* [1978] ECR 25, C-216/98 *Commission v Greece* [2000] ECR I-8921 or C-302/00 *Commission v France* [2002] ECR I-2055 for the imposition of *minimum* prices; see also Case C-65/75 *Tasca* [1976] ECR 291; Joined Cases 88/75 to 90/75 *SADAM* [1976] ECR 323; Case C-181/82 *Roussel* [1983] ECR 3849 or Case C-13/77 *GB-Inno v ATAB* [1977] ECR 2115 for the imposition of *maximum* prices. For *price freezing*, see Joined Cases 16/79 to 20/79 *Danis* [1979] ECR 3327. For the setting of *minimum or maximum profit margins*, see Case C-116/84 *Roelstraete* [1985] ECR 1705 or Case C-188/86 *Lefèvre* [1987] ECR 2963. In C-238/82 *Duphar* [1984] ECR 523 as well as in Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, the Court admitted that Member States are free to organize their social security systems and to determine the concrete circumstances in which social security benefits are granted but established that, if the measures thus taken are concretely influencing the market by perverting the scope of imports, they may have a negative impact on the intra-EU trade and thus constitute an obstacle to the free movement of goods.

[293] Cases C-174/82 *Sandoz* [1983] ECR 2445; C-24/00 *Commission v France* [2004] ECR I-1277; C-420/01 *Commission v Italy* [2003] ECR I-6445; C-192/01 *Commission v Denmark* [2003] ECR I-9693; C-41/02 *Commission v Netherlands* [2004] ECR I-11375; C-319/05 *Commission v Germany* [2007] ECR I-9811; C-473/98 *Toolex* [2000] ECR I-5681; C-270/02 *Commission v Italy* [2004] ECR I-1559.

establishing the requirement to obtain a specific national authorisation[294], or setting certain presentation requirements[295] or advertising restrictions[296], or deposit obligations[297], or imposing certain indications of origin or quality marks or inciting the purchase of national products *etc*[298], or setting an obligation to use only the national language[299] *etc*, constitute genuine barriers to the intra-Community (or Union) trade and must be censured.

On the other hand, a very interesting discussion concerning the margins of the freedom of movement of goods in those cases where at stake is a fundamental right is offered by Case C-220/17 *Planta Tabak Manufaktur*[300], where the Court retained that, although Directive 2014/40 'leaves the proprietors of the trade marks referred to in Article 13(1)(c) and (3) *the freedom to make use of them in any way*, in particular by wholesale, other than

[294] See, for instance, C-254/05 *Commission v Belgium* [2007] ECR I-4269; C-432/03 *Commission v Portugal* [2005] ECR I-9665, paragraph 41; C-249/*07 Commission v Netherlands*, [2008] ECR I-174 or C-390/99 *Canal Satélite Digital* [2002] ECR I-607 (where the Court elaborated on the conditions under which such prior authorisation might be found to be justified). In C-344/90 *Commission v France* [1992] ECR I-4719, the Court proposed a simplified procedure for the cases of 'indirect bans' consisting of a requirement to obtain a specific prior authorisation before marketing a product in another Member State.

[295] See Case C-33/97 *Colim* [1999] ECR I-3175 or Case C-416/00 *Morellato* [2003] ECR I-9343 where the Court considered that requirements with regard to the presentation or identification of imported products which may force manufacturers and importers to transform or otherwise adapt them to a different set of rules than those under which they were manufactured (by example by altering the labels) are, in effect, equivalent to setting quantitative restrictions. See also Case C-261/81 *Rau v De Smedt* [1982] ECR 3961, Case C-30/99 *Commission v Ireland* [2001] ECR I-4619 or Case C-244/06 *Dynamic Medien* [2008] ECR I-505.

[296] See C-286/81 *Oosthoek* 1982 ECR 04575 or Case C-362/88 *GB-INNO-BM* [1990] ECR I-667 and Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-4151. After *Keck*, such advertising restrictions were rather treated as selling arrangements and hence subjected to a 'discrimination' test.

[297] See C-463/01 *Commission v Germany* [2004] ECR I-11705; C-309/02 *Radlberger* [2004] ECR I-11763 or C-302/86 *Commission v Denmark* [1988] ECR 4607.

[298] See C-325/00 *Commission v Germany* [2002] ECR I-9977; C-6/02 *Commission v France* [2003] ECR I-2389; C-255/03 *Commission v Belgium*, not published in the ECR, C-227/06 *Commission v Belgium*, C-12/74 *Commission v Germany* [1975] ECR 181, C-113/80 *Commission v Ireland* [1981] ECR 1625, C-249/81 *Commission v Ireland* [1982] ECR 4005 (the famous '*Buy British*' case) or C-222/82 *Apple and Pear Development Council* [1983] ECR 4083. According to this case law, a measure which encourages the purchase of domestic products rather than of those imported from other Member States is directly impinging on the free movement of goods – see the *Buy British* case. Otherwise, a rule on origin or quality marking might be found to be conforming to the EU legislation if the products concerned possess the required qualities merely because they originate in a specific geographical area, or if the origin refers to a place where traditions set a specific standard *etc*. Similarly, such a measure might be justified where the possibility that consumers be otherwise misled by, for example, the packaging or labelling of the product is high. References to certain properties of a product (*eg*, fruits or vegetables) are allowable, even if these properties are in fact common for domestic products, *as long as consumers are not encouraged to purchase domestic products mainly based on their origin rather than qualities*.

[299] Case C-33/97 *Colim* [1999] ECR I-3175 (especially para 44). The Court nonetheless decided throughout its case law that the obligation to use a specific language in the stages *downstream* the sale *is* discriminatory and cannot be justified based on consumer protection grounds, as consumers are not concerned with these businesses and for them is irrelevant which language do manufacturers, or wholesalers or transporters *etc*, use. In Case C-366/98 *Geffroy* [2000] ECR I-6579, the Court reached the conclusion that the obligation imposed on retailers to use a specific language for the labelling of foodstuff collides with Article 34 TFEU inasmuch as such measure restrains the right of those resellers to use another language which is at least as easily understood by the targeted consumers or at least to inform consumers by any other suitable means. Furthermore, in Case C-85/94 *Piageme* [1995] ECR I-2955, the Court identified the key factors that may justify a choice for a language 'easily understandable' by consumers.

[300] Case C-220/17 *Planta Tabak-Manufaktur*, ECLI:EU:C:2019:76.

those mentioned in those provisions' (para 98), 'tobacco products having a characterising flavour facilitate initiation of tobacco consumption and affect consumption patterns, [therefore] *the prohibition of placing trade marks referring to a flavouring on the labelling of unit packets*, the outside packaging and the tobacco product itself *is liable to make them less attractive and meets objectives of general interest recognised by the European Union, by contributing to ensuring a high level of protection of public health*' (para 99) – emphasis added.

To conclude, the case law developed by the Court around Articles 34 to 36 TFEU is ― even if the possibility to put on goods a 'social' burden is much narrower than in the case of services and persons ― impacting significantly on also the public procurement market, since many measures taken in this area, especially in the context of pursuing certain social policy goals, carry a restrictive load. To this extent, it is important to determine up to whether, or how exactly, in the light of this case law, may a contracting authority set qualitative (and in particular *social*) standards on the goods it intends to purchase. Of course, in the actual framework, but also given their substance and nature, the possibility to seek some social benefit through the procurement of goods is in general limited to either the production stage (*eg*, via the imposition of certain production standards or methods), or the establishment of certain quality standards (*eg*, via minimum accessibility requirements) – both of which may be documented including by the requiring of relevant (social) labels *etc*, or, finally, the delivery stage, where the authority may, according to also the relevant legislation, impose certain 'social' conditions. Such an effort requires, inevitably, a double assessment, with the weighting of the *Concordia Bus*, *Wienstrom* or the *Max Havelaar etc* line of cases against the *Dassonville* and *Keck* decisions (and the case law flowing from them), since the latter established that all measures instituting certain quality standards to be met by goods (including those to do with the production thereof) fall as such within the scope of Article 34 TFEU and, consequently, must be subjected to the *Cassis de Dijon* test. So would, under this assessment, be for example lawful a measure requiring the suppliers to prove that their goods have been manufactured (*ie*, a 'regulation of the conditions of production') or are destined to a specific use (*ie*, a 'restriction on use') with the observance of certain 'social' standards, especially when those standards concern, or are ordained to protect, particular enclaves of socially disadvantaged people? It maybe is worth recalling here that, although they are both 'social' in their very essence and pertain to some key policy areas, there is an essential difference between the requirements set by Article 18(2) or Article 42 (1) paragraphs 4 and 5 from Directive 24, for example, and the requirement to prove that those

goods have been manufactured in a facility where a specific percentage of the employees are members of a *local* minority *etc*. In one case, the standards are of a general application as they are set by laws adopted (or assumed) at the Union's level and, thus, allegedly fall within the so disputed European social model (which apparently offers full immunity in the face of the rigors of Articles 34 and 35 TFEU), whereas the other represents nothing but a mere example of *ad-hoc* positive discrimination which is explicitly prohibited by the same Union law (as repeatedly stressed by the Court.[301] It is clearly important to note, in this context, that the case regulated under Article 20 of Directive 2014/24 (the only legally permitted form of positive discrimination in public procurement) not only requires unequivocal publicity in this particular regard, but also entails non-discrimination and equal treatment so that both direct awarding and *local* favouritism are forbidden.[302]

[301] Apparently, in the academia, the instrumentality of public procurement is vividly debated. Some suggest that public procurement serves as an effective regulatory tool, being an alternative form of governance next to, or in lieu of, the 'traditional public law model'. For details, see for ex. J J Czarnezki, *'Green public procurement: legal instruments for promoting environmental interests in the United States and European Union'*, December 13, 2019, at SSRN: https://ssrn.com/abstract=3504676, esp. 11 and 152 *et seq*. See also J Hettne, 'Legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU law' (2013) Upphandlingsutredningen (Legal Analysis) 6, R Caranta, '*On Jörgen Hettne's legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU Law'* or P Kunzlik, '*Comment on Professor Jörgen Hettne's Paper, 'Legal analysis of the possibilities of imposing requirements in public procurement that go beyond the requirements of EU Law*,' in Annex 12 to the Official Report of the Swedish Government 2013:12, "Goda affärer – en strategi för hållbar offentlig upphandling" (SOU 2013:12), all at https://www.regeringen.se/49bb50/contentassets/94e3a7f86d2f4784b126e16c6f4ec3a4/bilagedel-3-sou-201312. Naturally, the most efficient path to 'social integration' is, just as in any other area, that of direct intervention (positive integration). The 'regulate first' approach appears to be the traditional, first choice of both the Member States and, inevitably, the EU. For a comprehensive discussion on this, see for ex. M Kaeding, '*Towards an effective European single market: Implementing the various forms of European policy instrument across Member States*', Springer, 2013. In reality, public procurement is, at least inasmuch as 'sustainability' is concerned, not a 'measure' in itself, but rather a *means* used to implement extraneous policy measures. In the social field, this characteristic is much more obvious than in other areas (such as the environmental one) as social measures are, customarily, far more discriminatory than the 'environmentally friendly' ones and, on top of that, the European legislature is, in this area, devoided of the usual legislative instruments (through which it could open the door to protectionism). Especially in the specific EU legislative context, alternative (policy) instruments prove far more effective (for discussion, see, again, M Kaeding, cited above). This might also explain the difference in approaching various 'sustainability issues', in particular environmental v. social – see our comments under n. 122 and 123 above and the literature cited there. As a consequence, and in the lack of any 'traditional public law models' which to be implemented directly, via the customary channels, all social measures bound to be implemented through various public procurement schemes must, in order to be considered in line with the EU law, find *justification* elsewhere – *eg*., in either a European social model – on which we will elaborate more in Chapter IV below or, upon the case, a legitimate national (or local) policy or, finally, a 'mandatory requirement' – as detailed under this Chapter. Also, for an extensive discussion on the legal impediments to regulating through public contracts, see our extensive comments in Chapter V, esp. Section 7.

[302] For a detailed discussion on these aspects, see Chapters V and VI below and also I Baciu, '*The possibility to reserve a public contract under the new European public procurement legal framework*', in (2018) European Procurement & Public Private Partnership Law Review 4. The pith of this provision is the protection of disadvantaged people in general, as a social category, and not of *local* enclaves thereof. One may easily spot some similarities, in this regard, with the (im)possibility to support, via restrictive measures, economically (and, implicitly, socially) disadvantaged local communities of a Member State (which the Court found to be *not*

1.2 *Testing the elasticity of the freedom to provide services in the internal market*

The *Dassonville* and *Cassis* doctrines were straightforwardly translated, from the freedom of trade, to the free provision of services, the freedom of establishment, the free movement of capital and the free mobility of workers. The literature found however that '[t]here are (…) interesting differences among these liberties with regard to the type of national regulation that the Court will never allow as a 'mandatory requirement'. When the free movement of capital and persons is an issue, the court will generally not accept revenue and budget concerns as an imperative requirement (…). For the trade in goods, regulations of product qualities may be justified, whereas regulations of the conditions of production could never justify a restriction on imports. For services, however, where production and consumption will often occur *uno ictu*, regulations on the qualifications of service providers and the process of service provision could massively affect the quality of the service itself. Hence, they could not generally be denied the status of a justifiable 'mandatory requirement'. This explains why the Bolkestein proposal of a services directive met with massive opposition when it postulated the mutual recognition of regulations adopted and implemented in the country of origin as a general rule.'[303]

Article 56 (ex Article 49 TEC) on the freedom to provide services within the internal market is one of the most important texts in the economy of the Treaty on the Functioning of the European Union is. The provisions contained in this Article are the more important as services occupy, in general, a big portion of the EU public procurement market, so that their implications are obvious. Depending on their meaning and purpose, these provisions are likely to shape the substance of all public service contracts awarded across the Union. This may or may not, for example, allow the use of social considerations in the relevant procurement equations or, upon the case, determine the margins of this possibility. The CJEU developed a substantial case law on the interpretation, and scope, of this Article.

According to Article 56 (which is situated in Chapter 3 – 'Services' of Title IV – 'Free Movement of Persons, Services and Capital'), '*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall*

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conform to the EU law) — an aspect which is discussed in more detail further below, in this Chapter and also in Chapter V.

[303] F Scharph, '*The asymmetry of European integration, or why the EU cannot be a 'social market economy*', in [2010] 8 Socio-Economic Review 2, Oxford University Press, 220.

be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.' (emphasis added). In this particular context, the Court concluded that '*[w]hilst it is true that, in a sector which has not been subject to full harmonisation at Community level, Member States remain, in principle, competent to define the conditions for the pursuit of the activities in that sector, they must, when exercising their powers, respect the basic freedoms guaranteed by the EC Treaty*.'[304] (emphasis added).

But the Court had, throughout its case law, to deal with an impressive variety of circumstances and was faced with the need to clarify a series of key aspects deemed as crucial for the proper application of the rule consecrated in Article 56 TFEU. By doing so, it eventually invaded the spaces reserved by the Treaties for national governments (such as that concerning social policies and the provision of social services), a result which was heavily contested in both practice and the dedicated literature.

The CJEU thus elaborated on the meaning of several key terms such as 'services', 'economic/non-economic activities', 'cross-border character', or 'provider' and respectively 'recipient of services' *etc*.. It further established which measures constitute restrictions to the freedom to provide services and which do not, whether the restrictive character of a measure is contingent upon the identity, nationality or legal nature of the entity that imposed it or, finally, whether *discrimination* has any relevance in this context (*ie*, if only discriminatory measures may be found to generate restrictions to the freedom to provide services or, to the contrary, also non-discriminatory ones could be found to have the same effect) *etc*.

Many of these decisions are, to a certain extent, also concerned with also Article 57 TFEU.

One of the most important aspects developed by the Court in its case law is that concerning possible justifications. In fact, the 'mandatory requirements' theory developed in the line of cases to do with the freedom of movement of goods impacted heavily (and over the long haul) on the entire legal construct grown around the concept of freedom to provide services. Ultimately, the door opened by the Court in *Cassis de Dijon* actually

[304] See Case C-393/05 *Commission v Austria* [2007] ECR I-10195, paragraph 29, and Case C-404/05 *Commission v Germany* [2007] ECR I-10239, para 31, but also Case C-438/08 *Commission v Portugal* [2009] ECR I-10219, para 27.

ushered in new, valuable possibilities to introduce social considerations into the award of public contracts.

Thus, in defining the term 'services', the Court decided that Article 56 TFEU is only concerned with '*economic'* activities, that is only activities provided for a *remuneration* (see for ex. *Regione Sardegna*[305], *Hubbard*[306] or *Luisi & Carbone*[307] -- where it concluded that Article 57 TFEU, that is the similar text contained in Article 60 of the Treaty then in force, applies to all services 'normally provided for remuneration, *in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons*, including the free *movement of workers* within the Community' – emphasis added), that is, as a *consideration* for those services (typically *agreed between the provider and the recipient*[308]) and not external from them (see for ex *Geraets – Smits and Peerbooms*[309], *Humbel* or *Society for the Protection of Unborn Children Ireland*[310]), without being necessary that the provider effectively seek to make a *profit* (*Jundt*[311] *etc*) or that that remuneration be *paid by the actual recipient* or *beneficiary* of those services (see *Skandia and Ramstedt*[312], or *Bond van Adverteerders* or *Deliège*[313], *etc*). In fact, as bluntly said by the Court in *FKP Scorpio Konzertproduktionen*[314] and further reiterated in *Liga Portuguesa de Futebol Profissional*[315] and *Football Association Premier League and Others*[316], '*the freedom to provide services is for the benefit of both providers and recipients of services*' (emphasis added).[317]

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[305] Case C-169/08 *Presidente del Consiglio dei Ministri /Regione Sardegna* [2009] ECR I-10821 §23. For a similar approach, see Cases C-263/86 *Humbel and Edel* [1988] ECR 5365, paragraph 17; C-109/92 *Wirth* [1993] ECR I-6447, paragraph 15; and C-355/00 *Freskot* [2003] ECR I-5263, paras 54 and 55 etc.

[306] Case C-20/92 *Hubbard* [1993] ECR I-3777 para 13. The Court clarified that this condition is met where the service is provided by a member of a profession.

[307] Joined Cases C-286/82 and C-26/83 *Luisi & Carbone* [1984] ECR 377 para 9.

[308] Case C-109/92 *Wirth* [1993] ECR I-6447 para 15.

[309] Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473 para 58.

[310] Case C-263/86 *Humbel* [1988] ECR 5365, para 17 to 19, and Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, para 18.

[311] Case C-281/06 *Jundt* [2007] ECR I- I-12231 paras 32, 33, but also C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paras 50 and 52, etc.

[312] Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817 para 22, 24 and, similarly, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para 58.

[313] Case C-352/85 *Bond van Adverteerders and Other*s [1988] ECR 2085, para 16, and Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para 56.

[314] Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, para 32.

[315] Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, para 51.

[316] Case C-403/08 *Football Association Premier League and Others* [2011] ECR I-9083, para 85.

[317] See also Case C-274/96 *Bickel & Franz* [1998] ECR I-7637 para 15 or Case C-186/87 *Cowan* [1989] ECR 195, para 15 or Case C-43/93 *Vander Elst* [1994] ECR I-3803 para13, as well as the ensuing case law (where the Court clarified that Article 56 TFEU is applicable also to the situations where the recipients of services located in another Member State come to the Member State where the provider is located in order to benefit from the latter's services abroad. In C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447 (paras 42, 44) the Court, reiterating the conclusions rendered in C-107/94 *Asscher* [1996] ECR I-3089 (para 53), established that

Translated to public procurement (where all services are, or should be, 'provided for remuneration'), these findings must lead to the conclusion that the fact that the real (final) beneficiaries of a contract the subject matter of which consists of the provision of services for the community are not paying for them does not take that contract from the scope of Article 56. This further means that, in order to be able to give that contract a social orientation, the contracting authority must necessarily find a breach in either Article 52 TFEU (to which Article 62 TFEU refers in explicit terms) or in one of the relevant 'mandatory considerations' construed as offering sufficient and pertinent justification. In this regard, the Court established that, as a matter of principle, Article 56 'precludes the application of *any* national rules which have the effect of making the provision of services between Member States *more difficult than the provision of services entirely within a single Member State*'.[318]

It on the other hand clarified that all activities which a State is not seeking to deliver for profit but in the context of 'fulfilling its *duties towards its own population in the social, cultural and educational field*' (emphasis added) do not fall within the scope of Article 56 TFEU,[319] except where they are financed by private funds (*eg*, by students and parents, or patients *etc*), without being necessary that such private funding be the *only* or otherwise the *main* source.[320]

Another sensitive issue triggered by the application of Article 56 TFEU is the '*cross-border character*' which a service must have[321] in order to fall within its scope (that is, only services which are performed in *another* Member State or for the nationals of *another*

'[a]ny tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State.'

[318] See Case C-444/05 *Stamatelaki* [2007] ECR I-3185, para 25, or Case C-211/08 *European Commission v Spain* [2010] ECR I-5267 para 55.

[319] See to that effect Case C-56/09 *Zanotti* [2010] ECR I-4517 paras 31,32, Case C-263/86 *Humbel* [1988] ECR 5365 paras 17 and 18, and Case C-109/92 *Wirth* [1993] ECR I-6447, paras 15 and 16.

[320] See, in particular, Case C-352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, para 16; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para 56; *Smits and Peerbooms*, para 57; and *Skandia and Ramstedt*, para 24, but also Case C-318/05, *Commission v Federal Republic of Germany* [2007] ECR I-6957 para 70, Case C-76/05 *Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849 paras 39, 40, Case C-281/06 *Jundt* [2007] ECR I-12231 §30, Case C-109/92 *Wirth* [1993] ECR I-6447 paras 15, 16, 17, or Case C-263/86 *Humbel and Edel* [1988] ECR 5365 paras 17-19.

[321] See for ex. Joined Cases C-64/96 and C-65/96 *Nordrhein-Westfalen v Uecker and Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-03171, para 16; Case C-134/95 *INAIL* [1997] ECR I-00195 para 19 and Case C-332/90 *Steen v Deutsche Bundespost* [1992] ECR 1-00341, para 9, or Case C-108/98 *RI.SAN* [1999] ECR I-5219 para 23, Joined Cases C-225/95, C-226/95 and C-227/95 *Kapasakalis* [1998] ECR I-4239 para 22, Case C-70/95 *Sodemare* [1997] ECR I-3395 §38, Case C-134/95 para 19, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511 para 14, Case C-60/91 *José António Batista Morais* [1992] ECR I-2085 paras 7,9, Joined Cases C-330/90 and C-331/90 *López Brea* [1992] ECR I-323 paras 7, 9 etc. In *RLSAN* for ex, the Court held in clear terms that '*the Treaty rules governing freedom of movement and regulations adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law and all elements of which are purely internal to a single Member State*' (emphasis added).

Member State may be 'services' within the meaning of that Article[322]). Moreover, the Court settled that the cross-border condition is met not only when the service is provided outside the country of residence but also in the case where the provider carries it out without moving from the Member State where it is established (provided however that that service is delivered not only for the benefit of the nationals of that Member State[323] but also for at least those of another Member State, including remotely, via internet or phone).[324] The fact that a provider of services relocated its business to another Member State with the mere purpose to escape its domestic legislation is irrelevant in this context, and so is the fact that the restrictive measures preventing it from accessing the market of the Member State from where it has left has been adopted just as a form of sanction for that evasion. From this point of view, it is the responsibility of the Member State from where that provider left to take all the appropriate measures to prevent such forms of evasion, but only to the extent where the freedom to provide services consecrated by Article 56 TFEU is not infringed.[325] Exceptionally though, in specific sectors (such as public procurement and concessions) which have been subject to harmonization at the EU level, Article 56 may become applicable to even purely internal situations.[326]

Inasmuch as the possibility reserved for a service provider to *temporarily* pursue his activity in the Member State where the service is effectively provided and under the same conditions as those imposed by that State on its own nationals, the Court explained that the aim of the third paragraph of Article 57 TFEU is 'primarily to enable the person

[322] In *Luisi & Carbone* (Joined Cases C-286/82 and C-26/83 *Luisi and Carbone* [1984] ECR 377 – see para10) the Court had already concluded that 'By virtue of Article 59 of the Treaty, *restrictions on freedom to provide such services are to be abolished in respect of nationals of Member States who are established in a Member State other than that of the person for whom the service is intended. In order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established*.' (emphasis added).

[323] Case C-97/98 *Jägerskiöld* [1999] ECR I-7319 paras 43, 44.

[324] See to this end Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paras 21 and 22 and Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, para 53 or Case C-211/08 *European Commission v Spain* [2010] ECR I-5267 para 48.

[325] Case C-23/93 *TV10* [1994] ECR I-4795 para 15.

[326] See for ex. *Parking Brixen* (Case C-458/03 *Parking Brixen* [2005]ECR I-8585 – esp. paras 54, 55). For an interesting discussion, see P Craig and G De Búrca, '*EU Law: Text, Cases and Materials*' 5th ed, Oxford University Press 2011, 818, or V Hatzopoulus and T U Do, '*The case law of the ECJ concerning the free provision of services: 2000-2005*', (2006) 43 Common Market Law Review 4, 945 *et seq*. See also H Pohto, '*Bringing clarity to the purely internal situations rule? Case commentary on the judgment C-268/15 Ullens de Chooten*', in (2018) Helsinky Law Review 1. In that case (*ie*, C-268/15, *Ullens de Chooten*', ECLI:EU:C:2016:874), the Court concluded that the interpretation of the fundamental freedoms provided for in Article 49, 56 or 63 TFEU may prove to be *relevant in a case confined in all respects within a single Member State where national law requires the referring court to grant the same rights to a national of its own Member State as those which a national of another Member State in the same situation would derive from EU law* (para 52, emphasis added).

providing the service to pursue his activities in the host Member State without suffering discrimination in favour of nationals of that State'. It nonetheless added that 'those provisions do not mean that all national legislation applicable to nationals of that State and usually applied to the permanent activities of persons established therein may be similarly applied in their entirety to the temporary activities of persons who are established in other Member States.'[327]

In *Seco*[328], the Court went even further and, picking up where *Webb*[329] left off, held that Article 60(3) EEC (currently Article 57(3) TFEU) prohibited not only '*overt'* forms of discrimination based on nationality, but also all forms of '*covert'* discrimination which, '*although based on criteria which appear to be neutral, in practice lead to the same result*'. The importance of this line of cases lies in the fact that they practically extended the scope of the cited provisions to also *indirect* discrimination, including thus also all sorts of restrictions to the freedom to provide services within the internal market hidden under a veil of 'fair neutrality'[330]. Take for example the situation where a contracting authority decides to award its contracts only to companies which may prove that at least a specific percentage of their employees are persons with disabilities or, *en fin*, disadvantaged persons (*eg*, refugees or members of various minority groups, *etc*). Such a requirement, if implemented, would inevitably create a discriminatory environment, especially against those bidders coming from another Member State where there are no laws, policies or practices which to force or otherwise encourage them to take such measures. So, read through the prism of the CJEU's case law to do with the functioning of the internal market, and especially that concerning the exceptions to the rules governing it, such a measure would *limit in a substantial manner the access of foreign companies to the market* of that contract. To this extent, the contracting authority has no option than to either caption the contract as reserved for social enterprises (as now explicitly allowed under Article 20(2) of Directive 2014/24) or, simply, drop that criterion. Of course, where that measure is ordained to protect exclusively *local* social

[327] C-294/89 *Commission v France* [1991] ECR I-3591 para 26. See also Case C-205/84 *Commission v Germany* [1986] ECR 3755 para 26 or Case C-279/80 *Webb* [1981] ECR 3305 para 16.
[328] Joined Cases C-62/81 and 63/81 *Seco* [1982] ECR 223 para 8.
[329] Case 279/80 *Webb* [1981] ECR 3305.
[330] In Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633 (para 51) and also in Case C-403/08 *Football Association Premier League and Others* [2011] ECR I-9083 (see para 85) the Court reiterated this conclusion, insisting that Article 56 TFEU ranges on all sorts of restriction, regardless of whether they are intended to be applied only in relation with service providers located in another Member State or they concern as well, national providers, without distinction. See also Case C-255/04 *Commission v France* [2006] ECR I-5251, para 37 and Case C-262/02 *Commission v France* [2004] ECR I-6569, para 22, but also Case C-258/08 *Ladbrokes Betting* [2010] ECR I-4757 para 15, Case C-203/08 *Sporting Exchange Ltd* [2010] ECR I-4695 para 23 or Joined cases C-447/08 and C-448/08 *Sjöberg and Gerdin* [2010] ECR I-6921 para 32.

economy actors, or people, neither Article 20 from Directive 24 nor the relevant publicity may save it from the rigors of Article 56 TFEU.[331]

As for the temporary character of the provision of services, this is to be determined 'in the light of its duration, regularity, periodicity and continuity'.[332] Services supplied for example in connection with the construction of a large infrastructure (such as the headquarters of a central institution, or even better, a motorway *etc*.) are 'services' within the meaning of Article 57 TFEU[333] and, therefore, subject to the limitations set under Article 56 TFEU.

Again, reading these conclusions in the light of public procurement specific rules, it is clear that Article 56 applies not only to contracts the object of which consists of the provision of services in the Member State where the contracting authority is located but also to those which refer to services which are or may be provided remotely, *ie*, from another Member States. It also applies, equally, to ancillary and *uno-ictu* services or, in general, to services with a temporary character (such as those delivered under a public procurement contract concluded for a limited period or for one or several specific acts of delivery). With particular regard to the provision of services under public contracts, the CJEU clarified throughout its case law that (a) contracting authorities are free to determine the place where services should be provided; and (b) sub-contractors operating in other Members States are required, in general (and with a few significant exceptions), to comply with the same applicable labour measures as laid down by contracting authorities.[334]

Relevant in this regard are cases C- 552/13, *Grupo Hospitalario Quirón*[335] and C-102/17 *Secretaria Regional de Saúde dos Açores*[336] (the latter referring to the possibility to ask bidders to prove that they have delivered similar contracts within the same administrative circumscription). Of course, all these decisions must be read in the light of also Recitals 37 and 38 from Directive 2014/24. With regard to the second aspect, it is worth citing also case C-549/13, *Bundesdruckerei GmbH*[337] – where the Court clarified that subcontractors operating in other Member States do not fall within the scope of the Poster Workers

[331] See, again, I Baciu, '*The possibility to reserve a public contract under the new European public procurement legal framework*', in (2018) European Procurement & Public Private Partnership Law Review 4 – esp. Romania's case, as discussed thereunder.
[332] See Case C-55/94 *Gebhard* [1995] ECR I-4165 para 39.
[333] Case C-215/01 *Schnitzer* [2003] ECR I-14847 para 30, 40.
[334] B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', in [2017] Rivista Trimestrale di Diritto Pubblico 4.
[335] C- 552/13, *Grupo Hospitalario Quirón*, ECLI:EU:C:2015:713.
[336] C-102/17 *Secretaria Regional de Saúde dos Açores*, ECLI:EU:C:2018:294.
[337] C-549/13, *Bundesdruckerei GmbH*, ECLI:EU:C:2014:2235.

Directive[338] and cannot, therefore, be bound to respect minimum wage or other labour security clauses. On the limits to subcontracting, relevant are also the ECJ decisions rendered in C-406/2014 *Wrocław*[339], C-94/12, *Swm Costruzioni 2 SpA*[340] (especially paragraph 31), or C-314/01, *Siemens AG Österreich*[341].

According to the Court, the fact that the restriction is ordered or implemented by the State itself or by a local authority is irrelevant in the economy of Article 56 TFEU.[342]

Finally, it is worth noting that, as the Court explained in *Fidium Finanz*[343], the reference, in the first paragraph of Article 57 TFEU, to the provisions relating to freedom of movement for goods, capital and persons (which, in light of the wording used, appears to take precedence over the application of the provisions to do with the freedom to provide services), should not be construed as establishing an order of priority between these freedoms. In fact, as the Court underscored in the same decision, that paragraph is only meant to clarify the definition of 'services', to the extent that '[t]he notion of 'services' covers services which are not governed by other freedoms, in order to ensure that all economic activity falls within the scope of the fundamental freedoms.' (paragraph 32 of the decision). This position was further reiterated in *Gebhard*[344], where the Court clarified that '[t]he provisions of the chapter on services are subordinate to those of the chapter on the right of establishment in so far, first, as the wording of the first paragraph of Article 59 assumes that the provider and the recipient of the service concerned are 'established' in two different Member States and, second, as the first paragraph of Article 60 specifies that the provision relating to services apply only if those relating to the right of establishment do not apply (…).'

1.3 *The freedom of establishment*

In its case law to do with the scope and application of the rules concerning the right of establishment (Article 49 *et seq*. TFEU), the Court followed a line of reasoning identical to that used in the cases concerned with the freedom to provide services, retaining in

[338] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1–6.
[339] C-406/14, *Wroclaw*, ECLI:EU:C:2016:562.

[340] C-94/12, *Swm Costruzioni 2 SpA* , ECLI:EU:C:2013:646.
[341] C-314/01, *Siemens AG Österreich*, [2004] ECR I-02549.
[342] Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, para 28 and the case-law cited) and Case C-169/08 *Presidente del Consiglio dei Ministri /Regione Sardegna* [2009] ECR I-10821 §29.
[343] Case C-452/04 *Fidium Finanz* [2006] ECR I-9521 paras 31, 32.
[344] Case C-55/94 *Gebhard* [1995] ECR I-4165 para 22.

principle that 'any national measure which, *albeit applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive* the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty constitutes a restriction within the meaning of Article 49 TFEU ' – emphasis added.[345] This is for example the case of a national rule which makes the establishment of an undertaking from another Member State contingent upon obtaining of a prior authorisation from an authority of the host Member State, or upon the satisfaction of certain predetermined requirements.[346] The fact that the restriction is of limited scope or minor importance is, again, irrelevant.[347]

The case law concerned with the fundamental right of establishment has as well been marked by the discussion whether a restriction must necessarily be discriminatory (based on nationality), either directly or indirectly, or also non-discriminatory measures may constitute restrictions, similarly to that concerning the freedom to provide services discussed above.[348] The Court chose, once more, to juggle with key terms like 'discrimination' and

[345] See for ex. Case C- 299/02 *Commission v Netherlands* [2004] ECR I-9761, para 15, Case C-140/03 *Commission v Greece* [2005] ECR I-3177, para 27, Joined Cases C-570/07 and C-571/07 *Blanco Perez* [2010] ECR I-4629 para 54, or Case C-293/06 *Deutsche Shell* [2008] ECR I-1129 para 28 (which made explicit reference to the case law rendered in connection with the freedom to provide services, ie., Case C-55/94, *Gebhard* and Case C-442/02, *Caixabank France*).

[346] See to that effect *Blanco Perez*, para 54, but also the previous Case C-11/77 *Patrick* [1977] ECR 1199 para 15, Case C-340/89 *Vlassopoulou* [1991] ECR I-2357 para 15, Case C-114/97 *Commission v Spain [*1998] ECR I-6717 paras 31and 44, Case C-203/98 *Commission v Belgium* [1999] ECR I-4899 para 13 or Case C-531/06 *Commission v Italy* [2009] ECR I-4103 para 44.

[347] Case C-270/83 *Commission v France*, [1986] ECR 273, para 21; see also Case C-34/98 *Commission v France* [2000] ECR I-995, para 49, Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, para 43 or Case C-170/05 *Denkavit Internationaal* [2006] ECR I-11949, para 50.

[348] See for example Case C-279/93 *Schumacker* [1995] ECR I-225, paras 21 and 26; Case C-80/94 *Wielockx* [1995] ECR I-2493, para 16, Case C-107/94 *Asscher* [1996] ECR I- 3089, para 36 and Case C-250/95 *Futura & Singer* [1997] ECR I-2471 paras 19 and 22, as compared to Case C-222/86 *UNECTEF v Heylens and Others* [1987] ECR 4097, para 11, Case C-19/92 *Kraus* [1993] ECR I-1663 para 28 or Case C-221/89 *Factortame* [1991] ECR I-3905 para 23. In *Commission v Portugal* (Case C-458/08 *Commission v Portugal* [2010] ECR I-11599), the Court reiterated the conclusions offered in *Kattner Stahlbau* – see Case C-350/07 *Kattner Stahlbau* [2009] ECR I-1513, para 78. Before that, in *Vlassopoulou* (Case C-340/89 *Vlassopoulou* [1991] ECR I-2357 para 15) the Court had already insisted that '[i]t must be stated in this regard that, *even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 52 of the EEC Treaty. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State*' (emphasis added), while in *Halliburton* - Case C-1/93 *Halliburton* [1994] ECR I-1137 – the Court had stressed that '*the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result*.' (para 15), emphasis added. Meanwhile, in *Kraus* - Case C-19/92 *Kraus* [1993] ECR I-1663 – the Court had explained that '*Community law sets limits to the exercise of those powers by the Member States in so far as provisions of national law adopted in that connection must not constitute an obstacle to the effective exercise of the fundamental freedoms guaranteed by Articles 48 and 52 of the Treaty*' (para 28), emphasis added. This came to confirm the conclusions rendered in *Steinhauser v City of Biarritz* (Case C-197/84 *Steinhauser v City of Biarritz* [1985] ECR 1819, in particular para 14) and *Konstantinidis* (Case C-168/91 *Konstantinidis* [1993] ECR I-1191, in particular paras 12, 13, 15 and 17). Moreover, in C-327/12 *Soa Nazionale Costruttori* [2013] not published yet, the Court stressed that 'It should be noted that Article 49 TFEU precludes [any] restrictions on the freedom of establishment. That provision

'restriction', sometimes overlapping ─ as it did in the free movement of goods (starting with the *Cassis de Dijon* case) ─ the scope of the latter with that of a particular form of 'indirect discrimination'. It however concluded that, whatever the circumstances, a justification and proportionality test is essential in both cases.[349]

In *Blanco Perez*, the Court held that '(…) *unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is at issue and if there is a consequent risk that it will place the former at a particular disadvantage*.' (para 119) – emphasis added, while in *ASM Brescia*[350] it reiterated that where a 'concession is of a certain cross-border interest, its award, in the absence of any transparency, to an undertaking located in the Member State to which the contracting authority belongs, amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession but which are located in other Member States. *Unless it is justified by objective circumstances*, such a difference in treatment, which, by excluding all undertakings located in another Member State, operates mainly to the detriment of the latter undertakings, amounts to *indirect discrimination on the basis of nationality*, prohibited under Articles 43 EC and 49 EC.' This conclusion came as a reinforcement of the decision handed down in *Parking Brixen*[351], and, after that, in *ANAV*.[352]

Anyway, as explained throughout the related case law, it is irrelevant if a restriction to the right of establishment comes from either the state of destination[353] or from

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prohibits any national measure which is liable to hinder or render less attractive the exercise by European Union nationals of the freedom of establishment guaranteed by the Treaty. *The concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade*' (para 45) - emphasis added. The same conclusions were reached in Case C-518/06 *Commission v Italy* (para 64) and Case C-577/11 *DKV Belgium* [2013] not published yet (para 33).

[349] Case C-171/02 *Commission v Portugal* [2004] ECR I-5645, paras 42 and 55 or Case C-53/95 *Inasti* [1996] ECR I-703 para 12. See also Case C-71/76 *Thieffry* [1977] ECR 765, paras 12 and 15, Case C-106/91 *Ramrath* [1992] ECR I-3351, paras 29 and 30 and Case C-299/02 *Commission v Netherlands* [2004]ECR I-9761 paras 17 and 18.

[350] Case C-347/06 *ASM Brescia* [2008] ECR I-5641 paras 59 and 60.

[351] Case C-458/03 *Parking Brixen* [2005]ECR I-8585 para 50.

[352] Case C-410/04 *ANAV* [2006] ECR I-3303 paras 21 and 22.

[353] See for ex. Case C-186/12 *Impacto Azul* [2013] not published yet para 39, Case C-326/07 *Commission v Italy* [2009] ECR I-2291 para 56, Joint Cases C-151/04 and 152/04 *Nadin* [2005] ECRI-11203 para 55, Case C-53/95 *Inasti* [1996] ECR I-703 para 12, Case C-11/77 *Patrick* [1977] ECR 1199 para 18, or Case C-79/85 *Segers* [1986] ECR 2375 where the Court explained that '[d]iscrimination against employees in connection with social security protection indirectly restricts the freedom of companies of another member state to establish themselves through an agency, branch or subsidiary in the member state concerned' (para 15).

the state of origin[354]. It is also irrelevant whether such restrictions come from the State itself (or an emanation thereof) or from an association or organization not governed by public law.[355]

The Court constantly insisted, throughout its case law, that the *exercise of official authority* (referred to in Article 51 TFEU as a and legally justified exception from the freedom of establishment) concerns only those activities which, '*in themselves*[,] are *directly* and *specifically* connected with the exercise of [such an] authority' (emphasis added)[356]. This should exclude those 'functions that are merely auxiliary and preparatory vis-à-vis an entity which effectively exercises official authority by taking the final decision'.[357] The Court also stressed that '*the first paragraph of Article 45 EC is an exception to the fundamental rule of freedom of establishment. As such, the exception must be interpreted in a manner which limits its scope to what is strictly necessary to safeguard the interests it allows the Member States to protect*' (emphasis added).[358] This means that the application of this provision cannot be extended to 'certain activities that are *auxiliary or preparatory* to the exercise of official authority (…), *or to certain activities whose exercise, although involving contacts, even regular and organic, with the administrative or judicial authorities, or indeed cooperation, even compulsory, in their functioning, leaves their discretionary and decision-making powers intact*.' (emphasis added)[359] Moreover, the Court made it clear that *'[a]cting in pursuit of an objective in the public interest is not, in itself, sufficient for a particular activity to be regarded as directly and specifically connected with the exercise of official authority*.' (emphasis added)[360] and also that, 'while Regulation No 2092/91 does not

[354] See for ex. Case C-415/93 *Bosman* [1995] ECR I-4353 para 97, Case C- 264/96 *ICI* [1998] ECR I-4695, para 21, Case C-470/04 *N v Inspecteur van de Belastingdienst Oost/kantoor Almelo* [2006] ECR I-7409 para 35, Case C-298/05 *Columbus Container Services* [2007] ECR I-0000 para 33, Case C-157/05 *Holböck* [2007] ECR I-4051 para 27, Case C-414/06 *Lidl Belgium* [2008] ECR I-3601 para 19, Case C-418/07 *Papillon* [2008] ECR I-8947 para 16, Joined cases C-197/11 and C-203/11 *Libert and Others* [2013] not published yet, paras 38, 39 and 40, Case C-386/14 *Groupe Steria* [2015] not published yet para 14, etc. Later, in *Viking* (Case C-438/05 *Viking* [2007] ECR I-10779), the Court showed that 'The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State' (para 69).

[355] See to that effect Case C-36/74 *Walrave* [1974] ECR 1405 (where the Court emphasized that '*Article 48 not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner*,' - para 17, emphasis added. See also *Bosman* (para 82), or *Viking* (para 57) *etc*.

[356] See for ex. Case C-47/08 *Commission v Belgium* [2011] ECR I-4105, para 85, and the case-law cited there.

[357] Case C-438/08 *Commission v Portugal* [2009] ECR I-10219 para 36.

[358] Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para 45. See also C-47/08 *Commission v Belgium* [2011] ECR I-4105 para 83, C-54/08 *Commission v Germany* [2011] ECR I-4355 para 86, C-53/08 *Commission v Austria* [2011] ECR I-4309 para 84 or C-50/08 *Commission v France* [2011] ECR I-4195 para 86.

[359] Case C-47/08 *Commission v Belgium* [2011] ECR I-4105 para 86.

[360] Case C-465/05 *Commission v Italy* [2007] ECR I-11091 para 38.

preclude the Member States from conferring on private bodies rights and powers of public authority (…), or even from entrusting to them other activities which, taken in themselves, are directly and specifically connected with the exercise of official authority, it is however clear from the Court's case-law that the extension of the exception allowed by Articles 45 EC and 55 EC to an entire profession is not possible when the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole.'[361]

The Court furthermore explained that the award of a public contract to an undertaking located in the Member State to which the contracting authority belongs, even if discriminatory, might, '*exceptionally, be allowed on one of the grounds set out in Article 52 TFEU or justified by overriding reasons in the public interest, in accordance with the Court's case-law (...). On this last point, it is clear (...) that no distinction need be drawn between objective circumstances and overriding reasons in the public interest. Objective circumstances must, ultimately, be accepted as overriding reasons in the public interest*.' (emphasis added).[362] 'General good' is, in the Court's opinion, one of the most reliable justifications.[363]

'The reasons which may be invoked by a Member State in order to justify a derogation from the principle of freedom of establishment must [nonetheless] be accompanied by an analysis of the *appropriateness* and *proportionality* of the restrictive measure adopted by that Member State, and by precise evidence enabling its arguments to be substantiated'.[364] In this context, according to the Court, an infringement relating to social security contributions may justify the exclusion of a bidder from a procurement procedure only where it is substantial (including in relation with the effects that it generates.[365] On the other hand, the imposition of 'minimum tariffs for certification services' offered to bidders *is* a restriction of the freedom postulated under Article 49 TFEU.[366]

Of particular concern are those cases involving measures aiming to prevent the violation of certain imperative national rules (*eg*, fiscal rules, *etc*) which the Court approached cautiously, deciding that, as a matter of principle, such measures cannot be used

[361] Case C-404/05 *Commission v Germany* [2007] ECR I-10239 para 47.
[362] Case C-221/12 *Belgacom* [2013] not published yet para 38. See also Case C-64/08 *Engelmann* [2010] ECR I-8219 paras. 51 and 57 and Joined Cases C-357/10 to C-359/10 *Duomo Gpa and Others* [2012] ECR I-0000, para 39.
[363] See for ex. Case C-71/76 *Thieffry* [1977] ECR 765 paras 12, 15.
[364] Case C-161/07 *Commission v Austria* [2008] ECR I-10671 para 36.
[365] Case C-358/12 *Consorzio Stabile Libor Lavori Pubblici* [2014] not published yet para 41.
[366] Case C-327/12 *Soa Nazionale Costruttori* [2013] not published yet para 69.

with the concrete purpose to justify restrictions to the fundamental freedoms enshrined in the Treaties, Member States being otherwise free to take whatever measured they assume right in order to prevent such circumvention.[367]

With specific regard to the access to staple supplies (such as electricity or health services *etc*), the Court insisted that '*the object of ensuring a secure supply of such services in the case of a crisis in the territory of the Member State concerned may constitute a reason of public security and, therefore, justify a restriction of a fundamental freedom*'[368] (emphasis added).[369]

In the meantime, in *Omega*[370], the Court laid down a comprehensive and surprisingly coherent theory on the possibility to invoke a *fundamental right* in order to justify a restriction to the freedom of establishment. This construction may in fact very well be extrapolated to any of the other freedoms and, particularly in the social policy environment (or, even more focused, in the public procurement area) it may prove a very efficient justification for various derogations from the principles and obligations imposed under any fundamental freedom.[371]

In *Jany*[372], on the other hand, the Court resolved that '*a national authority's use of a public-policy derogation presupposes that there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society.*' (emphasis added). However, the Court clarified in *Shingara & Radiom*[373] that the exceptions consecrated by Articles 48 and 56 of the EC Treaty [later, 45 and 52 TFEU concerning possible exceptions to the freedom of movement of workers and the freedom of establishment respectively] allow Member States to adopt, with respect to the nationals of *other* Member States and *on (…) grounds justified by public policy stringencies,* measures which they *cannot apply to their own nationals,* but this only where they 'cannot expel the latter from their national territory or deny them access thereto.' (emphasis added).

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[367] See for ex. Case C-196/04 *Cadbury Schweppes* [2006]ECR I-7995 (para 50). On the other hand, in Case C-205/84 *Commission v Germany* [1986] ECR 3755, the Court had nuanced this conclusion (see, in particular, para 22). See also Case C-229/83 *Leclerc and Others* [1985] ECR 1 cited above.

[368] Case C-326/07 *Commission v Italy* [2009] ECR I-2291 para 69. See also Case C-169/07 *Hartlauer* [2009] ECR I-1721 paras 47, 48 and 49 or Case C-294/00 *Gräbner* [2002] ECR I-6515 para 42.

[369] This might become even more relevant and meaningful in the light of the recent COVID-19 crisis.

[370] Case C-36/02 *Omega* [2004] ECR I-9609 paras 33, 35 and 36.

[371] See also Case C-438/05 *Viking* [2007], where the Court found an application of this theory in the area of collective actions for the protection of workers – in principle, para 77. For the same conclusion in the area of the free movement of goods, see C-112/00 *Schmidberger*, para 74 and, in relation to the free movement of capital, Case C-54/99 *Église de Scientologie* [2000] ECR I-1335 para 18.

[372] Case C-268/99 *Jany and Others* [2001] ECR I-8615 para 59. This decision is apparently based on the conclusions rendered just three years earlier, in Case C-114/97 *Commission v Spain* [1998] ECR I-6717 – see para 46).

[373] Joined Cases C-65/95 and C-111/95 *Shingara & Radiom* [1997] ECR I-3343 para 28.

Svensson[374] furthermore confirmed, in the area of freedom of establishment, the conclusion rendered in a long array of other cases[375], that exceptions to which Article 52 TFEU makes reference must *not* bear any *economic* value.[376] However, according to the Court's own conclusion, states are not necessarily wrong in invoking economic arguments (which the Court accepted as such, especially in the health and medical services sectors[377], inasmuch as they concerned serious financial and budgetary hiccups), only they have to argue their claims properly in order to be successful.[378]

In the social protection area, the Court confirmed, in *Commission v Spain*[379] and later, in *Libert and Others*[380], that social objectives such as those pertaining to a social housing policy developed in a Member State can represent an *overriding reason in the public interest* and, to that extent, justify a restriction to the freedom of establishment. Other possible justifications can be found in the area of road safety[381] or consumer protection.[382] For similar reasons, and depending on the concrete circumstances[383], we may consider reasons residing in the need to integrate or support the inclusion of some disadvantaged

[374] Case C-484/93 *Svensson* [1995] ECR I-3955. The Court ruled there that '(…) the rule in question entails discrimination based on the place of establishment. Such discrimination can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty, to which Article 66 refers, *and which do not include economic aims*.' This paragraph practically reiterated the conclusions laid down in Case C-288/89 *Gouda and Others* [1991] ECR I-4007 – see para 11, according to which '*economic aims cannot constitute grounds of public policy within the meaning of Article 56 of the Treaty*' (emphasis added).

[375] For a comprehensive review thereof, see S Arrowsmith, '*Rethinking the approach to economic justifications under the EU's free movement rules*', in (2015) 68 Current Legal Problems 1.

[376] Along the same line of arguments, see also Case C-96/08 *CIBA* [2010] ECR I-0000, where the Court stressed that '*purely economic objectives cannot constitute an overriding reason in the public interest*' – emphasis added (CIBA, para 48).

[377] See Cases C-372/04 *Watts v Bedford* [2006] ECR I-4325, paras 103-104 and C-173/09 *Elchinov* [2010] ECR I-8889, para 42.

[378] See for ex. Case C-490/09 *Commission v Luxembourg* [2011] ECR I-247, para. 44. For details, see N Nic Shuibhne, M Maci, '*Proving public interest: The growing impact of evidence in free movement case law*', (2013) 50 Common Market Law Review 4 p 993.

[379] C-400/08 *Commission v Spain* [2011] ECR I-1915.

[380] Case C-197/11 *Libert and Others*.

[381] See Case C-55/93 *van Schaik* [1994] ECR I-4837, or Case C-54/05 *Commission v Finland* [2007] ECR I-2473.

[382] See for ex. Case C-220/83 *Commission v France* [1986] ECR 3663, *CaixaBank France* cited above or Case C-393/05 *Commission v Austria* [2007] ECR I-10195.

[383] The context in which measures are taken are significantly important. For example, the migrants issue remained obscure until the Southern and Eastern Member States joined the EU and the Court would have surely denied a measure based on policies targeting migrants. The same happens now with the refugees. In a nutshell, we may conclude that there is justified ground for intervention when a problem becomes sufficiently stringent so as to require determined measures in order not to let things get worse and destabilize the proper functioning of the system, even if by such measures the cross-border trade would be harmed. As for who is competent to decide when such a ground exist, the CJEU seems pretty much unsure (as in some cases it decided itself whereas in others, it referred the problem to the national courts).

categories or people, especially people with disabilities, or the poor, but also refugees or migrants similarly justified.[384]

On the other hand, in *Inasti*[385], the Court found that a national legislation such as that under its scrutiny 'affords no additional social protection.' Therefore, a hindrance to the pursuit of occupational activities in more than one Member State may not in any event be justified *on that basis*' (emphasis added).

So, according to the cited CJEU case law, *de facto* discrimination is prohibited in the internal market context, as are also those national rules which, without being discriminatory *per se*, obstruct market access.

Another sensitive aspect which the Court took into consideration in many cases is the principle of mutual recognition (developed in the *Cassis de Dijon* case), which may potentially receive particular connotations in the labour area[386], one of the most intricate aspects in public procurement and a generator of abundant case law (starting with *Bentjees* and up to *Rüffert* and *RegioPost*, via *Nord-Pas de Calais, etc*).

Finally, the level of harmonization was acknowledged as a key element and a source of answers in the balancing process.[387] Where harmonization is exhaustive, there is basically no room for justified derogations. To the contrary, where harmonization is partial, Member States may either cite Article 36 TFEU or adduce a mandatory requirement to justify their restrictive measures.[388]

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[384] See for ex D Ferri and M Marquis, *'Inroads to social inclusion in Europe's Social Market Economy: state aid supporting employment of workers with disabilities'*, (2011) 4 European Journal of Legal Studies 2.

[385] Case C-53/95 *Inasti* [19961 ECR I-703 para 13.

[386] For discussion, see P Davies, '*Market Integration and Social Policy in the Court of Justice*', (1995) 24 Industrial Law Journal 1, esp.71. This approach was actually embraced by the Court in *Laval*, although the Posted Workers Directive was – and still is – clearly stipulating otherwise.

[387] As underlined by the Court in, for example, C-323/93 *Crespelle*, [1994] ECR I-05077.

[388] See for ex. the conclusions offered in Case C-299/02 *Commision v Netherlands* [2004] ECR I-9761, where the Court simply established (see paras 17 and 18) that '[f]reedom of establishment may, however, *in the absence of Community harmonisation measures, be limited by national regulations justified by the reasons stated in Article 46(1)EC or by pressing reasons of general interest* (…)'. This being said, the Court cited its own decision in *Kraus* (Case C-19/92 *Kraus* [1993] ECR I-1663) to conclude that 'it is for the Member States to decide on the level at which they intend to ensure the protection of the objectives set out in Article 46(1) EC and of the general interest and also on the way in which that level must be attained. However, they can do so only within the limits set by the Treaty and, in particular, they must observe the principle of proportionality, which requires that the measures adopted be appropriate for ensuring attainment of the objective which they pursue and do not go beyond what is necessary for that purpose*'* – emphasis added.

1.4 *The freedom of movement and its particularities in the workers' case*

The free movement of workers[389] was, since the very beginning[390], one of the foundation stones of the EC Treaty. Article 48 EEC (now Article 45 TFEU), postulated the free movement of labour, allowing workers who were nationals of the Member States to move freely across borders with their families to seek and take up employment in other Member States. This right was doubled by a prohibition on discrimination based on nationality between workers as regards employment, remuneration and other conditions of work and employment.

Many of the principles and formulas enunciated or proposed by the Court throughout its case law on Article 49 were applied in also the interpretation and application of Article 45 TFEU (to do with the free movement of workers). Of course, in a public procurement context, Article 45 has a much heavier impact since public contracts usually entail the provision of services or works done by employees. In fact, the protection of workers is one of the overriding reasons of public interest acknowledged as such by the CJEU.[391]

The Court was asked, quite early in the development of EU competition law, to rule on the relationship between workers' collective agreements and competition law. It hence left no room for doubts and decided that collective agreements fall outside the scope of competition law and are not touched by the prohibitions associated therewith since they are key instruments for the facilitation of 'social dialogue' and for the protection of the workers'

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[389] 'From a legal perspective, Europe's answer to the intertwining of services and workers in a community context has been the Posted Workers Directive and its surrounding case-law (…). A more recent and equally growing legal issue is the distinction between a "services provider" and a "worker" as such. *As a matter of principle, services providers can offer their services in any member state without being subjected to labour standards. Labour standards indeed cover workers operating with an employment contract and not self-employed services providers.*' – M de Vos, '*Free movement of workers, free movement of services and the posted workers Directive: a Bermuda triangle for national labour standards?*', presentation given at the conference "Recent Developments in European Labour Law", 8-9 June 2006 in Trier (358, emphasis added).

[390] 'The Court of Justice's case law played a decisive role during the founding phase of the constitutionaliation of the Community legal order, especially in relation to the freedom of movement and social rights of migrant workers. During this heroic original phase of integration, when the constitutional bases of the common market were set, the freedom of movement of workers had been intended in a broader sense than suggested by the mere functional logic of market integration' – S Giubboni '*Free movement of persons and European solidarity revisited'*, (2015) 7 Perspectives on Federalism 3, 5.

[391] See, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, para 36; Case C-165/98 *Mazzoleni* and ISA [2001] ECR I-2189, para 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, para 33, but also Case C-438/05 *Viking* paras 45, 77 etc.

rights under the TFEU's provisions on social cohesion.[392] The Court however decided that this rationale could not be applied as such to also the agreements between self-employed workers, as the latter are not 'employees' in the sense of the TFEU's provisions and contracts between them would bring them too close to cartel schemes and other forms of abuses of a dominant position.[393]

Anyway, since the introduction of EU citizenship, the CJEU has refined the interpretation of the EU legislation in its case law on the free movement of workers. According to the CJEU, job seekers have the right to reside for a period exceeding six months (Case C-292/89, *Antonissen*) without having to meet any conditions if they continue to seek employment in the host Member State and have a 'genuine chance' of finding work.

Other cases relate to access to social benefits. The Court has extended the scope of the right to access for EU citizens residing in another Member State (see *Grzelczyk*[394] or *D'Hoop*[395]). The status of first-time job seekers has been the subject of intense discussions, as they do not have a worker status to retain. In *Collins*[396] and *Vatsouras*[397], the Court concluded that such EU citizens have equal access to a financial benefit intended to facilitate access to the labour market for job seekers. Such a benefit consequently cannot be considered to be 'social assistance', to which Directive 2004/38/EC excludes access. However, Member States may require a real link between the job seeker and the labour market of the Member State in question.

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[392] See for ex Joined cases C-430/93 and C-431/93 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705. Moreover, in Case C-22/98 *Becu and Others* [1999] ECR I-5665, the Court concluded that although, 'by allowing only a particular category of persons to perform certain work within well-defined areas, the national legislation at issue in the main proceedings grants to those persons special or exclusive rights within the meaning of Article 90(1) [TFEU]', (para 23), 'a person's status as a worker is not affected by the fact that that person, whilst being linked to an undertaking by a relationship of employment, is linked to the other workers of that undertaking by a relationship of association' (para 28). Consequently, dockers 'must be regarded as 'workers' within the meaning of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) as interpreted by the Court (see, in this regard, the *Merci* judgment [Case C-170/90 *Merci Convenzionali v Porto di Genova* [1991] ECR I-5889] para 13). To this extent, since dockers are, for the duration of that employment, intrinsic part of the undertakings that hired them and thus form a single economic unit with them [an allusion to the 'single economic unit' doctrine specific to competition law – see A Gerbrandy, W Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: How 'social' is public economic law?*', in (2019) 15 Utrecht Law Review 2, 41], dockers do not, in themselves, 'constitute [independent] 'undertakings' within the meaning of Community competition law.' (para 26). The notion of worker was furthermore expanded in Case C-413/13 FNV Kunsten, [2014] ECLI:EU:C:2014:2411, para 32 *et seq*.

[393] A Gerbrandy, W Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: How 'social' is public economic law?*', in (2019) 15 Utrecht Law Review 2, 41.

[394] Case C-184/99 EU:C:2001:458.

[395] C-224/98 *D'Hoop* [2002] ECR I-06191.

[396] Case C-138/02 *Collins*, [2004] ECR I-2703.

[397] Joined cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-4585.

In other cases, the Court found that the rules governing freedom of movement for workers could easily be frustrated if Member States were able to circumvent prohibitions under those rules merely by imposing *on employers* conditions to be met by any worker whom they wished to employ, which, *if imposed directly on the worker, would constitute restrictions of the exercise of the worker's right to freedom of movement* under Article 45 TFEU (see, to that effect, the judgment in *Clean Car Autoservice*[398]). A similar conclusion should also be drawn where the employer wishes to employ, not a salaried worker in the sense of the labour law, but self-employed whose situation falls under the scope of Article 49 TFEU (see, for the possibility for employees of a service provider to rely on freedom to provide services, *Abatay and Others*[399] or Case C-474/12 *Schiebel Aircraft*[400]). Also, for the situation where a national rule treats nationals who have not exercised their right to free movement and migrant workers differently, to the detriment of the latter, by simply treating their children differently, see Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511 – para 38.

Anyway, as a matter of principle, the concept of 'worker' was assumed, throughout the CJEU case law, to have a Community meaning, rather than defined by national laws of Member States.[401] Relevant in this regard are the cases C-75/63, *Hoekstra v. BBDA*[402] (where the Court decided that a person who had lost his job, not currently in employment but capable of finding another job, is 'worker' in the sense of the Treaty), C-66/85, *Lawrie-Blum*[403] (where the Court clarified that "the concept must be defined in accordance with objective criteria…[t]he essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the

[398] Case C-350/96 *Clean Car Autoservice* 1998 ECR I-02521, paragraph 21.
[399] Joint Cases C-317/01 and C-369/01 *Abatay and Others*, EU:C:2003:572, paragraph 106.
[400] C-474/12, *Schiebel Aircraft*, ECLI:EU:C:2014:2139.
[401] '[T]he Court has, on the one hand, accepted an extremely broad definition of worker. On the other hand, it allowed the holders of the fundamental freedom of movement, and their family members, to have access to the whole panoply of social rights guaranteed to the nationals of the host Member State under conditions of full equal treatment.' (S Giubboni '*Free movement of persons and European solidarity revisited'*, (2015) 7 Perspectives on Federalism 3, 5). And, at least in the earlier case law, 'social integration (…) [was] seen by the ECJ as an instrument for promoting participation within the EU internal market and within its economic objective of free movement of factors of production (…). *The rationale behind this case law has more to do with the internal market than with combating of social exclusion, even if this actually contributes to the latter*' (H Verschueren, 'Union law and the fight against poverty: which legal instruments?', in B Cantillon, H Verschueren Herwig and P Ploscar (eds), '*Social inclusion and social protection in the EU: interaction between law and policy*', Intersentia, Cambridge, 2012, 217, emphasis added). This approach was in the end left for a significantly tighter one (see for ex. *Martinez Sala* - C-85/96, *Martinez Sala* [1998] ECR I-269, 1versus *Brey* - Case C-140/12, *Brey*, ECLI:EU:C:2013:565 or *Dano* - Case C-333/13, *Dano*, ECLI:EU:C:2014:2358, which set the lines of the future Labour Mobility Package, with the Posted Workers Directive at its very core.
[402] Case C-75/63, *Hoekstra v. BBDA* [1964] ECR 00347.
[403] Case C-66/85, *Lawrie-Blum*, [1986] ECR 02121.

direction of another person in return for which he receives remuneration"), or C-344/87, *Bettray*[404] (according to which the concept of worker does not include a person from one Member State who performs work as a part of a drug-rehabilitation program in another Member State).

It is however worth mentioning that, in line with Article 46 TFEU (and the CJEU case law on it), the European legislature adopted a plump secondary legislation which actually shaped the EU policy of free movement of workers.[405] Most of these laws were adopted under the former Article 40 TEC (now Article 46 TFEU) and concerned in principle the conditions of entry, residence and the status of workers and their families. Notable examples include the Directive 64/221 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health[406], the Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families[407], the Regulation 1612/68 on freedom of movement for workers within the Community [408], the Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State[409] and the Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[410] (which repealed many of the cited laws) *etc*.

But one of the most important norms in this area is, without any doubt the Posted Workers Directive (cited above), which actually generated an impressive number of cases, of which some of a crucial import for the public procurement sector (see for example *Viking*, *Laval*, *Rüffert*, *Luxemburg*, *Bundesdruckerei GmbH* and *RegioPost* ― which will be discussed in detail in the ensuing sections of this Chapter III). It is evident that public

[404] Case C-344/87, *Bettray*, [1989] ECR 01621.
[405] N Tekin, '*The concept of the free movement of workers within the European Union under the case law of the European Court of Justice*', at https://dergipark.org.tr/download/article-file/155622.
[406] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 56, 4.4.1964, p. 850–857.
[407] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ L 257, 19.10.1968, p. 13–16
[408] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968, p. 2–12.
[409] Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ L 142, 30.6.1970, p. 24–26.
[410] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123.

procurement and the posting of workers overlap in several key areas. However, until *Rüffert*, the issue has never been approached seriously in neither the CJEU case law nor the relevant academic research.[411] The Posted Workers Directive hones the asperities engendered by, and mitigates the risks associated, in this area, with, the principle of equal treatment (in general stemming from Articles 45 and 56 TFEU), limiting the situations in which the laws of the host state may apply to workers posted there to provide services. It came against a backdrop where (and in response to) ambiguity[412] with regard to the applicable wages of workers posted abroad in the context of *temporary* service provision was high, and its principal aim was to fill this evident legislative gap[413] with a set of 'hard core minimum prescriptions' with which national laws and collective agreements should have complied.[414] According to this Directive, EU Member States 'could decide on general mandatory rules or public policy provisions applicable within their territory – as long as these rules did not lead to discrimination or protection of their market.'[415] Inspired by the previous judgements rendered in C-113/89, *Rush Portuguesa* and C-369/96, *Arblade*, the initial draft stated that Community law 'does not preclude Member States from applying their legislation or collective labour agreements entered into by the social partners, relating to wages, working time and other matters, to any person who is employed, even temporarily, within their territory, even though the employer is established in another State'[416]

[411] C Kilpatrick, *'Internal market architecture and the accommodation of labour rights. As good as it gets*?', European University Institute (EUI), Working paper 2011/04, at https://cadmus.eui.eu/handle/1814/16824, 214. According to this author, 'Those discussions have instead focused on whether *two other kinds of social considerations* can be taken into account in public procurement: first, measures focused on *reducing unemployment* (…); second, measures focused on *reducing the disadvantage/exclusion of status groups* – the disabled above all but also ethnic minorities and, to a lesser extent, women. Social considerations were a divisive issue in adopting the 2004 GPPD [*ie*, Directive 2004/18/EC].' (emphasis added).

[412] Due, in general, to the lack of a unitary approach at EU level, which only favoured the application of a huge variety of national norms (many of which excluded temporarily posted foreign workers from the application of the *lex loci laboris*) – see J Cremers, '*Economic freedoms and labour standards in the European Union*', in (2016) 22 Transfer (ETUI) 2, 153.

[413] The purpose of the Directive hence was to 'end uncertainty by specifying which parts of the host country's labour rules, relating to minimum terms and conditions, must be applied to those posted into its territory, no matter which law governs the contract of employment of the workers concerned. *In terms of the sources of the rules, the inclusion of 'generally applicable' collective agreements, along with legislative rules and collective agreements which are binding on all the undertakings in a particular area in a particular industry, has been a tense point of debate*.' (emphasis added) – see P Davies, '*Market integration and social policy in the Court of Justice*', (1995) 24 Industrial Law Journal 1, 74. The adoption of the Posted Workers Directive was in fact seen as a matter of absolute urgency in EC's White Paper on Social Policy– see the European Social Policy—A Way Forward for the Union. COM (94) 333, see p.22.

[414] J Cremers, '*Economic freedoms and labour standards in the European Union*', in (2016) 22 Transfer (ETUI) 2, 153.

[415] Ibidem.

[416] European Commission (1991) Proposal for a Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services. COM(91) 230 final-SYN 346.

The Posted Workers Directive is, in fact, a coordination Directive, as it identifies which rules apply in which situation,[417] yet without 'harmonis[ing] the material content of those mandatory rules for minimum protection, even though it provides certain information concerning that content.'[418] According to the CJEU's own words, the Posted Workers Directive has two main purposes: '[it] seeks, first, *to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally*, in so far as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host Member State by law, regulation or administrative provision or by collective agreements or arbitration awards *within the meaning of Article 3(8) of Directive 96/71, which constitute mandatory rules for minimum protection*. (…) Secondly, that provision seeks *to ensure that posted workers will have* [those] *rules (...) for minimum protection (...) applied to them while they work on a temporary basis in the territory of that Member State*.'[419] This is enough to demonstrate the social dimension of a text otherwise devised to respond to specific problems in the area of the provision of services.[420] It also explains the generous scope for equality of treatment spotted by the Court in *Viking*, *Laval*, *Rüffert*, *Luxemburg*, *Bundesdruckerei* or *RegioPost* (where Article 3(1) was construed as a limited derogation therefrom). Based on this assumption, a contracting authority interested in ensuring for the workers commissioned to fulfil the procured tasks a minimum level of protection may demand compliance with, limitedly, Article 3(1) (a) to (g) from the Posted Workers Directive. But not a bit beyond that (not even where additional levels of protection are proclaimed or granted through strong international instruments such as the ILO conventions to which some, including the host and the home Member States, but not *all* Member States, are parties – see to that effect Recital 37 from Directive 2014/24 and the in-depth discussion in the following chapters). Anyway, in *Laval* and then in *Luxembourg*[421], the Court made it clear that the hardcore labour rights enumerated in the Posted Workers Directive do not constitute a *minimum floor*, but a ceiling, as they make for an *exhaustive* list of rights. Consequently, Member states cannot (at least in the specific area of the posting of workers) use public policy arguments to introduce

[417] C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 200.
[418] Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*, ECLI:EU:C:2015:86, para 31.
[419] C-341/05 *Laval un Partneri* [2007] ECR I-11767, paras 74 to 76 (emphasis added).
[420] C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 201.
[421] C-341/05 *Laval un Partneri* [2007] ECR I-11767 and C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

additional rights which might impinge on the fundamental freedom of companies to provide services. Instead, such additional rights could be imposed on these companies only where they are justified and proportionate (which, in the two cited cases, they were assessed to be not).

All these secondary norms (and in principal the Regulation 1612/68) applied/apply only to workers who were nationals of one of the EU Member States. However, Article 45 TFEU makes them directly applicable both in the vertical relationship of the Union with Member States (including public bodies) and in the horizontal relationships with private employers.[422] In this regard, the CJEU held, first in *Walrave & Koch*[423], then in *Bosman*[424], that Article 45 TFEU has both a vertical as well as a horizontal direct effect where the employer has also the power to regulate on the relevant working conditions. The *Angonese*[425] case went further, granting that provision a direct effect against *all* employers (*ie*, not only public entities, but also *private* enterprises).[426] But this approach did not remain in isolation, as the Court soon did a similar exercise in other areas pertaining to labour and social security. It is worth adducing in this regard the famous decisions handed down in *Mangold*[427] and *Kücükdevici*[428] (both rendered in the sphere of discrimination based on age). In Mangold for example, the Court remarkably concluded that '*it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired*' – para 78, emphasis added. In both cases, the Court overtly affirmed the ubiquitously horizontal direct effect of the Directive in discussion and, without even questioning its enforceability against a *private* individual, but instead invoking *Simmenthal*[429] and *Solred*[430], reasoned that, because the general principle (of non-discrimination based on age which, *nota bene*, has an

[422] A Dashwood, M Dougan and others, '*Wyatt and Dashwood's European Union Law'*, Hart Publishing, 2011, 501-502.
[423] Case C-36/74 *Walrave & Koch v AUCI* [1974] ECR 1405.
[424] Case C-415/93 *Bosman* [1995] ECR I-4921.
[425] Case C-281/98 *Angonese* [2000] ECR I-4139.
[426] R Nielsen, '*Free movement and fundamental rights*', (2010) 1 European Labour Law Journal 1, 31.
[427] C-144/04, *Mangold* [2005] ECR I-9981.
[428] C-555/07 *Kücükdevici*, [2010] ECR I-00365.
[429] Case 106/77, *Simmenthal*, 1978] ECR 629, para 21.
[430] Case C-347/96 *Solred* [1998] ECR I-937, para 30.

obvious *social* nature!) was 'supreme'[431] – even if of an 'unwritten source'[432], the national court was obliged to set aside any national law conflicting therewith.

This discussion had in fact some interesting echoes in another very thought-provoking case, *Maribel Dominguez*[433], which involved some sensitive aspects of social and labour law and where the Court, recalling its own decisions rendered in *Impact*[434], *Adeneler and Others*[435] and *Angelidaki and Others*[436], established that '*the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem*'[437]. However, '*the principle that national law must be interpreted in conformity with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.*'[438] (emphasis added).

The two situations described above (job seekers v. posted workers), on the scope of which the Court had the chance to elaborate at length, correspond to two discrete situations which, each in a specific way, may have a strong impact on public procurement. Job seekers are in fact, as opposed to posted workers, *unemployed* persons. And it is not unusual (in fact this practice appears to be spreading) that, when a foreign company wins a public contract in another country and, according to that contract, its delivery must be done with unemployed people, that company resort to citizens of the Member State where its own headquarters are located, rather than locals (that is, denizens of the host Member State). Otherwise, many companies prefer, for administrative benefits but also for budgetary reasons, to set up (*post factum*, that is *after* the contract has been awarded to them) a vehicle in the host state through which to perform the services for which they were hired – instead of delivering them from abroad. This scheme may involve a displacement of either posted

[431] A Dashwood, '*From Van Duyn to Mangold via Marshall: reducing direct effect to absurdity?*', (2006–07) 9 Cambridge Yearbook of European Legal Studies, 81. See also E Muir, '*Enhancing the effects of EC Law on national labour markets: the Mangold case*' (2006) 31 European Law Review, 879.
[432] K Maslauskaite, '*Posted workers in the EU: State of play and regulatory evolution*', Policy Paper, Jacques Delors Institute, 2014, at http://www.institutdelors.eu/wp-content/uploads/2018/01/postedworkers-maslauskaite-ne-jdi-mar14.pdf?pdf=ok, 9.
[433] Case C-282/10, *Maribel Dominguez*, [2012], ECLI:EU:C:2012:33.
[434] Case C-268/06, *Impact* [2008] ECR I-2483.
[435] Case C-212/04, *Adeneler and Others* [2006] ECR I-6057.
[436] Joined Cases C-378/07 to C-380/07, *Angelidaki and Others* [2009] ECR I-3071.
[437] *Maribel Dominguez*, para 23.
[438] *Maribel Dominguez*, para 27.

workers (where the supplier hires them at home and then sends them away) or just jobseekers (in case the employment is done directly by the remote vehicle). In both scenarios, this movement of persons (workers of future workers) entails complex social aspects (not only linked to employment as such, but also with regard, in general, to welfare and social benefits).

Some of these issues are, given their crucial importance for the stability of the internal market, paid close attention in the EU legislation. In fact, the TFEU *does* contain a significant number of other provisions of concern for the free movement of persons and in relation to social security and welfare benefits provision in cross border situations. They include Article 18 (postulating *non-discrimination* on grounds of *nationality*), Articles 20 and 21 TFEU (on nationality, citizenship and free movement of the EU *citizens*), Articles 45-48 TFEU (on the free movement of *workers*) and Articles 49-53 TFEU (relating to the freedom of *establishment of self-employed persons*). In connection therewith, the CJEU has already established that Articles 20 and 21(1) on the right of citizens to move and reside freely within the Union, Article 45 on the free movement of workers and Article 49 TFEU on the freedom of establishment are all *directly effective*. 'This means that the relevant Treaty provisions not only provide the framework for the free movement of workers but also provide specific rights that can be relied on by individuals before their national courts and authorities to assert specific rights *in the absence of secondary legislation*.'[439] – emphasis added.

According to Article 48 TFEU, freedom of movement of workers is one of the fundamental pillars of the internal market and, as such, it must be complemented by a number of 'co-ordinating' measures, taken at the Union level, with purpose to ensure its effectiveness.

Nonetheless, as an evident expression of the cautiousness with which the authors of the Treaties approached the very sensitive field of social security and social benefits (and as a proof that, no matter how much they would have desired so, the social arm of the internal market economy is still not fully fledged), but also of the acknowledgement of the risk that any measure taken by the EU legislator in this area might harm the sovereignty of the Member States, the second paragraph of the same Article 48 came with a damper.

Based on Article 48 TFEU, the EU legislature came, in 2010, with two new "modernised" EU social security regulations: the Regulation (EC) No 883/2004 on the

[439] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/328811/FreeMovementLegalAnnex.pdf, p.24.

coordination of social security systems[440] and the "implementing Regulation" (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems[441]. These norms replace the previous regulations and contain basic rights and principles. 'Perhaps the most important of the principles is that the payment of benefits should not generally be subject to a condition that the recipient resides in the state responsible for payment (the export principle).'[442] Anyway, the scope of the EU coordination regulations has surged over the years due to a continuous legislative change and a very plump CJEU case law.

On the other hand, Article 45(4) TFEU excludes the application of Article 45 to employment in the public service, while Article 45(3) TFEU subjects the right to free movement of workers, as already mentioned above, to limitations on grounds of public policy, public security or public health. Additionally, particular cases of free movement limitations can be found in also Directive 2004/38 and Regulation 492/2011 on freedom of movement for workers within the Union [443] (see for ex. the linguistic requirements contained therein[444]).

The Court *had* the chance to refer to all these exceptions to the free movement of workers principle.[445] It thus clarified that '[t]he nature of the legal relationship between the employee and the employing administration is of no consequence in this respect'[446] but also that '[i]n the absence of any distinction in the provision referred to, it is of no interest whether a worker is engaged as a workman [ouvrier], a clerk [employe] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law.'[447] It on the other hand explained that 'employment within the meaning of Article 48 (4) of the Treaty must be connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State, to which the specific interests of local

[440] OJ L 166, 30.4.2004, p. 1–123.
[441] OJ L 284, 30.10.2009, p. 1–42.
[442] (n 439), 33.
[443] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011, p. 1–12.
[444] N Tekin, '*The concept of the free movement of workers within the European Union under the case law of the European Court of Justice'*, at https://dergipark.org.tr/download/article-file/155622.
[445] See for ex. Case C-152/73, *Sotgiu v Deutsche Bundespost* [1974] ECR 153 or Case C-149/79, *Commission v Belgium* [1980] ECR 3881, as well as Case C-131/79, *Santillo* [1980] ECR 1585 and Case C-30/77, *Regina v Bouchereau* [1977] ECR 1999. See also Case C-47/08 *Commission v Belgium* [2011] ECLI:EU:C:2011:334.
[446] Case C-152/73, para 6.
[447] Ibidem, para 5.

authorities such as municipalities must be assimilated.'[448] It also settled that, with regard to the interpretation of a text contained in a piece of secondary legislation, *'[t]he different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions [of] the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part*. (…)'. So, '[b]y coordinating national rules on the control of aliens, to the extent to which they concern the nationals of other Member States, Directive No 64/221/EEC [must be read as seeking] to protect such nationals from any exercise of the powers resulting from the exception relating to limitations justified on grounds of public policy, public security or public health, which might go beyond the requirements justifying an exception to the basic principle of free movement of persons.' To this extent, the term 'measure' referred to in that Directive must be construed to include '*any* action which affects the right of persons coming within the field of application of Article 48 to enter and reside freely in the Member States under the same conditions as the nationals of the host State.'[449] – emphasis added.

The Court also tackled the issues concerning the definition of 'worker'[450] in several benchmark cases.[451] Further, it sought to establish the scope of the minimum income and working time rules, clarifying that part-time jobs, as well as those done 'on a small scale' fell within the scope of Article 45 TFEU, regardless of the relevant income generated thereby, and even if such income would be below the minimum level of subsistence required by national law.[452] The Court also clarified that the *purpose* of work *is* relevant in the context of Article 45 TFEU[453] and concluded that 'frontier workers' (*ie*, those working in one Member State while residing in another) *are* covered by Article 45 TFEU.[454] Issues

[448] Case C-149/79, para 7.
[449] C-30/77, paras 14, 15 and 21.
[450] For the role of the CJEU in shaping an 'universal working definition', see B Woodruff, '*The qualified right to free movement of workers: How the Big Bang accession has forever changed a fundamental EU freedom'*, in (2008) 10 Duquesne Business Law Journal 1, 130.
[451] See for ex. Case C-85/96, *Martinez Sala* [1998] ECR I-2691, para 31, where the Court explained that '(...) there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied'. Before that, in Case C-75/63, *Hoekstra* [1964] ECR 177, it clarified that the definition of the term 'worker' falls on the Court and not the Member States, as being a matter of EU law. For a wide definition, see also Case C-66/85, *Deborah Lawrie-Blum v. Land Baden- Wurttemberg* [1986] ECR 212.
[452] See for ex. Case C-53/81 *Levin* [1982] ECR 1035 or Case C-139/85, *Kempf* [1986] ECR 1741.
[453] Case C-344/87 *Bettray* [1989] ECR 1621, or Case C-456/02, *Trojani v CPAS* [2004] ECR I-7573 where the Court decided that work done under a compulsory social rehabilitation programme is not 'work' in the meaning of the Union law whereas work performed under a sheltered programme, is.
[454] Case C-212/05 *Hartmann* [2007] ECR I-6303.

concerning worker training, education and related benefits (especially in a cross-border context) have been discussed by the Court in another long line of cases.[455]

1.5 *Restrictions and derogations: re-balancing the market*

The case law developed in the area of freedom of movement confirms that, as a matter of principle, all fundamental freedoms are subject to exceptions, *ie*, restrictions.[456] Some of them are explicitly (yet so generally) itemized in the TFEU. Article 36 TFEU states that '[t]he provisions of Articles 34 and 35 *shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants*; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. *Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*' (emphasis added). Furthermore, according to Article 45 TFEU freedom of movement for workers include several fundamental rights which are, however '*subject to limitations justified on grounds of public policy, public security or public health*' (emphasis added), whereas, according to Article 52 TFEU, '*The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health*.' (emphasis added). Each of these terms is however incredibly general, hence subject to a wide interpretation.

Occasionally, the Court decided that Member States may take restrictive measures even beyond the limited scope defined under the cited Articles of the Treaties. Case by case, it thus built what the literature calls a 'theory of discretion'[457], through which it tested, using a bundle of *ad-hoc* rules and principles, the limits of Member States' autonomy in derogating from the internal market rules. These judgements have shaped the level of

[455] See for ex. Case C-39/86, *Sylvie Lair v Universität Hannover* [1988] ECR 3161 or Case C-197/86, *Brown v Secretary of State for Scotland* [1988] ECR 3205 *etc*.
[456] T Bekkedal, 'The reach of free movement. A defence of court discretion', in M Andenas et al (eds), '*The reach of free movement*', T.M.C. Asser Press, 2017, 25.
[457] S Bogojević, X Groussot and J Hettne, 'The age of discretion: understanding the scope and limits of discretion in EU public procurement law', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law*', Hart Publishing, 2019, 3. See also D Kelemen, '*Eurolegalism: The Transformation of Law and Regulation in the European Union'*, Oxford University Press, 2011, 47-52, A Barak, '*Proportionality'*, Cambridge University Press, 2014, 384–85, or A Fritzsche, '*Discretion, Scope of Judicial Review and Institutional Balance in European Law'* (2010) 47 Common Market Law Review 361.

discretion left for Member States, up to the point of altering their very fundamental powers. The intensity of review by the Court however was apparently influenced by (hence became contingent upon) three key elements: the nature of the interest at stake ('cultural discretion'), the level of harmonization ('policy-making discretion') and the type of the proceedings ('evidentiary discretion').[458] Where the Court has spotted an overriding reason relating to the public interest adduced by a Member State to justify a derogatory measure, it has allowed it as such, expanding, proportionally, the level of discretion in that particular area. Similarly, the level of harmonization of EU secondary legislation has had a direct effect on the level of intensity of the review applied by the Court.[459] Finally, in many cases (especially in those linked to public procurement) the Court entrusted the application of the proportionality test to the national courts, thereby creating, indirectly, some latitude for discretion.

What is more, as a guarantor of the correct application of the internal market rules, hence of the integration process itself, the Court checked, in the cases brought before it, whether the national measures which were *de facto* or *de jure* affecting, or had the potential to affect, cross-border trade within the EU's internal market were justly reasoned, transparently taken and open to judicial review.[460] The leeway allowed by this case law, to Member States, to justify restrictive practices proved however to be 'worryingly imprecise and unpredictable'.[461]

1.5.1 Exceptions based on public policy

Of all the exceptional cases which may, according to Articles 36, 45 or 52 TFEU, justify derogations from the general internal market rules, public policy is, by far, the most controversial.[462] Of course, public morality, public health or the protection of health and life of humans have too, inevitably, a social vein. And the values that they are due to protect

[458] S Bogojević, X Groussot and J Hettne, 'The age of discretion: understanding the scope and limits of discretion in EU public procurement law', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law*', Hart Publishing, 2019, 11 or J Rivers, 'Proportionality and Discretion in International and European Law' in N Tsagourias (ed), '*Transnational Constitutionalism: International and European Perspective*', Cambridge University Press, 2007, 107.

[459] C Bovis, 'The drivers and boundaries of discretion in the award of public contracts', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law'*, Hart Publishing, 2019.

[460] S Weatherill, 'EU law on public procurement: internal market law made better', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law'*, Hart Publishing, 2019, 21.

[461] Ibidem, 22.

[462] H Lindahl, 'Discretion and Public Policy: Timing the Unity and Divergence of Legal orders' in S Prechal and B van Roermund (eds), *The Coherence of EU Law*, Oxford University Press, 2008, 291, 296–98. See also C-124/97, *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State*), [1999] ECR I-06067.

can be characterized, to a certain extent, as also fundamental rights. Nevertheless, since these areas are of a much stricter interpretation and of a too small interest for public procurement, they will not be discussed in detail in this paper, but the main focus will be on the public policy exception. It is on the other hand interesting to note that, at least with regard to the protection of (public) health, and/or life, the Court had the occasion, after the famous case *de Peijper*[463] (where it concluded that Member States have a significantly wide discretion with regard to the level of protection they wish to establish), to revisit this ground on quite many occasions, nuancing dramatically its conclusions.[464] The same happened in the case law to do with fundamental rights (and especially with fundamental *social* rights) – see for example the *Laval* case (where the Court admitted that the right to collective action is fundamental yet it cannot infringe the fundamental principles of the internal market).

In *van Duyn*[465], the Court used the *effect utile* argument (which it had applied for the first time, with a notable success, in *Steenkolenmijnen Limburg*[466]) to clarify that 'the particular circumstances justifying recourse to the concept of public policy *may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.*' (emphasis added). On the face of it, the text is puzzling. First, it talks about discretion (hinting at the idea that member states should be given a larger margin of appreciation and more possibilities to derogate), then it points out that that discretion must remain 'within the limits imposed by the Treaty' (*ie*, no, or very little, derogation). In fact,

[463] Case 104/75 *de Peijper* [1976] ECR 613. See in particular para 15.

[464] In case C 220/17, *Planta Tabak-Manufaktur*, [2019] ECLI:EU:C:2019:76, for example, the Court assessed the application of a Directive in the context of the interest to protect a fundamental right and recalled that 'the principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified' (see para 36) and that '[t]he comparability of different situations must be assessed with regard to all the elements which characterise them. Those elements must in particular be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account'. Furthermore, with particular regard to the principle of proportionality, the Court settled that '(…) *it must be observed that, since general principles of law, which include that principle, form part of the EU legal order, they must be observed not only by the EU institutions but also by the Member States in the exercise of the powers conferred on them by EU directives (judgment of 2 June 2016, ROZ-ŚWIT, C 418/14, EU:C:2016:400, paragraph 20).*' – para 78 (emphasis added). Finally, it clarified that '*the right to property [including intellectual property] is not an absolute right and must be viewed in relation to its social function* (see, to that effect, judgment of 15 January 2013, *Križan and Others*, C 416/10, EU:C:2013:8, paragraph 113)' and, consequently, '*any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 4 May 2016, Pillbox 38, C 477/14, EU:C:2016:324, paragraph 160).*' – paras 94 and 96 (emphasis added).

[465] Case C-41/74, *van Duyn*, [1974] ECR 1337, para 18.

[466] Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1.

the Court made it clear in its forthcoming decisions that the latitude for discretion, as acknowledged in *van Duyn*, must be assessed on a case-by-case basis, and that that assessment must be done holistically, so that to be sure that any national measure remains within the general framework allowed by the EU legislation. The Court made thus, throughout its case law, a pretty clear distinction between situations and contexts which do *not* fall within the scope of the internal market rules and whose which *do* fall but which may, depending on the concrete context, be justified by imperative exceptions of immediate and direct application or merely by mandatory requirements which necessitate a prior evaluation of proportionality. It consequently found that public policy justifications are strong and effective when they stem from some measures and actions adopted at the EU level, but rather problematic when they are sourced in national environments, without being also mirrored at the EU level. A nice example for the first case is offered by the European social model, which is plump with measures and actions that collide with the basic internal market rules but which, by the mere fact of being endorsed at the EU level, are irrevocably presumed to take precedence over the latter (see for example the case law to do with the application of the Posted Workers Directive in public procurement scenarios, in particular *Laval* and *Rüffert* v. *Regio Post*).

The Court also underscored, on numerous occasions, that public policy (in the meaning offered by Articles 36, 45 or 52 TFEU) is very difficult to establish as a ground for exception in itself[467], and struggled to find a palpable element of distinction between pure 'public policy'[468] justifications and other, 'unwritten' grounds, which may qualify as mandatory requirements[469], it being sometimes rather hesitant in choosing a concrete path.[470]

In *van Duyn*, the Court actually submitted that, as a matter of principle, Member States lost their decisive authority for the interpretation of the concept of '*public policy*' — which was to become subject to the direct control of the European institutions of the Community and, in particular, of the Court itself.[471] In this scenario, the Court 'can annul a policy measure if it judges that the [organs that adopted it] have acted beyond or in excess

[467] See for ex. C-231/83, *Henri Cullet v Centre Leclerc*, [1985] ECR 00305.
[468] Which the Court had defined as a 'genuine and sufficiently serious threat (…) affecting one of the fundamental interests of the society' (see Case C-30/77 *Bouchereau* [1977] ECR 1999, para 3).
[469] D Thym, 'The constitutional dimension of public policy justifications' in P Koutrakos, N Nic Shuibhne and P Syrpis (eds) '*Exceptions from EU Free Movement Law; Derogation, Justification and Proportionality'*, Hart Publishing, 2016, 173.
[470] See for ex. *Cassis de Dijon* (para 10) vs. C-405/98 *Gourmet* (para 26).
[471] U Šadl, '*The role of effet utile in preserving the continuity and authority of European Union law: evidence from the citation web of the pre-accession case law of the Court of Justice of the EU*', (2015) 8 European Journal of Legal Studies 1, 34.

of their jurisdiction.'[472] It nonetheless conceded that, under "particular circumstances" the competent national authorities should be granted discretion.[473] Additionally, cases like *van Duyn*, but also *Krombach v Bamberski*[474] or *Bonsignore* and *Andoui and Cornuaille*, have the merit of making it clear that only the '*political'* decision – in the elaboration of a public policy – is to be left at the discretion of national governments, whereas all measures taken in the *implementation* thereof must remain within the control of the European institutions. They also established that the mere fact that a conduct is not illegal *per se* should not render the right to invoke the violation of public policy impossible (especially where the host state considers such a conduct to be 'socially harmful').[475]

The Court also concluded that 'the concept of public policy as justification for derogations from a fundamental freedom must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the European Union institutions (…). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.[476] And, although the strictness of application with respect to this determinant qualitative threshold has been rather inconsistent (see in this regard the *Italian Trailers* and *Mickelsson and Roos* but also *Regio Post* where the application of the proportionality test was surprisingly shallow) the Court has constantly required Member States, throughout its case law, to produce concrete, extensive[477] evidence to support their allegations that the protection of a fundamental right was under a 'serious threat'.[478]

Anyway, as a matter of principle, the escape door offered by Articles 36, 45 or 52 TFEU is only available inasmuch as the field to which it opens is not subject to full

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[472] G Tridimas, '*A political economy perspective of judicial review in the European Union: judicial appointments rule, accessibility and jurisdiction of the European Court of Justice'* (2004) 18 European Journal of Law and Economics 1, 99.

[473] *van Duyn*, para 18 cited above. This conclusion was reiterated in *Omega* and *Sayn-Wittgenstein*, where the Court insisted that 'the specific circumstances which may justify recourse to the concept of public policy may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty' (see *Sayn-Wittgenstein*, paras 86-87).

[474] Case C-7/98 *Dieter Krombach v André Bamberski* [2000] ECR I-01935.

[475] T Hoško, '*Public policy as an exception to free movement within the internal market and the European judicial area: A comparison'*, in (2014) Croatian Yearbook of European Law and Policy, 193.

[476] Case C-208/09, *Sayn-Wittgenstein*, [2010] ECR I-13693, para 71. This idea had been stressed already in *Omega*, but also in *Bouchereau* and *Calfa* (Case C-348/96, *Calfa*, [1999] ECR I-11). See also C-319/06, *Commission v Luxembourg* (a case to do with the protection of workers) para 30 *etc*.

[477] In *Commission v Luxembourg*, for example, the Court clarified that 'merely cit[ing,] in a general manner', the objective of worker protection, was not sufficient.

[478] S Reynolds, '*Tipping the scales: exploring structural imbalance in the adjudication of interactions between free movement and fundamental rights*', at https://livrepository.liverpool.ac.uk/2009399/1/ReynoldsSte_Feb2015_2009399.pdf (last visited December 3, 2019), 120.

harmonization. Once the EU legislature has decided to intervene in a concrete area, national measures that derogate from its rules are very hard to accept.[479] Harmonization may (pursuant to Article 114(1) TFEU, ex. Article 95(1) TEC[480]), in general, be either minimum, or partial or, finally, total. Total harmonization (also called 'pre-emptive') prevents Member States from taking any measures in that field. Minimum harmonization, in turn, allows Member States to adopt more stringent measures (on grounds of '*major needs*' as per Articles 36 or 52 TFEU – see Article 114(4) TFEU), as far as such measures are 'compatible with the Treaties'. In the context of minimum harmonization, 'the applicable Community legislation sets a floor, the Treaty itself sets a ceiling, and the Member States are free to pursue an independent domestic policy between these two parameters'.[481] Or, put otherwise, if an area of action falls outside the scope of any EU secondary legislation, Member States can regulate it within the boundaries fixed by EU's primary law. But if secondary legislation has been adopted at the EU level, the limits within which Member States can act will depend on the level of harmonization brought forth by that secondary legislation: where harmonization is minimum, or barely partial, Articles 36 or 52 TFEU can still play some role.[482] Exhaustive

[479] See C-323/93 *Crespelle*, [1994] ECR I-05077 or C-299/02 *Commision v Netherlands* [2004] ECR I-9761 and the discussion below (n 406, 407). In the same sense, see S Barón Escámez, '*Restrictions to the free movement of goods The protection of the environment as a mandatory requirement in the ECJ case law*', Master Thesis, University of Lund, 2006, 23.

[480] Which, according to its paragraph (3), is not applicable to those provisions '*relating to the free movement of persons nor to those relating to the rights and interests of employed persons*' (emphasis added) – as these are, in general, rather subject to 'coordination' under Article 5 TFEU and, upon the case, Article 52(2) TFEU, Article 156 TFEU or Article 168(2) TFEU etc or to a discrete harmonization mechanism – as that marked out by Article 153 TFEU in the sensitive field of social policy. On the other hand, according to the fourth paragraph of the same Article 153, '[t]*he provisions adopted pursuant to this Article: shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof*, [and] *shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaties*' (emphasis added). For a list of the most relevant Directives adopted in this area based on the cited provisions, see Chapter IV below.

[481] M Dougan, '*Minimun harmonization and the internal market'*, (2000) 37 Common Market Law Review 4, 855.

[482] J Wiers, '*Trade and Environment in the EC and the WTO. A legal analysis*', Europa Law Publishing, 2002, 95. 'After minimum harmonisation measures have been adopted, general principles of law and the fundamental Treaty provisions continue to play an important role. When a Member State imposes requirements beyond the minimum level, it must respect the Treaty provisions and, for instance, the principles of equal treatment, mutual recognition and proportionality.' – see J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 33. According to the cited author, harmonization at the Union level affects the contracting authorities' discretion in public procurement in two fundamental ways: on the one hand, where the harmonization concerns a product or a service that a contracting authority would like to purchase, that authority is, in principle, obliged to take into account and respect harmonisation rules *if they are relevant for the subject-matter of the contract* (p 33). Two benchmark case are cited in this regard, namely *Commission v Greece* (Case C-489/06, *Commission v Greece* [2009] ECR I-1797) and *Medipac* (Case C-6/05, *Medipac-Kazantzidis v Venizelio-Pananio* [2007] ECR I-4557) where the Court decided that it is not possible to reject a tender for not meeting concrete health needs if the offered products bears a CE mark indicating that they were in line with the standards set by the relevant Directive; and, on the other hand, where the harmonization concerns the social or environmental criteria which

harmonization however prevents not only the application of the derogations regulated by Articles 36 and 52 TFEU, but also of those based on the mandatory requirements theory.[483] The Court confirmed these conclusions in several benchmark cases.[484]

The references to 'public policy' are recurrent throughout the TFEU (*eg*, Article 36 with concern to the free movement of goods, Article 45(3) – on the free movement of workers, Article 52(1) – to do with the freedom of establishment, or Article 62 – which brings Article 52 also in the services area, as well as Article 65(1) – pertaining to the chapter on the free movement of capital) and the Court established, throughout its case law, that public policies are not a '*domaine reservee*' for Member States, in the sense that they cannot set *any* public policies they like, or take *any* measures they like under a specific public policy, since the term 'public policy' belongs (by the mere fact of being explicitly mentioned in the Treaty) to the EU legal order and it is only the CJEU who has the authority to interpret its meaning and scope.[485] It also settled that public policy exceptions must be interpreted strictly as they are derogations from the fundamental rules of the Treaty consecrating the freedom of movement in the internal market.[486]

But, according to the CJEU's case law, 'public policy' is not (always) similar to 'fundamental rights'. This difference is best evidenced in *Omega* and *Schmidberger*. In both cases, the Court recognised the respect for human dignity a general principle of Community law capable of restricting the freedom to provide service. However, in *Omega*, unlike *Schmidberger*, the restrictive measure was not based straightforward on protection of a fundamental right but rather on grounds of public policy. The German conception of human dignity was not 'a conception shared by all Member States' and consequently could not be put on an equal footing with 'that of the guarantee of human dignity as recognised in Community law.'[487] In conclusion, a restriction of a fundamental freedom cannot be based

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an authority intends to use in a public procurement context, that authority must take note of the standards set by that harmonization rule and not go beyond them. *Rüffert* is cited in this latter regard.

[483] M Dougan, '*Minimun harmonization and the internal market'*, (2000) 37 Common Market Law Review 4, 866.

[484] See for ex. case C-227/82, *van Bennekom* [1983] ECR 388 para 35 or case C-5/94, *Hedley Lomas* [1996] ECR I-2553, para 19. In a even more interesting line of cases, e.g., C-1/96, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd.* [1998] ECR I-1251 (the '*Compassion case*') or C-11/92, *R. v. Secretary of State for Health, ex parte Gallaher Ltd.e al.* ('*Gallaher'*) [1993] ECR I- 3445 etc., the Court settled that where a Directive imposes minimum standards (*ie*, minimum harmonization), and a Member State chooses to implement stricter standards, it cannot put a ban on imports from another Member State for the mere reason that that other Member State decided to apply only the minimum standards (which the imported goods actually meet), provided that those minimum standards are however exhaustively laid down in the Directive.

[485] See in this regard Case C-35/76 *Simmenthal* (para 14), or Case C-41/74 *van Duyn* (para 18).

[486] See for ex. C-46/76 *Bauhuis* [1977] ECR 5.

[487] See the Opinion of AG Stix-Hackl of 18 March 2004 in case C-36/02, *Omega*, [2004] ECR I-9609, para 92.

directly on a specific fundamental right protected by the constitution of a Member State, especially when that right is not recognized and protected in a similar manner in all Member States[488] (hence following a European social model). However, a common conception of a fundamental right [is] not necessary where the restriction it generates [is] based on grounds of public policy [consecrated via the Community law] and indirectly on the protection of a national constitutional right.'[489]

Anyway, in the silence of the Treaties (but also of the secondary legislation adopted for their application) and in spite of all the efforts of both the doctrine and the Court of Justice of the Union, no consensus has been reached with regard to what constitutes, concretely, a *restriction* to the fundamental freedoms. Notwithstanding that, based on the relevant case law of the CJEU it became pretty clear that there are no measures which to be qualified as restrictions forthright, *ex officio*, without a further investigation into their nature and effect and, on the other hand, that measures which solely incur extra costs or generate a reduction in the volume of trade cannot as such be deemed to unlawfully affect the access to the market.[490]

In fact, the Court appears to have imposed three constraints on Member States' freedom to invoke the derogations explicitly permitted under the TFEU.[491] First, it established that Articles 36, 45 or 52 TFEU must be interpreted strictly as the list contemplated thereunder is exhaustive so that exceptions cannot be extended to cases other than those (see Case 113/80, *Commission v. Ireland* (*Irish Souvenirs*)). Second, it clarified that the resort to public-policy derogations is possible only where there is a genuine and sufficiently serious threat to a fundamental interest of society. And third, that those derogations cannot be used to serve economic objectives (see for ex. Case C-7/61, *Commission v Italy*) — unless such objectives are ancillary to other, non-economic ones (according to a 'centre of gravity' test[492]).

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[488] N J de Boer, '*Justice, Market Freedom and Fundamental Rights: Just how fundamental are the EU Treaty freedoms? A normative enquiry based on the political theory of John Rawls into whether there should be a hierarchy between fundamental rights and the Treaty freedoms*', (2013) 9 Utrecht Law Review 1, 180.

[489] Opinion of AG Stix-Hackl in *Omega*, para 71. See also N J de Boer, '*Justice, Market Freedom and Fundamental Rights: Just how fundamental are the EU Treaty freedoms? A normative enquiry based on the political theory of John Rawls into whether there should be a hierarchy between fundamental rights and the Treaty freedoms'*, (2013) 9 Utrecht Law Review 1, 180.

[490] See in this regard Joined Cases C-267/91, *Keck and Mithouard*, para 13; Case C-20/03, *Burmanjer*, paras 30–31; Case C-518/06, *Commission v. Italy*, [2009] ECR I-3491, paras 62–63; Opinion of AG Poiares Maduro in Case C-446/03, *Marks & Spencer plc v Halsey* (Her Majesty's Inspector of Taxes), [2005] ECR I-10837, para 37.

[491] F Raffaele, 'The free movement of goods', in R Torino (ed), '*Introduction to European Union internal market law*', Roma Tre Press, 2017.

[492] For more on this, see further below.

As underscored by AG Kokott in *UTECA*[493], '*it is established case law that the notion of a restriction encapsulates both the prohibition of discrimination and indistinctly applicable measures that constitute a hindrance to free movement*.' (emphasis added). On the other hand, as AG Maduro pointed out, the Court cannot be called to *"*review the *political choices* made by the Member States. Judicial review of measures likely to prohibit, impede or render less attractive the exercise of the freedoms of movement rather *seeks to ensure that those choices take account of the impact which they may have on transnational situations*."[494] (emphasis added).

However, the CJEU's initial approach to the restrictions to the fundamental freedoms was marked by an evident degree of generality (see for ex. the famous cases *Dassonville*[495] – for goods, *van Binsbergen*[496] – for services or *Gebhard*[497] – for persons). In the latter case at least, the Court tried to clarify once and for all the distinction between '*restriction'* as such (which appears to be connoted but also confined by the extremely general formula 'hinder or makes less attractive') and '*discrimination'*, clarifying (but much less emphatically than it did later, in *Laezza*[498]) that the latter merely serves – in the context of the internal market fundamental freedoms – at making (or not) applicable the doctrine of mandatory requirements (in the sense that only non-discriminatory situations may qualify for that test).[499]

Otherwise, the Court conceded that the *inherently restrictive nature* of certain fundamental rights should suffice to justify the exercise thereof in the context of the internal market rules. It did so especially in the cases where the internal market rules were confronted

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[493] Opinion of AG Kokott in Case C-222/07, *UTECA*, EU:C:2008:468, para 77. He referred there in particular to: on free movement for workers: C-415/93, *Bosman*; C-190/98, *Graf*, EU:C:2000:49, and C-464/02, *Commission v Denmark*, EU:C:2005:546; on freedom of establishment: C-55/94, *Gebhard*, EU:C:1995:411, and C-442/02, *CaixaBank France*, EU:C:2004:586; on freedom to provide services: C-76/90, *Säger* and C-490/04, *Commission v Germany*, EU:C:2007:430; on the free movement of capital: the golden shares judgments C-367/98, *Commission v Portugal*, EU:C:2002:326, C-483/99, *Commission v France*, EU:C:2002:327 and Joined Cases C-463/04 and C-464/04, *Federconsumatori and Others*, EU:C:2007:752.

[494] Opinion of AG Poiares Maduro in Case C-446/03 *Marks & Spencer plc v Halsey* (Her Majesty's Inspector of Taxes), para 37 cited above.

[495] C-8/74, *Dassonville* [1974] ECR 837.

[496] C-33/74, *van Binsbergen*, [1974] ECR 1299.

[497] Case C-55/94, *Gebhard*. See also Case C-442/02, *CaixaBank France*.

[498] C-375/14, *Laezza*, EU:C:2016:60, para 25.

[499] It is nevertheless important to note that, at the time when it was established – *ie*, through the *Cassis de Dijon* decision — where the Court settled that '*obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements*' (emphasis added) — the doctrine of mandatory requirements represented nothing more than a formal interpretation of the original rules enshrined in the very Treaty, as the Court's intention was not to constitute a totally discrete category of exceptions – see in this regard T Bekkedal, 'The reach of free movement. A defence of court discretion', in M Andenas et al (eds), '*The Reach of Free Movement'*, T.M.C. Asser Press, 2017, 25.

with social rights and liberties. *Albany* is a relevant example in this regard. The Court accepted there that the social-policy objectives born by collective agreements would be seriously undermined if the social partners were subjected to Article 101(1) TFEU when seeking jointly to adopt measures to improve working conditions[500]. It however refused to apply the same principle in *Laval*.

The truth is that, in the face of the general principles of the Treaties, national governments and authorities are usually tempted to force the limits of the internal market and test the limits of their own freedom. This temptation is encouraged by the vagueness of the notion of 'restriction' (with its corollary of possible 'justifications'). This risk has been, in one way or another, constantly assessed by the Court throughout its case law. In *Cassis de Dijon*, it concluded that '*in the absence of harmonization of legislation, obstacles to free movement of goods* which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, *rules that lay down requirements to be met by such goods* (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) *constitute measures of equivalent effect prohibited by Article 30*.' (para 14) – emphasis added.

The CJEU case law on (national) *social* policies is however intriguingly tenuous. This may be because, as opposed to the specific trade rules applying directly to intra-Community trade (such as those under scrutiny in *Cassis de Dijon*), the bulk of the national social regulations brought on the dockets of the Court of Justice of the Union were only indirectly affecting imports.

The task is even more difficult as it inevitably encompasses a burden of proof (on the Member State) that their measures, although restrictive, are necessary/justifiable and proportionate.[501] This even if more and more voices argue that the assessment of justification and proportionality is not (or should not be) the realm of the judiciary, but is (or should remain) in the exclusive competence of the political and administrative national bodies.[502] Moreover, when the Court reviews State public-interest arguments, 'it engages with a range

[500] See Case C-67/96 *Albany* [1999] EU:C:1999:430, para 59.
[501] See C Kilpatrick, '*The Court of Justice and labour law in 2010: A new EU discrimination law architecture*' (2011) 40 Industrial Law Journal 3, 280; see also G Mathisen, '*Consistency and coherence as conditions for justification of Member State measures restricting free movement*' (2010) 47 Common Market Law Review 4, 1021, C Barnard, '*Restricting restrictions: Lessons for the EU from the US?*' (2009) 68 Cambridge Law Journal 3, 575 or C Barnard, 'Derogations, justifications and the four freedoms: Is State interest really protected?' in C Barnard and O Odudu (eds), *The outer limits of European Union Law*, Hart Publishing, 2009, 273.
[502] See for ex. S Weatherill, *Cases and Materials on EU Law*, 10th ed., Oxford University Press, 2012, 415-416 or T Tridimas and G Gari, '*Winners and losers in Luxembourg: A statistical analysis of judicial review before the European Court of Justice and the Court of First Instance: 2001-2005*' (2010) 35 European Law Review 2, 131 at 135.

of very different things, from methodological or technical questions – e.g. evaluating the rationality or consistency of national policy measures – to more obviously substantive questions e.g. the reasonableness or effectiveness of those measure(s).'[503] Moreover, the fact that Member States adduce arguments from several policy areas (*eg*, economic and social or environmental *etc*), many of them overlapping or even colliding with each other, makes the finding of the right balance even more problematic. Cases like *Concordia Bus*[504], *Kohll*[505] or *Vandraekel*[506] are worth citing in this regard.

In spite of these critiques, this necessary evaluation does not, as argued by some authors, require the Court to enter into an assessment of the existence of a *hypothetical* alternative means which might be less restrictive for the right or interest in question, but only of those means that further the national legislator's main drives as set forth in the restricting rule. Moreover, such an assessment ought to stay away from any comparison of the situations *before* and *after* the adoption of the measures under scrutiny.[507] In fact, '[t]he proportionality doctrine is based on a fundamental distinction between the *scope* of constitutional rights and their *protection*.'[508] (emphasis added).

However, the Court's approach has been very much contingent on the freedom at stake. For example, restrictions and justifications in the area of the free movement of goods were examined from a much more economic perspective than those concerning the free

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[503] N Nic Shuibhne, M Maci, *'Proving public interest: The growing impact of evidence in free movement case law*' (2013) 50 Common Market Law Review 4, 970.

[504] C-513/99, *Concordia Bus Finland*, [2002] ECR I-07213, where the Court embraced the arguments adduced by the city of Helsinki and the Finnish Government that 'it is in the interest of the city and its inhabitants for noxious emissions to be limited as much as possible. For the city of Helsinki itself, which is responsible for protection of the environment within its territory, *direct economies follow from this, especially in the medico-social sector, which represents about 50% of its overall budget. Factors which contribute even on a modest scale to improving the overall state of health of the population enable it to reduce its charges rapidly and to a considerable extent*.' (para 46) – emphasis added.

[505] Case C-158/96 *Kohll v Union des caisses de maladie* [1998] ECR I-1931, where the Court admitted that 'the objective of maintaining a balanced medical and hospital service open to all…although intrinsically linked to the method of financing the social security system, *may also fall within the derogations on grounds of public health…in so far as it contributes to the attainment of a high level of health protection*' - para 50 (emphasis added).

[506] Case C-368/98 *Vanbraekel and others v ANMC* [2001] ECR I-5363, where the Court concluded that ''it cannot be excluded that the risk of seriously undermining the *financial balance* of a social security system might constitute an overriding reason in the general interest capable of justifying a barrier to the principle of freedom to provide services' (para. 47) – which AG Jacobs characterized (in *Commission v Austria*) as a 'a departure from the orthodox approach of the Court' and 'a double derogation, first from the fundamental principles of free movement and second from the accepted grounds on which those derogations can be justified' – see AG Jacobs in *Commission v Austria*, para. 31 of the Opinion.

[507] See A Barak, '*Proportionality – Constitutional rights and their limitations*' Cambridge University Press, 2012, 323. See also I Lianos, '*In memoriam Keck: The reformation of the EU law on the free movement of goods*', (2014) 5 Centre for Law, Economics and Society – Research Paper Series, 23.

[508] A L Bendor and T Sela, '*How proportional is proportionality?*', (2015) 13 International Journal of Constitutional Law 2, 531.

movement of persons since, in the latter case, the 'social' factor is inevitable and cannot be ignored. On another tier, it is interesting to note that, slowly but steadfast, the CJEU case law grew to allow more discretion for Member States in those areas not fully harmonized at the EU level whereas restricting Member States' sovereignty in those areas covered entirely by the EU legal order, that is, where national measures have usually been subjected to a mere conformity test. This pattern, together with the fact that, in time, more and more areas fell prey to extensive harmonisation (as a result of Commission's determined initiatives) led to a considerable case law where the Court applied a *European model of a* '*good society*' where fundamental social values took precedence, especially owing to the Charter of Fundamental Rights and its constitutional status (acknowledged via Article 6 (1) TEU), as well as to other documents that consecrated the fundamental character of various social rights (such as the European Social Charter signed at Turin on 18 October 1961 and the Community Charter of the Fundamental Social Rights of Workers of 1989 – see Article 151 TFEU).[509]

1.5.2 Exceptions based on mandatory requirements

The grounds enumerated in Articles 36 as well as 45 and 52 TFEU are, no matter how you read them, limitative and the Court interpreted them very strictly. This is why the Court was invited, even since *Nungesser*[510] (and, later, *Pronuptia*[511]), to make use of a concept customarily used in the American anti-trust law, that of 'rule of reason', in order to justify the exclusion from the fundamental rules of the internal market of certain arrangements that did not fall within the scope of the cited Articles.[512] It is not very clear how the Court got caught into this doctrinal spiral, but it did. Embryonic traces of this rule may thus be found in *Albany*[513], a case contemporaneous with *Cassis de Dijon*. There, the Court eventually concluded that labour law cannot, as such, fall out of the scope of EU competition law, especially where its aim is to reduce poverty and exclusion.[514] Exceptions were, in fact, rarely accepted based on the 'rule of reason' but, in several previous benchmark cases to do

[509] D Thym, 'The constitutional dimension of public policy justifications', in P Koutrakos, N Nic Shuibhne and P Syrpis (eds) '*Exceptions from EU Free Movement Law; Derogation, Justification and Proportionality'*, Hart Publishing, 2016, 184.
[510] Case C-258/78, *Nungesser*, [1982] ECR 02015.
[511] Case C-161/94, *Pronuptia*, [1995] ECR I-0480.
[512] Briefly, the role of the rule of reason in the American law has been 'to prevent specific agreements from entering the cave of justice inhabited by legal troglodytes armed with economic formulae' – see S Vousden, '*Albany, market law and social exclusion*', in (2000) 29 Industrial Law Journal 2, 184.
[513] Case C-67/96 *Albany*, [1999] ECR I-05751.
[514] S Vousden, '*Albany, market law and social exclusion*', in (2000) 29 Industrial Law Journal 2, 182.

with social policy measures[515], the Court had identified certain elements of justification for possible derogations.

It is in *Cassis de Dijon* where it first started to resort to, and juggle with, a far more refined set of exceptions, *ie*, those based on certain 'mandatory requirements' (that is, reasonable public interests which, contextually, *may* justify a departure from the economic rules of the internal market), thereby expanding greatly the grounds on which Member States may rely to justify specific restrictions. This allegedly permitted a better balancing of free movement and public interests[516], especially in a context where more and more interests, not covered by Articles 36, 45 or 52 TFEU, have, in a piecemeal fashion, been acknowledged as overriding.

However, in its earliest decisions dealing with these issues, the Court refused to overtly admit that it was in front of a conflict between the fundamental rules of the internal market and (national) social overriding interests.[517] In those cases, it practically limited itself to either acknowledge that the national rules under scrutiny did not raise any conformity issues, as it couldn't spot any discrimination against imports, or at least any obstruction thereof (so it let the national rulings live) or, to the contrary, that there was an infringement (since the national rules were in fact discriminatory), and simply overturned them.[518] But, by the mid 1990s, the Court had the chance to evaluate a long array of national laws on working hours.[519] In most of these cases, the Court found that the ban on Sunday trading *did* affected the trade (in the sense that the sales went down significantly). It however failed to establish that the same measure was discriminating against imports, as domestic traders seemed

[515] See for ex. C-41/90, *Höfner*, or C-55/96, *Job Centre coop. arl*., [1997] ECR I-07119.

[516] A Cuyvers, 'Free movement of goods in the EU', in E Ugirashebuja, J E Ruhangisa, T Ottervanger and A Cuyvers (eds), '*East African Community Law: Institutional, Substantive and Comparative EU Aspects*', Brill, 2017, 341.

[517] In her study on the Court's judgments in 1984, 1994, and 2004, C Barnard concluded that the case law '*show[s] a remarkable shift (…) from considerable deference to Member States' regulatory freedom in 1984…to a greater willingness to review Member State justifications in 1994…[to] a more substantial review of the Member States' justifications in 2004, albeit combined with a recognition of a greater of number of justifications*' – see C Barnard, 'Derogations, justifications and the four freedoms: Is State interest really protected?' in C Barnard and O Odudu (eds), '*The outer limits of European Union Law'*, Hart Publishing, 2009, 295, emphasis added.

[518] For discussion, see P Davies, '*Market Integration and Social Policy in the Court of Justice*', (1995) 24 Industrial Law Journal 1, 52.

[519] See for ex. Case C-155/80, *Oebel* [1981] ECR 1993 for the German law, the Sunday Trading cases (ie., Case C-145/88, *Torfaen* [1989] ECR 3851; Case C-306/88, *Rochdale B C* [1992] ECR 1-6457; Case C-304/90 *Reading* [1992] ECR 1-6493; Case C-169/91 *Stoke-on-Trent* [1992] ECR 1-6635) for the UK, Case C-312/89 *Conforama* [1991] ECR 1-997 for the French law, Case C-332/89, *Marchandise* [1991] ECR 1-1027 for the Belgian law, Joined Cases C-401/92 and C-402/92, *Heukske and Boermans* [1994] ECR 1-2199 for the Dutch law, or Joined Cases C-69/93 and C/-258/93, *Punto Casa and PPV* [1994] ECR 1-2355 for the Italian law. Interestingly, the last two decisions were handed down *after* the Court had pronounced its decision in *Keck*. As a consequence, the result was different from the previous ones, which had been inspired by *Cassis de Dijon* and *Dassonville*.

affected just as much. Therefore, the Court decided, as it already did in *Cassis de Dijon*, but much more blatantly (at least in the first of the *Sunday Trading* cases, *ie*, in *Torfaen*), that the national law under review constituted an obstacle to the intra-Community trade, even if it was not discriminatory based on nationality. In *Torfaen* for example, the Court embarked on a quest which had proved to be fraught with peril. It tried to establish (in the teeth of the objections opposed by the Advocate General of the case – who warned that '*[a] measure which is regarded as necessary by a Member State may often only be appraised if the Court is prepared to concern itself with areas of policy for which Community law provides no, or at any rate few, criteria of assessment*.'[520] – emphasis added) whether Article 30 was (more or less) about discrimination against imports or mainly about the obstruction of the Community trade.[521] The Court concluded that that Article was, in essence, about unrestricted intra-Community trade (rather than discrimination against imports) and based, interestingly, its decision on the same argument adduced in *Oebel*, *ie*, that, although the national rules at hand *were* impinging on the freedom established in Article 30, their restrictive nature was annihilated by the reality that they constituted *'a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty*'. (emphasis added)[522].

In *Cassis de Dijon*, the Court tried, (as it will have done even more emphatically a few years later, in *Torfaen*)[523] to actually make a distinction between 'equal burden rules' and 'dual burden rules', only to decide that the first should fall outside the scope of Article 34 TFEU while the second, should not (since imported goods have to comply with two different sets of regulations, one in their home state and another, in the state to which they are exported, and these 'disparities between the national laws' of Member States equates to a restriction to the intra-Community free trade). This formula was successfully used in several ensuing cases[524] while in others, the Court considered that the high degree of

[520] Case C-8/74, *Dassonville* [1974] ECR 837, para 33.
[521] P Davies, '*Market integration and social policy in the Court of Justice'*, (1995) 24 Industrial Law Journal 1, 55.
[522] *Torfaen*, para 13.
[523] In a contemporaneous case (C- 788/79 *Gilli and Andres* [1980] ECR 02071), the Court went even deeper into the essence of things, concluding that 'In the absence of common rules relating to the production and marketing of the product in question it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory *subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade. It is only where national rules, which apply without discrimination to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to the protection of public health, the fairness of commercial transactions and the defence of the consumer that they may constitute an exception to the requirements arising under Article 30*.' – see in particular paras 5–6 (emphasis added).
[524] See for ex. Case C-75/81, *Blesgen* [1982] ECR 1211; Case C-23/89, *Quietlynn* [1990] ECR I-3059.

generality of the *Dassonville* and *Cassis de Dijon* formulas was in fact generating anomalous situations where the compliance with the EU rules of various national laws, otherwise hard to qualify as obstructing free trade, was heavily contested and Member States' liberty to enact any regulation was considerably limited. In these latter cases, the Court decided, given the case-specific circumstances, narrow down the category of restrictions which, based on the *Dassonville* and *Cassis de Dijon* tests, were falling within the scope of Article 34 TFEU[525].

Thus, by introducing the concept of 'indirect discrimination', the Court expanded, pretty riskily, the traditional scope of Article 34 TFEU. It however conceded, even if occasionally, that at least certain 'legitimate part(s) of economic and social policy' are, or may be found 'consistent with the objectives of public interest pursued by the Treaty' and, thus, validated as acceptable restrictions to the intra-Community trade, even if they do not fall within the scope of Articles 36, 45 or 52, *etc*, TFEU. These are the so-called 'mandatory requirements' exceptions (although, according to some, they appear not to be genuine 'justified restrictions' ─ as are, for example, those contemplated by Articles 36, 45 or 52 TFE ─ but rather some 'additional defences'[526]). They are supposed to confer legitimacy upon those national rules which are not *directly* discriminatory (*ie*, are not implemented with the direct purpose to ban or at least hinder imports) but which, indirectly, may have an adverse effect thereon. And, unlike Articles 36 or 45 *etc*, they do not form a closed list.[527] Finally, as clarified by the Court in *Houtwipper*[528], 'in the absence of harmonization of legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marked, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. *This is so even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods*.' (emphasis added).

Notably, following the decisions rendered by the Court in *Cassis de Dijon* and *Gilli and Andres*, the Commission came with a Communication[529] where it tried to

[525] A good case in point are Joined cases C-60/84 and 61/84, *Cinéthèque* [1985] ECR 2605 and C-145/88, *Torfaen Borough Council v B&Q plc* [1989] ECR 3851 (a.k.a. the famous *Sunday Trading* case law).
[526] See P Davies, '*Market Integration and Social Policy in the Court of Justice*', (1995) 24 Industrial Law Journal 1, 54.
[527] Ibidem.
[528] C-293/93 *Houtwipper*, [1994] ECR 4249, para 11.
[529] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (' Cassis de Dijon ') [1980] OJ C256/2.

summarise the findings of the Court and to foresee, in that light, a possible evolution of the application of the free movement rules. It hence 'put into the same category 'protection of consumers or the environment and the fairness of commercial transactions', none of which figured in the Treaty as permissible limits on free movement, and 'public health', which did. Moreover, the addition of 'etc' was *a tacit indication that other concerns might justify exceptions to the four freedoms*.'[530]

The Communication nonetheless failed to fill in the gap resulting from the failure of the European legislature to come up with a coherent set of secondary norms by the end of the transitional period prescribed in the original Treaties (and, before them, in Article XX of the GATT) which to complete the general provisions of the Treaties.[531] In reality, the only law adopted in that context was Directive 70/50[532] which tried, indeed, to define the unclear scope of the 'measures of equivalent effect' referred to by Article 30 of the Treaty[533] but which covered, limitedly, the trade of tangible goods while leaving outside services and persons, and which soon felt under the burden of the relevant case law (in particular, C-8/74, *Dassonville* or C-15/79, *Groenveld*[534] where the Court inexplicably acknowledged, for exports, a stricter regime – as compared with imports).[535] The Court struggled in fact to fill these gaps through a very sinuous case law[536] through which it basically proclaimed, in the lack of any helpful secondary norms, the direct effect of the fundamental rules of the 'Common Market' as contained in the Treaties.[537]

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[530] D Edwards, 'The exceptions to the four freedoms: the historical context' - in P Koutrakos, N Nic Shuibhne and P Syrpis (eds) , '*Exceptions from EU free movement law; derogation, justification and proportionality'*, Hart Publishing, 2016, 7. The author also remarks that 'Since that time, the Treaty-makers have added greatly to the list of 'policies', 'objectives' and 'aims' that must be taken into account.' (p 8).

[531] See Chapter II above.

[532] Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty, OJ L 13, 19.1.1970, p. 29–31.

[533] For the regulation of which (via directives) Article 57 TEEC provided a strict schedule. These directives should have covered 'problems specific to establishment and services generally, such as mutual recognition of qualifications' *etc* but, since this did not happen, the Court saw it fit to intervene promptly in order for the integration process not to be destabilized (D Edwards, 'The exceptions to the four freedoms: the historical context*'* in P Koutrakos, N Nic Shuibhne and P Syrpis (eds), '*Exceptions from EU free movement law; derogation, justification and proportionality'*, Hart Publishing, 2016, 6). Significant in this regard are the judgements pronounced in *Thieffry* (esp para 12), *Cassis de Dijon* (esp. para 8) or *Gilli and Andres* (esp. paras 5 and 6) or *Torfaen*.

[534] Case C-15/79 *P.V. Groenveld BV v Produktschaap voor Vee en Vlees*, [1979] ECR 03409.

[535] D Edwards, 'The exceptions to the four freedoms: the historical context' in P Koutrakos, N Nic Shuibhne and P Syrpis (eds), '*Exceptions from EU free movement law; derogation, justification and proportionality'*, Hart Publishing, 2016, 6.

[536] See for ex. C-48/65, *Alfons Lütticke v Hauptzollamt Saarlouis*, [1966] ECR 00027, C-13/68, *Sagoil*, Case C-2/74 *Reyners v Belgium* [1974] ECR 00631 or C-33/74, *Van Binsbergen*.

[537] 'That did not mean, however, that all national restrictions on free movement — other than those expressly provided for in Articles 36, 48, 56 and 66 — were thereby rendered unenforceable.' - D Edwards, 'The exceptions to the four freedoms: the historical context' in P Koutrakos, N Nic Shuibhne and P Syrpis (eds),

The test of mandatory requirements, as elaborated by the Court throughout its case law (starting with *Cassis de Dijon* and, not too late thereafter, *Torfaen*), entails a double assessment: one, on the substance of the subject matter of the case, and another, teleological. First, based on the 'mandatory requirements' test, the Court must plumb the *legitimacy* of the objectives pursued (in rapport with the Community law). Second (and only if the first test finds the objective to be legitimate), it must test the *necessity* of that measure, *ie*, whether it responds to a *concrete need*, is *proportionate* in relation with that need and there is *no other means* by which the objectives set forth in the under scrutiny to be attained. This was made pretty clear in *Webb* (and, after that, even clearer, in *Commission v Germany*)[538].

It is also important to reiterate that, as opposed to the derogations listed in Articles 36, 45 and 52 TFEU, the possibility to invoke mandatory requirements is practically unlimited (as it only depends on the concrete circumstances of that State). *Cassis de Dijon* refers for example to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions or consumer protection.[539] Other cases involved the improvement of working conditions and the protection of the working environment (see for ex. C-155/80, *Oebel*[540]) or the fight against long term unemployment (*eg*, *Beentjes* or *Nord-*

'*Exceptions from EU free movement law; derogation, justification and proportionality*', Hart Publishing, 2016, 6. To the contrary, the Court saw it necessary to secure certain outputs through which the tensions created by a very strict application of the common market rules to be let out. This however came with a condition on proportionality.

[538] According to para.17 from C-279/80 *Webb*: first, national social policies, no matter how dear to the national legislature, must always be subject to evaluation under Community law where they appear to infringe free movement as a 'fundamental principle'; second, a restriction to cross-border trade (or services) may be justified only inasmuch as it refers to both domestic and foreign enterprises [*ie*, as long as it does not discriminate – direct discrimination, that is]; third, that restriction must serve the 'general good'; and, fourth, the means chosen must not be disproportionate to that legitimate end [in the sense that they cannot do more than is needed for the attainment of that objective] in particular by not subjecting the foreign provider to a dual burden ruling. The fourth condition seems to have been added by the Court in Case C-205/84, *Commission v Germany* [1986] ECR 3755 – see para 27. The Webb formula was successfully applied in the 'tourist guide' line of cases, *ie*, C-154/89, *Commission v France* [1991] ECR 1-659; C-180/89, *Commission v Italy* [1991] ECR 1-709; C-198/89, *Commission v Greece* [1989] ECR 1-727 and C-375/92, *Commission v Spain* [1994] ECR 1-923, where the Court found that the requirement asking all tourist guides interested in providing guiding services on the territory of a Member State to hold a national qualification which was impossible to obtain in other Member State was evidently discriminatory and obstructive for cross-border provision of services (the similarities of these cases with the provisions of the Romanian Law No.98/2016 which, in its Article 56 – to do with reserved contracts – asks social enterprises to be authorised according to the Romanian law are evident). But the importance of the Webb formula became explicitly clear later on, in *Rush Portuguesa*, C-l13/89 [1990] - ECR 1-1417 (and, similarly, in *Vander Elst* – Case C-43/93 *Vander Elst* [1994] ECR I-3803 – see para 23) and even further, in *Viking* and *Laval*. In *Rush Portuguesa,* the Court found that the domestic law was in effect hindering cross-border provision of services even if it applied equally to national and foreign providers (*ie*., it was not discriminatory *on the face of it*), as it had a clear adverse impact upon the latter.

[539] S Barón Escámez, '*Restrictions to the free movement of goods The protection of the environment as a mandatory requirement in the ECJ case law'*, University of Lund, 2006, 36.

[540] C-155/80, *Oebel* [1981] ECR 1993.

Pas de Calais) or the reduction of costs in the public health (as in *Decker*[541]) *etc*.[542] In its case law, the Court decided that '*it is for the Member States, in the absence of harmonization, to decide what degree of protection (…) they intend to assure, having regard however for the requirements of the free movement of goods within the Community.*'[543]

In conclusion, the fundamental rules of the internal market could be breached where the 'general good' (*ie*, an overriding public interest) so demands, but such exceptional measures must be subject to a proportionality test[544] which '*requires that the power of the Member States to prohibit imports of the products in question from other Member States should be restricted to what is necessary to attain the legitimate aim [at issue]. Accordingly, national rules providing for such a prohibition are justified only if (…) they are compatible with the need to protect [that aim]*.'[545] Interestingly, according to the cited case law, the proportionality test (especially its *necessity* arm) is to be applied both to the derogations listed under Articles 36 or 52 TFEU and to mandatory requirements. But, with regard to the justifications based on 'overriding requirements', the Court added - in several key decisions (see for ex. *ERT*[546] *Nijman* or *Familiapress etc*) – that they must necessarily be interpreted '*in the light of the general principles of law and in particular of fundamental rights*'[547] which were thus offered the 'role to moderate the use of mandatory requirements by national measures that restrict a Community fundamental principle.'[548]

In *Keck*[549] on the other hand, the Court went even further and, while referring to the standard *Dassonville*[550] formula, proposed (as already explained above) an *additional* test aimed at delineating selling arrangements from the traditional product requirements (such as those itemized in *Cassis de Dijon*). So, while trying to explain the 'objectives and reach of

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[541] C-120/95, *N Decker v. Caisse de Maladie des Employés Privés* [1998] ECR I-1831.
[542] Other cases to do with mandatory requirements are joint cases C-60 & 61/84, *Cinéthèque*, ABDUH, C-302/86, Commission v. Denmark, C-382/87, *Buet* (C-382/87, *Buet v. Ministère Public*, [1989] ECR 1235), or C-368/95, *Familiapress, etc* (where the Court retained that '*an overriding requirement for the purposes of art. 30 (Art 34 TFEU)* (…) *helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order*' - para. 18, emphasis added).
[543] C-174/82, *Sandoz*, [1983] ECR 2445, para 16 (emphasis added).
[544] See for ex. case C-261/81, *Rau v De Smedt* [1982] ECR 3961 (in particular, para 12).
[545] Ibidem, para 18 (emphasis added). The same conclusions were re-stated in *Nijman* (C-125/88, *Nijman* [1989] ECR 3533) or *Eurim Pharm* (C-347/89, *Freistaat Bayern v. Eurim-Pharm GmbH*, [1991] ECR I- 1747). The *Danish bottles* case (C-302/86, *Commission v. Denmark* [1988] ECR 4607) had already established similar principles (see paras 6, 11, 12).
[546] Case C-260/89 *ERT* [1991] ECR I-2925.
[547] *ERT*, para 43; *Familiapress*, para 24. Emphasis added.
[548] Barón Escámez (n 244), 40.
[549] Joined cases C-267/91 and C-268/91, *Keck and Mithouard*, para.16 et seq.
[550] C-8/74, *Dassonville* [1974] ECR 837.

the principle of free movement'[551], the Court practically clarified in *Keck* that, if a measure may be justified by a '*public interest objective taking precedence over the free movement of goods*'[552] (emphasis added), it is not a restriction to the free movement of goods, and nor are also those rules which introduce some restrictions to 'certain selling arrangements' but are applied with equal force to both domestic and foreign traders. In a nutshell, according to *Keck*, in the selling arrangements area, restrictions without discrimination are no longer restrictions. The consequence is that, when the *Keck* formula is applied, the mandatory requirements test developed in *Cassis de Dijon* cannot be adduced to justify *discriminatory* measures or practices that restrict or prohibit selling arrangements. Such measures may eventually be cured only by one of the explicit exceptions enumerated in Article 52 TFEU.[553]

The distinction brought about by *Keck* (between 'product rules' and 'selling arrangements'), even if introduced out of desperation rather than in consideration of a concrete theory – since 'businesses were beginning to use Article 30 [TEC] to challenge more and more elements of the regulatory structure in which they had to operate, even where the national legislation was not aimed at imports'[554] and the Court found itself flooded with a huge amount of cases, was actually used very interestingly in its further case law. It was quite successfully applied in some cases.[555] It was nevertheless ignored in other cases, due to the specific particularities with which the Court was confronted, which made the classification of the restrictions at hand (as either 'product rules' or the 'selling arrangements') impossible.[556]

What is interesting about *Keck*, in the context of this thesis, at least, is that the national rules under evaluation there did not have a *social* foundation *per se*, but they in fact were propped by reasons to do with consumer protection, which has an evident social tinge.

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[551] T Bekkedal, 'The reach of free movement. A defence of court discretion', in M. Andenas et al (eds), '*The Reach of Free Movement'*, T.M.C. Asser Press, 2017, 33.
[552] *Keck*, para.15.
[553] T Bekkedal, 'The reach of free movement. A defence of court discretion', in M. Andenas et al (eds), '*The Reach of Free Movement*', T.M.C. Asser Press, 2017, 36. Along the same line of arguments, see *Gebhart* (n), *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para 36; Case C-546/07 *Commission v. Germany* [2010] ECR I-439, paras 39–53; Joined Cases C-344/13 and C-367/13 *Blanco & Fabretti* ECLI:EU:C:2014:2311, para 37; Case C-375/14 *Laezza* EU:C:2016:60, para 25.
[554] P Davies, '*Market Integration and Social Policy in the Court of Justice*', in (1995) Industrial Law Journal, Vol.24 No.1, 55.
[555] Take for example the *Dinamic Medien* case – Case C-244/06, *Dynamic Medien* [2008] ECR I-505 – where the Court considered the national rule at stake to be a 'product rule' hence prohibited by Article 34 without possibility to justify, or *Familiapress* – Case C-368/95, *Familiapress* [1997] I-3689 – where it construed the national law under scrutiny to be also a 'product rule' although it was not directly discriminatory.
[556] See for ex. C-391/92 *Commission v Greece* [1995] ECR I-1621, C-416/00, *Morellato* [2003] ECR I-9343, Joined cases C-158/04 and 159/04 *Alfa Vita* [2006] ECR I-8135. In *De Agostini* (Joined cases C-34, 35 & 36/95 *De Agostini* [1997] ECR I-3843) on the other hand, the Court decided that a ban on TV advertising of magazines for children was indeed a 'selling arrangement' which, in that case, may have discriminate against imports, but refused to give a straight answer and dismissed the case by letting the domestic courts decide.

In reality, the *Keck* decision contributed to the development of the EU law in several respects. First, it restructured the previous conflicting case law dealing with national rules 'concerning socially and culturally determined market circumstances' by ascertaining that inconsistent judgments referred to the Court by various national courts could hardly contribute to the building up of a coherent body of law. Second, it organized and simplified the evaluation of the claims brought before it under Article 30 EC and clarified the elements which are needed for the identification of those cases which are genuinely capable of hindering intra-Community trade. 'Third, and most important, the Court's ruling in Keck preserves and advances the Court's central function as guarantor of a vital Community legal order by providing for a more coherent development of the law, which in turn enhances the international solidarity of the Union.'[557]

The *Keck* legacy marks an era in which the Court endeavoured to leave behind its initial approach (built on the *Dassonville* and, later, on the *Cassis* line of cases which rely on the balancing of conflicting interests and values and the application of a proportionality test), and focus on other, more 'workable' principles for the interpretation of Article 34 TFEU (which to offer sufficient leeway for Member States to regulate their national markets and pursue other public policy objectives).[558]

Nonetheless, soon after *Keck,* the Court returned[559] to an overbroad definition of the 'measures equivalent to a quantitative restriction' (the 'MEQR'), proposing instead an even more complex *market access* rule. Furthermore, in its relatively recent case law, the Court re-introduced the distinction between measures aimed in principal at treating less favourably products from other Member States and those that do this by their *effect*[560] — which seems to be based on the 'factual presumption' that certain types of measures treat less favourably foreign products by their *nature*, while others may arrive to the same result by their *effect*.[561]

In *Auer*[562] and, later, in *Commission v Luxembourg*[563], the Court made it plain that any national measure 'involves, [inevitably,] additional administrative and financial

[557] R Chriss, '*Keck Considered: A New Doctrinal Model for the Free Movement of Goods in the European Union*', in (1995) 7 Pace International Law Review 1, 150.
[558] I Lianos, '*In memoriam Keck: the reformation of the EU law on the free movement of goods'*, (2014) 5 Centre for Law, Economics and Society – Research Paper Series, 5.
[559] It appears that the *Keck* test was applied in a relatively small number of ensuing cases and, after 2010, it almost disappeared. For details on this, see Lianos (n 558), 9.
[560] See for ex. C-110/05, *Commission v. Italy (Trailers)*, [2009] ECR I-519, para 37.
[561] Lianos (n 558), 9.
[562] Case C-136/78, *Vincent Auer*, ECR 1979 00437, para 21.
[563] Case C-319/06, *Commission v. Luxembourg*, EU: C:2008:350.

burden for undertakings established in another Member State, so that the latter are not on an equal footing'[564] and insisted on the need to avoid such 'dual burdens'. The Court based its conclusion on the truism that any foreign trader is interested in relying as much as possible on the law of his own home State rather than being treated according to the law of the Member State where he moves to provide his trade, even if that would not put him in a less favourable position as compared with the domestic traders (since such foreign law is, for him, unknown and, on many occasions, difficult, if not impossible, or at least very costly, to understand and observe). So, from a foreign trader's point of view at least, discrimination is regularly associated with a variation in the national regulations across the EU in the sense that such a variation is usually presumed to create, in itself and by itself, 'obstacles to movement'.[565] This approach brought additional clarity on the *Dassonville* solution. However, it appears that the freedom of establishment is not completely secured by the mere uniform application of the national laws of the host state, as such application may retain other traps, not necessarily associated with the foreign citizenship or the nationality of the entity that establishes in another Member State but, in particular, resulting from the disparity of the conditions laid down by the different national laws for the acquisition of an appropriate professional qualification *etc* – see in this regard Article 53 TFEU v. *Auer*, para 21.

The *Gebhard* decision made it also clear that, as detailed above, the notion of 'restriction' reaches much farther than the term 'discrimination', although it includes the latter. This might respond to AG Tesauro's 'famous question'[566] raised in *Hünermund*[567], where he asked, rhetorically, whether the right to free movement should be construed as protecting national interests or, to the contrary, as promoting the liberalization of the intra-Community trade.[568]

This is probably why the Court was rather reluctant in applying the *Keck* formula also in the cases to do with restrictions to the freedom to provide services. In the *Friedrich Kremzow*[569] or *Alpine Investment* cases[570], it relied with much more vigour on the 'market access' line of reasoning (as first used by the Court in *Sager* and touted by AG

[564] *Commission v Luxembourg*, para 85.
[565] T Bekkedal, 'The reach of free movement. A defence of court discretion', in M. Andenas et al (eds), '*The Reach of Free Movement'*, T.M.C. Asser Press, 2017, 35.
[566] Ibidem, 51.
[567] Opinion of AG Tesauro in case C-292/92, *Hünermund*, para 1.
[568] M P Maduro '*We, the Court'*, Hart, Oxford, 1998.
[569] Case C-299/95, *Friedrich Kremzow v. Republik Österreich*, [1997] ECR I-02629, para 16, where the Court ruled that while any deprivation of liberty may impinge on a person's freedom to exercise his or her right to free movement, a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of free movement provisions.
[570] Case C-384/93, *Alpine Investments*, paras 36-38.

Jacobs in *Leclerc-Siplec*[571] but also, more recently, by AG Kokott in *Mickelsson and Roos*[572] and reaffirmed by the Court, although with a twist in the freedom of movement of goods case law [573] – *eg*, more recently, in *Trailers*[574], where it denied the extension of *Keck*[575] to 'user arrangements').[576] In fact, the much-cited argument adduced by AG Jacobs in *Leclerc-Siplec*[577] was soon embraced by the Court in *Bosman*[578] as well as in other famous cases.[579] The 'market access' test was well received by the academic circles[580], and cases like *Familiarpresse*[581], *De Agostini*[582], *Gourmet*[583] or *Alfa Vita*[584] or, more recently, *Scotch Whisky*[585] (where the Court confirmed its preference for the market access test) made large rounds in the dedicated literature. Nevertheless, decisions like *Trailers*[586] or *Mickelsson and Roos*[587] (which were soon followed by others in the same vein[588], where the Court went beyond the usual margins of the 'market access' test and included also restrictions in the *use*

[571] Opinion of Jacobs AG in Case C-412/93, *Leclerc-Siplec*, where he argued that 'The question (…) is what test should be applied in order to determine whether a measure falls within the scope of Article 30. *There is one guiding principle which seems to provide an appropriate test: that principle is that all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market*.' – emphasis added (para 41). According to Snell, the recent development of the CJEU case law contains strong indications that is has eventually fallen in with this approach (see J Snell, '*The notion of market access: A concept or a slogan?*' (2010) Common Market Law Review 47, 455)

[572] Opinion of AG Kokott in case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273.

[573] T Bekkedal, 'The reach of free movement. A defence of court discretion', in M. Andenas et al (eds), '*The Reach of Free Movement'*, T.M.C. Asser Press, 2017, 44 et seq.

[574] Case C-110/05 *Commission v Italy* [2009] ECR I-519.

[575] It appears that, in *Trailers*, the Court reverted to a broad market access formula, with a significantly 'lighter touch' on both the evaluation of justification adduced by the Member State at hand (Italy) and proportionality than that adopted in *Keck*, where it had restrained as much as possible the Dassonville test – see in this regard C Barnard, '*Trailing a new approach to free movement of goods?*' in (2009) 68 The Cambridge Law Journal 2, 290.

[576] However, fine traces of *Keck* (where the Court had anticipated the 'market access' test – see for example para.15 of the *Keck* decision) may be noticed in *Alpine Investment*, but also in Case 51/96 *Deliege* or Case C-544/03 *Mobistar* – Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723.

[577] According to which, if "*an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade*" (emphasis added) – see Opinion of Jacobs AG in Case C-412/93 Leclerc-Siplec, para 39.

[578] Case C-415/93 *Bosman*.

[579] See Case C-515/14 *Commission v. Cyprus* EU:C:2016:30, para 46, or Case C-370/05 *Festersen*, EU:C:2007:59, para 25.

[580] See for example, S Weatherill, '*After Keck: Some thoughts on how to clarify the clarification*', (1996) 33 Common Market Law Review 885; L Gormley, '*Reasoning Renounced? The Remarkable Judgement in Keck and Mithouard*' (1994) 5 European Business Law Review 3, 63, or C Barnard, '*Fitting the Remaining Piece into the goods and persons jigsaw*' (2001) 26 European Law Review 35, 52.

[581] Case C-368/95, *Familiapress*, [1997] ECR I-03689

[582] Joined Cases C-34/95, C-35/95 and C-36/95, *De Agostini*.

[583] Case C-405/98, *Gourmet.*

[584] Joined Cases C-158/04 and C-159/04, *Alfa Vita*, [2006].

[585] Case C-333/14, *The Scotch Whisky Association and Others*, [2015] n.y.p. - ECLI:EU:C:2015:845.

[586] Case C-110/05, *Commission v. Italy* (trailers), [2009].

[587] Case C-142/05, *Mickelsson and Roos*.

[588] See for ex. Case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*, [2009] ECR I-03717.

of products post-selling) have proved how problematic it is to move from the dichotomy 'product requirements' vs 'selling arrangements' to a 'market access' approach in a freedom of movement of goods case.[589]

It is, in fact, in the area of the freedom to provide services where the Court insisted more – up to the point where it became principle – that a *directly* discriminatory measure can only be justified under the derogations explicitly and limitedly enumerated in Articles 36, 45 or 52 TFEU whereas all cases of *indirect* discrimination (*ie,* inadvertently generated by measures applicable equally to domestic and foreign traders) may be justified on overriding public interest grounds. For the latter, the Court distilled the *Cassis de Dijon* solution up to the point where it obtained the so-called '*Gebhard* formula'[590] which it used on so many occasions, forcing the scope of the internal market rules in various directions. It thus concluded that such an overriding public interest could refer not only to the community, in general, but also to a specific category thereof (a minority), and it is not necessary that such interest have a community-oriented load, but may also refer (even if limitedly) to economic (that is, commercial) aspects. But a public interest evidenced as overriding could, according to the CJEU's cited case law, justify derogations from the internal market rules only provided that the measures taken to preserve it are as well proportionate.[591] The proportionality test, which reached its maturity in C-205/84, *Commission v Germany,* had in fact been anticipated even earlier, in *Campus Oil*[592], where the Court reiterated that "Article [36], as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which is intended to secure and the measures taken pursuant to that Article must not create obstacles which are *disproportionate to those objectives'* (emphasis added).

Otherwise, the Court decided that measures placed sufficiently far from the core of the internal market rules should escape any additional verification. The limits of Articles 34 TFEU were thus drawn by the so called rule of remoteness (according to which a

[589] I Antonaki, '*Keck in Capital? Redefining 'restrictions' in the 'Golden Shares' case law*', in (2016) 9 Erasmus Law Review 4.
[590] U Altinişik, '*The free movement of companies within the EU*', in (2012) Ankara Bar Review 1, 110.
[591] See for ex. the *SEVIC Systems AG* case (C-411/03 *SEVIC Systems AG* [2005] ECR I-10805) where the Court established that national rules could, theoretically, be justified on reasons to do with the protection of the interests of creditors, minority shareholders, employees, especially where this is essential for the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions – see Altinişik (n 302) 111. For a detailed discussion on the possibility to adduce economic justifications for measures not necessarily aimed at protecting national industries or companies against foreign competition, see S Arrowsmith, '*Rethinking the approach to economic justifications under the EU's free movement rules*', (2015) 68 Current Legal Problems 1, 318 *et seq*.
[592] Case C-72/83, *Campus Oil*, [1984] ECR 02727.

measure should not fall within the scope of Article 34 TFEU if its impact is "too remote and indirect") — see in this regard Case 69/88 *Krantz*[593], C-379/92 *Peralta*[594] or C-291/09 *Guarnieri*[595].

Inasmuch as *social-economic* justifications[596] are concerned, the Court clarified that measures aimed at protecting the industry from competition (regardless of whether they concern only specific firms, or a specific sector, or an industry in a specific region, or the whole national industry) are, especially when their purpose is overtly directed towards this aim, clearly restrictive and in general not justifiable.[597] In *Du Pont de Nemours Italiana*, the Court pointed out that protectionist measures cannot be justified even if they are used as *tools of regional policy*. In that case, the Court decided that preferences in public supply contracts favouring a national company do violate the free movement rules and cannot be found justified even if they are implemented in accordance with a regional policy developed under the state aid provisions of the Treaties (in particular Article 92(3)(a) TEEC – now Art.107(3)(a) and (c) TFEU) and in a context defined by the *fight against regional social and economic imbalances in a region with an abnormally low standard of living*. In this regard, the Court embraced the solution suggested by AG Lenz that a State "*may not rely on mandatory requirements to protect its domestic economy*".[598] Put otherwise, in this case the Court seems to have implied that such policies (based on a general interest accrued in relation to regional development)[599] can rather be pursued through authorised state aid schemes (for example "to promote the execution of an important project of common European interest") than through protectionist measures limiting imports.[600] Moving even further, one may reach the conclusion that, in general, national measures implemented under the EU's cohesion policy are less likely to be validated by the Court of Justice based on the mandatory requirements test. A possible explanation for this could reside in the predominantly *economic*

[593] Case C-69/88, *Krantz*, [1990] ECR I-00583.
[594] Case C-379/92, *Peralta*, [1994] ECR I-03453.
[595] Case C-291/09, *Guarnieri*, [2011] ECR I-02685.
[596] As clarified by the Court in the *Du Pont de Nemours Italiana* case – C-21/88, *Du Pont de Nemours Italiana SpA v Unità sanitaria locale Nº 2 di Carrara* [1990] ECR I-00889, Art.36 TFEU "is directed to eventualities of a non-economic kind which are not liable to prejudice the principles [of free movement]".
[597] S Arrowsmith, '*The purpose of the EU procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies'* (2012) 14 Cambridge Yearbook of European Legal Studies 1, 314.
[598] AG Lenz's Opinion in *Du Pont de Nemours Italiana*, para 45.
[599] This would hence include substantially all contracts awarded under a scheme developed under the EU's Cohesion policy, provided that that scheme entails a preference for local suppliers to the detriment of foreign ones. Cohesion cannot, therefore, justify reverse discrimination.
[600] S Arrowsmith, '*The purpose of the EU procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies'* (2012) 14 Cambridge Yearbook of European Legal Studies 1, 315.

nature of the cohesion policy, which places all the social aims on a secondary/ancillary position.

The Court also clarified throughout its case law that where a measure aimed at *promoting SMEs* has an evidently economic load (*eg*, as it seeks to create a protectionist environment for all domestic SMEs or just a category thereof), this economic purport precludes, as such, the recourse to the mandatory requirements justification. It did so for example in C–360/89, *Commission v Italy*[601], where it was confronted with measures that restricted competition in a public contract context, but also in C-400/08 *Commission v Spain*[602] or C-535/89 *Commission v the Netherlands*[603].

In all these situations, protectionism is, according to the Court, to be measured independently of the nationality of the party that is favoured (*ie*, domestic or foreign – such as in the case where the contract is awarded without transparency to a non-national to settle a contractual dispute[604]).

Anyway, inasmuch as a measure has a dual purpose, the Court seems to have applied, throughout its case law, a 'centre of gravity' test based on a both teleological and systemic interpretation of the act that implements it.[605] Transposed into the context of this paper, this means that where that measure has primarily a *social* goal, the social values protected by the Treaties or by the secondary legislation adopted for their application (*eg*, those subsumed to the European social model, such as the Posted Workers Directive *etc*.) must be given priority and vice-versa, where the main scope is *economic*, the internal market (and competition) rules must take precedence.

The Court used the mandatory requirements theory to conclude that qualification criteria (such as contractor's previous similar experience or financial resources) may, in general, create obstacles to trade, regardless of whether they are directly or otherwise indirectly discriminating. But not always.[606] It however maintained that justification should

[601] Case C-360/89 *Commission of the European Communities v Italian Republic* [1992] ECR I-03401.
[602] Case C-400/08 *European Commission v Kingdom of Spain* [2011] ECR I-01915, in particular paras 95-98.
[603] Case C-353/89 *Commission of the European Communities v Kingdom of the Netherlands* [1991] ECR I-04069.
[604] S Arrowsmith, '*The purpose of the EU procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies'* (2012) 14 Cambridge Yearbook of European Legal Studies 1, 316.
[605] L Krämer, '*European environmental law'*, Sweet & Maxwell, 2003, 72-76, cited in Barón Escámez, '*Restrictions to the free movement of goods. The protection of the environment as a mandatory requirement in the ECJ case law*', University of Lund, 2006, 27.
[606] See to this effect Case C-376/08 *Serrantoni Srl and Consorzio stabile edili Scrl v Comune di Milano* [2009] ECR I -12169.

be assessed against the *specific* public interest served by the contract at hand,[607] as such interest may concern a non-economic value (such as the protection of life and health) or may just have a mere budgetary background.[608] Anyway, as retained in the dedicated literature, a line must be drawn between circumstances to do with the *delivery* of a public contract (which usually fall within the scope of the internal market rules) and those to do with the subject matter of that contract (in short, with the decision on *what* to buy) – which usually exceed margins of the free movement rules and offer contracting authorities an as wide a latitude as possible.[609]

This is why many insist on the fact that the 'market access' postulated by the Court is not as much a test as it is an objective of the Union and that, by using it, the Court actually gives shape to the right to free movement, regardless of its object.[610] The main advantage offered by the 'market access' approach is that, as opposed to that involving an assessment of the presence/absence of 'discrimination', it facilitates a more holistic evaluation, much more close to the true purport of the Treaty. The judgements rendered in *Gourmet*[611] and *Caixa Bank France*[612] are relevant in this logic[613] (as they show that restrictions which, under the *Dassonville* and even the *Keck* formulas, would have been denied as veritable restrictions to trade, may be upheld as justified when subjected to the 'market access' test). It is worth noting, though, that, in the market access equation, the

[607] In C–234/03, *Contse v Insalud* [2005] ECR I–09315, the Court retained that the conditions under scrutiny were justified inasmuch as they were ordained to ensure protection of life and health.

[608] According to Arrowsmith, qualification conditions usually bear inherent budgetary implications (*eg*, since the failure to deliver may trigger various additional costs, including those pertaining to the organization of a new procedure or the setting up of other, alternative arrangements, for urgency reasons etc.) hence, at least in the particular case of public procurement contracts, qualification criteria may be justified by budgetary reasons as well – see p.342 *et seq*. In our opinion though, due to the concrete economic nature of such justifications, they cannot be adduced as mandatory requirements to justify that measure, but contracting authorities have, in general other instruments at hand – *eg*, the negotiated procedure without prior notice *etc* (S Arrowsmith, 'The purpose of the EU procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies' (2012) 14 Cambridge Yearbook of European Legal Studies 1).

[609] See for ex. S Arrowsmith and P Kunzlik, "EC Regulation of Public Procurement", in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions'*, Cambridge University Press, 2009, 59-72. See also P Trepte, "The contracting authority as purchaser and regulator: should the procurement rules regulate what we buy?", G S Ølykke, C R Hansen, C D Tvarnø (eds), '*EU public procurement - Modernisation, growth and innovation: discussions on the 2011 proposals for public procurement directives*', DJOF Publishing, 2012.

[610] S Enchelmaier, '*Four freedoms, Ever more principles?*' in (2016) 36 Oxford Journal of Legal Studies 1, 217.

[611] C-405/98 *Gourmet*, EU:C:2001:135, para 25.

[612] C-442/02 *CaixaBank France*, para 11.

[613] These are not the only relevant examples. Meritorious in this context are also Case C-473/98 *Toolex*, EU:C:2000:379, para 35; Case C-205/99 *Analir*, EU:C:2001:107, para 22; Case C-483/99 *Commission v. France*, EU:C:2002:327, para 41; Case C-372/04 *Watts*, EU:C:2006:325, paras 95–98; Case C-400/08 *Commission v. Spain*, EU:C:2011:172, paras 66–70; Case C-472/14, *Canadian Oil Company Sweden and Rantén*, EU:C:2016:171, para 44, *etc*.

assessment of the proportionality and the necessity of the measure under scrutiny is not waived or forwent.

The main advantage offered by the 'market access' approach is, thus, that it facilitates the evaluation of many national rules and measures (such as embargos, or significant restrictions on use, or the obstruction of trans-European roads etc.) which, although instituting some obvious obstacles to trade, do not involve any form of discrimination. Also, inasmuch as they are seen as non-discriminating selling arrangements, such measures would have been validated under the classic *Keck* test, but not under the 'market access' approach[614]. Anyway, as established in *Geddo*[615] and *Dassonville*, it does not matter whether the restriction is total or partial, but what matters is the *effect*, not the intent.[616]

The market access approach may be even more important in the case of social policies, the discriminatory character of which is usually merely incidental, indirect. The *Sunday Trading* line of cases is relevant in this regard. In these cases, the Court brought (against AG Van Gerven's opinion) the national regulations at stake (concerning the opening or trading hours of local businesses and hence the working hours of their employees, which were evidently a social measure destined to protect domestic employees) into the realm of what was then Article 30 TEEC. By doing so, it also decided that it was necessary to assess whether those regulations were justified or not and, if yes, if they were also proportionate. However, no clear criteria or guidelines were, on that occasion, made available for such an assessment, which made all the ensuing efforts of the Court all the more wearisome.[617]

But, since then, things evolved significantly, not only within the CJEU case-law level, but especially within the EU's primary law. The new provisions brought by the Treaty of Lisbon have re-balanced the economic v social values/policies dichotomy. In this context, some see it perfectly possible to implement measures which until very recently were treated as unacceptable ― such as that involving the integration of single parents into the labour market by for example encouraging the provision of childcare facilities, nurseries or *etc* ― even if they might, indirectly, create a discriminatory environment for foreign

[614] See for ex. Case C-34/79 *Henn and Darby*, EU:C:1979:295; Case C-275/92 *Schindler*, EU:C:1994:119; Case C-42/07 *Liga Portoguesa*; Case C-142/05 *Mickelsson and Roos*; Case C-110/05 *Commission v. Italy* ("*Trailers*"); Case C-112/00 *Schmidberger*; Case C-320/03 *Commission v. Austria*, etc.
[615] Case C-2/73, *Geddo*, [1973] ECR 00865.
[616] The Court reiterated this axiom with even more emphasis in *Trailers* (see above).
[617] As P Davies notes, '[w]ithin four years of embarking on this task the Court was in full retreat and insisting that no Article 30 point arose for consideration in such cases' (P Davies, '*Market integration and social policy in the Court of Justice*', (1995) 24 Industrial Law Journal 1, 53).

players.[618] The idea of integrating single parents is not new. The Buying Social Guide launched by the European Commission in 2011 (and which is on its way to be revamped and modernized to correspond to the latest trends developing at the EU level) had suggested (it still does, as the paragraph has not been so far watered down or removed) that such requirements are not possible in public procurement since, according to the EC, the condition that bidders (providers of services or works) demonstrate their commitment to such a policy by providing nurseries for their employees which are single parents is evidently discriminatory[619]. This conclusion has been vehemently contested by social organizations, which have seen it as a proof of opacity and an echo of a past where economic values took forthright precedence, in the internal market context, over the social ones.

We also can't help noticing, just like other authors[620], that the substantial changes brought by the latest amendments to the Treaties and, in principal, those to do with citizenship and the fundamental social rights brought a shift into the CJEU's approach towards the freedoms on which the internal market itself is built.[621] So, if the initial political arrangement required that all freedoms be interpreted as a '*mere standard of promotion of trade between Member States*'[622] and implemented in the limited scope of removing all the existing barriers to a purely *economic* integration, they are now construed in a more *personal*[623] sense. Thus, in *Alfa Vita*[624], the freedoms are seen as reflecting 'the cross-border dimension of the economic and social status conferred on European citizens'[625] while, in *Lilli Schröder*[626], the Court stressed that Article 119 EC (current Article 157 TFEU) is an integral part of '*the social objectives of the Community, which is not merely an economic union but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasised in the Preamble to the Treaty*'[627] just to conclude that the '*economic aim pursued by Article*

[618] Ibidem.
[619] Buying Social Guide, p.43
[620] See for ex. I Lianos, '*Shifting narratives in the European internal market: Efficient restrictions of trade and the nature of "economic" integration*' (2010) 21 European Business Law Review 5, 705–760.
[621] See, generally, C. Barnard, '*The Substantive Law of the EU: The Four Freedoms*' 4th ed., Oxford University Press 2013; P. Craig and G. De Búrca, '*EU Law: Text, Cases and Materials*', 5th ed., Oxford University Press 2011; or D. Chalmers, G. Davies and G. Monti, '*European Union Law*' 3rd ed., Cambridge University Press, 2014.
[622] Opinion of AG Maduro in Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulus*, para 40 (emphasis added).
[623] *Ie*, more close to the person and its identity or rights, rather than to the stark (impersonal) economic interests of the internal market.
[624] Joined Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulus*.
[625] See AG Maduro's Opinion in *Alfa Vita*.
[626] Case C-50/96, *Deutsche Telekom AG v Lilli Schröder*, EU:C2000:72.
[627] *Lilli Schröder* para 55.

119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right'[628] (emphasis added). This approach sits actually very close to the idea that 'the notion of a common market necessarily implies a uniform treatment of all regardless of nationality'.[629] It also responds better to the fine-tuning required by the 'market access test'.

Along this avenue of considerations, some argued that 'goods are not persons'[630] therefore the free movement of goods must remain an instrument in the fight against all barriers to economic integration, rather than be treated as a 'fundamental' or even 'personal' right. Notwithstanding these arguments, the Court tried to demonstrate that '[f]ree movement of goods concerns not only traders but also individuals'[631] (that is, buyers), whence its *personal* feature. And, as pinpointed in *Trailers* and the *Mickelsson and Roos,* restrictions on use have a "considerable influence on the behaviour of consumers".[632]

Another interesting innovation of the Court to justify certain restrictions to the fundamental freedoms is the test of '*demand limitation*'. This theory was seeded in *Höfner*[633] and concerned the application of the competition rules in the sense incipiently developed in the *Leclerc Siplec*[634] case. According to *Höfner,* a restriction is presumed to exist where the actors on a market, owing to some excessive regulation, are '*manifestly not in a position to satisfy demand*' (paras 25 and 31). By the use of this doctrine, the CJEU has basically extended the application of the fundamental rules of the internal market to services of general (*economic*) interest and, more recently, to *social* services (*eg*, in the health sector).[635] *Höfner* is important also in the procurement context since, according to the Court, the mere fact that employment procurement activities are outsourced and entrusted to *public* entities could not

[628] *Lilli Schröder* para 57.
[629] T Bekkedal, 'The reach of free movement. A defence of court discretion', in M. Andenas et al (eds), '*The Reach of Free Movement'*, T.M.C. Asser Press, 2017, 38.
[630] P Oliver and W-H Roth, '*The internal market and the four freedoms'* in (2004) 41 Common Market Law Review, 441. For the same conclusion, see F De Cecco (2014) '*Fundamental freedoms, fundamental rights, and the scope of free movement law*' in (2014) 15 German Law Journal, 384, 390.
[631] Case C-362/88 *GB-INNO*, EU:C:1990:102, para 8. See also Opinion of AG Trstenjak in case C-445/07, *Danske Slagterier*, EU:C:2008:464, para 83.
[632] *Mickelsson & Roos*, para 26; *Trailers* para 56.
[633] Case C-41/90 *Höfner*, EU:C:1991:161, esp. paras 25 and 31. For an interesting discussion on this theory, see J L Buendia Sierra '*Exclusive rights and state monopolies under EC Law*' Oxford University Press, Oxford, 1999, pp. 163 et seq.
[634] C-412/93, *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA*. (*Leclerc-Siplec*), [1995] ECR I-00179.
[635] See for ex. Case C-475/99 *Ambulanz Glöckner*, EU:C:2001:577; Case C-157/99 *Smits & Peerbooms*, para 103; Case C-385/99 *Müller-Fauré*, EU:C:2003:270, para 91; Case C-372/04 *Watts*, paras 73–74 *etc*.

affect the *economic* nature of such activity.[636] This conclusion was however re-shaped in *FENIN*[637], where the Court affirmed that '(…) an organisation which purchases goods - even in great quantity - not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC.' (para 37).

So, at least in its initial case law, the Court followed, as explained above, two main approaches: one, in which it limited itself to the mere determination of the scope of the EC rule subjected to interpretation (with the consequence that only national measures which it found *not* to fall into this scope were kept alive while all the other were bluntly deprived of any legal effect) and another, much more subtle, where it weighted the two policy objectives to decide which should take precedence. In this latter category, national policies found to be falling within the ambit of the Community law were not rejected *as such*. They were further measured and weighted, *ie*, undergone a justification and proportionality test.[638] As noted by Judge Everling, the latter process has become '*generally characteristic of the Court's case law*" as it "*strives to balance the fundamental requirement of securing the Common Market with the legitimate need of Member States to adopt rules in the public interest*".[639]

However, regardless of the chosen approach, the Court set, throughout its case law, several *limits* to this 'rule'. These limits concern, in general, the requirement for a strict interpretation of the context in which that derogation was applied[640]; the exclusion of purely

[636] According to the *Hoffner* decision, 'The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. *It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules*.' (paras 22, 23).
[637] T-319/99, *FENIN* [2003] ECR II-357, and C-205/03 P, *FENIN* [2006] ECR I-6295.
[638] J Everling - *'The Court of Justice as a decisionmaking authority*' (1984) 82 Michigan Law Review, 1294, 1305-8.
[639] Ibidem.
[640] This was for the first time included in the Court's assessment in the *Irish souvenirs* case (C-113/80, *Commission v. Ireland,* [1981] ECR 1625). See in particular para 115, according to which 'a derogation from the basic rule that all obstacles to the free movement of goods between Member States shall be eliminated (…) must be interpreted strictly'.

economic grounds[641] (which does not entail an exclusion in *all* cases, but only in those cases where the economic aim is prevalent and takes precedence)[642]; and the avoidance of any direct discrimination (be it *material* – manifest in all cases where different situations are treated similarly, or *formal* – specific to the cases where similar situations are treated differently)[643]. This last limitation was developed by the Court slowly, in a piecemeal fashion. However, it is now common ground that measures involving an overt discrimination (*ie*, the declared purpose of which is to protect domestic trade) fall outside the realm of the 'mandatory requirements' exception – due in principal to the general rule contained in Article 18 TFEU[644].

In conclusion, while Articles 36, 45, 52 or 62 TFEU may provide justification for both discriminatory and non-discriminatory measures, the mandatory requirements test can only be applied *in the absence of any form of direct discrimination*. Furthermore, it is submitted that these Articles might excuse both import and export restrictions, whereas mandatory requirements cannot be used to justify reverse discrimination (such as *export* restrictions).[645] In other words, while Articles 36, 45 and 52 (or 62) TFEU constitute veritable derogations to the general rules enshrined in Articles 18, 34 (or 35), 45, 49 or 56 TFEU, mandatory requirements are bound to stay within the general legal framework of the Union (which excludes any forms of *overt* discrimination in the intra-Community trade except where the Treaties themselves stipulate otherwise).

Consequently, only those measures taken in the context of public policies which have a clear Treaty foundation (or justification) — *ie*, falling within the realm of the 'public policy' referred to in Articles 36, 45 or 52 *etc*, TFEU, may really derogate from the

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[641] See for ex. C-72/83, *Campus Oil* [1984] ECR 2727, C-7/61, *Commission v. Italy* [1961] ECR 317, C-120/95, *N Decker v. Caisse de Maladie des Employés Privés* [1998] ECR I-1831 (in particular para 39), or C-254/98, *Wettbewerb* [2000] ECR I-151 (para 33) or, finally, C-203/96, *Dusseldorp* [1998] ECR I-4075 (in particular para 44) etc.

[642] For a detailed discussion, see above, in this Section. See also S Arrowsmith, '*Rethinking the approach to economic justifications under the EU's free movement rules*', (2015) 68 Current Legal Problems 1, J Snell, 'Economic aims as justification for restrictions on free movement', in A Schrauwen (ed), '*Rule of Reason: Rethinking Another Classic of EC Legal Doctrine*', Europa Law Publishing, 2005, M Józon, '*The enlarged EU and the mandatory requirements'*, (2005) 11 European Law Journal 5, 556 or H Temmink, '*From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection- a case law analysis'*, (2000) 1 Yearbook of European Environmental Law, 72.

[643] S Barón Escámez, '*Restrictions to the free movement of goods The protection of the environment as a mandatory requirement in the ECJ case law'*, University of Lund, 2006, 44.

[644] According to which '[w]ithin the scope of application of the Treaties, and *without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*'. Articles 36, 45 and 52 are such 'special provisions' therefore direct discrimination grounded on either of the derogations listed therein is accepted.

[645] S Barón Escámez, '*Restrictions to the free movement of goods. The protection of the environment as a mandatory requirement in the ECJ case law'*, University of Lund, 2006, 45.

internal market rules, just as pointed out by the Court in its case law.[646] All the other measures and policies, even if justified by some overriding imperatives, must necessarily remain away from any form of local protectionism and, in principle, from any economic scope (including when at stake is the economic redress of a region severely affected). It is hence clear why also the derogations allowed under Articles 36, 45 or 52 TFEU should entail a proper justification (and a suitable application of the proportionality test).[647] Article 36 TFEU (second sentence) cautions, to this end, against any form of 'arbitrary discrimination', censuring explicitly all 'disguised restriction[s] on trade'. This must, of course, be read to mean that no national policy may justify a protectionist measure without a strong reasoning (usually reflected at the EU law – or policy – level).[648]

The clear delineation (between the measures that fall within the scope of Articles 36, 45, 52, *etc*, TFEU and those justified by a mandatory requirement) has however started to become quire blur of late, especially owing to a very interesting CJEU case law that involved the need for striking a balance between two (or more) *fundamental* values of the Union. In this context, the Court began for example to see certain *social* values (especially those enshrined in the Charter, but also other, included or not as such in a European social model — as the right to a minimum standard of living or to minimum wages, or the right to social action in the context of the delivery of a public contract, *etc*) on a par with the

[646] See, again, C-35/76 *Simmenthal* (para 14), or Case C-41/74 *van Duyn* (para 18) *etc*.

[647] See to that effect the Opinion of AG Trstenjak of 14 April 2010 in Case C-271/08, *Commission v Germany*, [2010] ECR I-7091, para 192 — according to which 'a restriction on a fundamental freedom must be regarded as justified *if that restriction arose in the exercise of a Community fundamental right and was appropriate, necessary and reasonable* for the attainment of the interests protected by that fundamental right' (emphasis added).

[648] This is a rather thorny issue, but it might explain the essential difference between the derogations to the internal market law that *are* included in the Treaties and other restrictive measures which, without being explicitly permitted by the primary law of the Union, might still be allowed, *on a case-by-case basis*, depending on the concrete circumstances that impose them (the so-called 'mandatory requirements'). There are, on the other hand, example of policies which started as a matter of national interest/law but which, given the too big diversity of approaches at the Member States' level, forced the EU to intervene (taking advantage of the 'soft edges of the principle of conferral') in order to harmonize the field for the sake of a good functioning of the internal market. The law relating to disability might be a relevant example in this regard (as disability remains, in general, a matter of national interest yet, in the context of a more and more substantial initiative from the EU in the area of consumer protection, it inevitably ended up by acquiring an EU dimension too). This happened especially through the adoption of Directive 2001/85/EC (relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat, and amending Directives 70/156/EEC and 97/27/EC, OJ L 42, 13.2.2002, p.1–102) which was recently replaced by Regulation (EC) No 661/2009 of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor OJ L 200 of 31.7.2009, p.1–24. Strong reflections of the EU initiative in this area may be spotted also in the latest package of laws on public procurement (see for ex. Article 42 from Directive 2014/24). For the 'spillover' effect of the harmonization in this particular context, see S Weatherill, '*The internal market as a legal concept*', Collected Courses of the Academy of European Law, Oxford University Press, 2017, Kindle edition, 164 *et seq*.

economic values that lay at the foundation of the internal market, just to conclude that, in the context drawn by Article 9 TFEU, any derogation (from the fundamental *economic* principles of the internal market) grounded on such fundamental *social* values should be treated as a derogation permitted by the Treaty itself (in the sense indicated by Article 18 TFEU, *ie*, under the umbrella of a policy crafted in line with the 'special provisions' contained in Article 9 TFEU) rather than a particular national mandatory requirement. Thus, measures with a concrete *local* social impact (such as the inclusion of the local long-term unemployed, or the access to public contracts of local sheltered workshops *etc*.) have been placed into an uncertain legal context and validated as such, even if indirectly, in spite of the fact that they were not *explicitly* promoted under a public policy drafted in the 'traditional' meaning suggested by Article 36 (or 45, or 52) TFEU. Cases like *Beentjes* or *Nord-Pas-de-Calais* are particularly intriguing from this point of view, especially because the Court admitted there that the *national* social measures brought under its scrutiny were, in principle, *acceptable* as derogations from the internal market rules, even if the *European* law contained (at least at that time) no provision which to refer to long-term unemployed (so that to fall under the umbrella of Article 36, or 52 TFEU, for example) and, on the other hand, they were destined, limitedly, to protect *local* unemployed — hence *directly discriminatory*. Similarly intriguing are also the cases like where the Court chose to explicitly uphold *directly* discriminatory national laws on the basis of the mandatory requirements theory.[649]

Other cases, to do with the minimum wages payable to posted workers (such as *Rüffert* or *Regio Post*, *etc*), are even more complicated as they involved measures taken under a European norm / policy for which the Court offered an unexpectedly narrow reading, in an attempt to limit the damages which a too wide interpretation could inflict on the fundamental freedoms, *ergo* on the internal market itself. A plausible explanation for this might be found, more generally, in the scope (as identified by the Court) of the EU labour market regulation and social policy or, more concretely, in the diversity of choices recognized to Member States to choose within these boundaries.[650] Occasionally, though, the

[649] See for example the famous decisions rendered in the 'environmental policy' cases C-379/98, *PreussenElektra*, [2001] ECR I-2099 and C-2/90, *Commission v Belgium*, [1992] ECR I-4431 (the 'Walloon Waste' case).

[650] As rightly noticed by Stephen Weatherill, 'States choose different models according to local preference: some are willing to mandate high protective standards, others prefer less intervention. In so far as those choices lead to competition between jurisdictions, then firms as consumers of laws opt for the host jurisdiction that best suits their interest, and then that market will reveal which is the best solution. On this basis the EU should not disturb that diversity; on the contrary it should facilitate corporate mobility by allowing free movement unrestrained by reference to diverse patterns of market regulation. So, for example, a firm that chooses to re-locate to a low-cost jurisdiction should not for that reason face any impediment when it targets its economic

Court went rather astray and refused to trust the social factor (even when assumed at a transnational level), ignoring that, in general, 'EU law guards against excessive deregulation by, first, asserting that the reach of EU law has its limits and, secondly, (…) that there is always space to justify obstructive rules and, where justification is polycontextual, a soft standard of review (engaging a margin of appreciation) is applied'.[651]

2. The specific case of (social) public procurement

Socially responsible public procurement (or 'SRPP') is, in general, construed to be concerned with the ensuring of certain employment opportunities, with decent work condition, with compliance with labour regulations and collective agreements, with social inclusion and equality, with universal access, or with an ethical (fair) trade and so on. Furthermore, *employment* opportunities might refer to youth employment, or to a fair gender balance, or to the fighting of long-term unemployment, or to the inclusion of migrants, or of people with disabilities, or of other disadvantaged categories, *etc*. All these concepts and values are crucial. But, in a public procurement context, they might, to a certain extent, become restrictive of trade, in the sense that any national (local) rule that asks suppliers or providers to meet certain minimum standards in one of those areas in order to be accepted in a procurement procedure is, in essence, bound to make that contract unattractive for foreign bidders, who would see them as creating a 'dual burden'.

To this extent, in order for those national rules to be accepted as 'justified' exceptions from the fundamental principles of the EU law, they need to either fall into one of the categories explicitly referred to under Article 36 (or 45, or 52) TFEU, or have the characteristics of a mandatory requirement as defined throughout the relevant CJEU case law. A short perusal of the texts contained in Articles 36, 45 and 52 TFEU would nevertheless lead to the conclusion that they could at most justify matters of *EU* public policy or, specifically, measures aimed at the protection of health and life of humans, but not other protective/restrictive national measures, which remain to be grounded on *other* 'major needs'

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activities at other jurisdictions, even where it uses its own workers to undercut rates in the target state. To provide otherwise would suppress the competitive advantage of low-cost states able to attract 'consumers of regulation' to their territory. This policy preference resonates with the Court's interpretative choices about the grip exercised by free movement law over the imposition of host-state regulations (…).' – see S Weatherill, '*The Internal Market as a legal concept'*, Collected Courses of the Academy of European Law, Oxford University Press, 2017, Kindle Edition, 191-192.

[651] Ibidem, 129.

or matters of an overriding public interest ― which may eventually qualify as mandatory requirements.

On the gist of the term 'public policy', the Court had, as detailed above, the chance to decide in several cases, most of them to do with issues exceeding the field of public procurement.[652] There are however not too many the cases where the Court has been called to render a decision on, specifically, the possibility to pursue social considerations via public procurement and on the room that such values may occupy in a public procurement context. Moreover, when it was, the Court proved rather hesitant. In short, in most of these cases, the Court admitted the *fundamental* character of the values under scrutiny yet was rather reluctant in admitting the *supremacy* of the policies (all of them of a *national* origin) under which they had been crafted. This conclusion was maintained even where the national provisions at stake had been implemented as a reflection of a rule or measure adopted at the Union's level in the context of a more and more expansive and robust European social model. The rupture between the *Mangold* or the *Bouchereau* lines of cases and *Laval* or *Rüffert*, for example, is evident.

In *Viking*, *Laval*, *Rüffert*, *Bundesdruckerei GmbH*, *Max Havelaar*, or even in *Beentjes*, the Court acknowledged the fact that the mere placing of such goals in a public procurement context was in fact impinging dramatically on the basic internal market rules (which are at the core of the award of any public contract) to the extent where those rules remained ineffective and worthless. The Court was thus, in general, very reluctant in accepting, in the area of public procurement, measures based on concrete *social public policies*, even when subsumed under the general framework of the European social model. It however proved, occasionally, ready to receive justifications based on certain stringent *mandatory requirements*.

Consequently, decisions like those rendered in *Laval*, *Rüffert*, or *Luxembourg* (the concrete circumstances of which involved social aspects pertaining to one or more social policies developed at the EU level) have often been construed as 'threatening the sustainability of the European social model'[653] or at least as unveiling 'the fault lines that run

[652] See for example Case C-30/77 *Regina v Bouchereau,* or Case C-35/76 *Simmenthal* (para 14), or finally, C-41/74 *van Duyn* (para 18). For more on this, see D Thym, 'The constitutional dimension of public policy justifications' in P Koutrakos, N Nic Shuibhne and P Syrpis (eds) '*Exceptions from EU Free Movement Law; Derogation, Justification and Proportionality*', Hart Publishing, 2016.

[653] K Maslauskaite, '*Posted workers in the EU: State of play and regulatory evolution*', Policy Paper, Jacques Delors Institute, 2014, at http://www.institutdelors.eu/wp-content/uploads/2018/01/postedworkers-maslauskaite-ne-jdi-mar14.pdf?pdf=ok, 10.

between the single market and the social dimension at national level'[654], while many of the social economy actors blame the Court for having granted a genuine "license for social dumping".[655]

2.1 *The Beentjes case*

The case involved Gebroeders Beentjes BV and the Netherlands Ministry of Agriculture and Fisheries and was born in connection with a public invitation to tender, launched by the latter, for a public works contract consisting of a land consolidation operation.

In short, Gebroeders Beentjes BV claimed that the decision of the awarding authority to reject its tender, although it was the cheapest, based on its inability to employ long-term unemployed persons (a condition which the court found to refer to the 'quality' of the works to be done rather than of the bidders or of their bids), and to award the contract to the next-lowest bid, had been taken in breach of the provisions of the Directive 71/305/EEC then in force which, pretended Gebroeders Beentjes BV, did not leave any room for such non-economic elements. Or, put otherwise, that that Directive precluded the introduction, in a public procurement equation, of any elements which did not have an *economic* load.

In resolving the case, the Court first clarified that, in order to be accepted as valid, 'such a condition must comply with all the relevant provisions of Community law, in particular the prohibitions flowing from the principles laid down in the Treaty [*ie*, the TEEC, as just amended by the SEA] in regard to the right of establishment and the freedom to provide services'.[656] So, in the eyes of the Court, the primacy of the economic values (in the single market context) was (still) undisputable, as was the discriminatory potential of the obligation to employ long-term unemployed[657]! This stance was in fact in full accord with the decisions already rendered by the Court in the general area of the freedom of movement (see for example the equally famous *Dassonville* and *Cassis de Dijon* cases), so this conclusion was, at that time, only normal.

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[654] S F Deakin, "*Regulatory competition after Laval*", (2008) Cambridge Yearbook of European Legal Studies, 10.
[655] See the ETUC opinion, available at http://www.etuc.org/r/847.
[656] *Beentjes*, para.29.
[657] See *Beentjes*, paras. 29 and 30.

But the Court had in fact cracked the door open in *Oebel*[658] (where it had held that the restrictive nature of a ruling might be annihilated by the fact that it is *'a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty'*[659] – emphasis added) and concluded that the discriminatory effect of such a condition, *even if potential*, was not immediate, but it had first to be checked by the national court – who could found it justified. It hence ruled, in *Beentjes*, that 'the condition relating to the employment of long-term unemployed persons *is compatible with the directive if it has no direct or indirect discriminatory effect on tenderers from other Member States* of the Community.'[660] (emphasis added). The *Dassonville* and *Cassis de Dijon* veins are evident (as the Court searched, in *Beentjes*, for traces of discrimination rather than for signs of obstruction of the market access).

It is important to note that *Beentjes* was not the first case where the Court applied the 'rule of reason' to a public procurement context.[661] It is however in *Beentjes* where the Court admitted, for the first time, overtly, that social considerations may be pursued *through public procurement*. It also made it clear that '*[t]he obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality laid down in the second paragraph of Article 7 of the Treaty if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other Member States would have difficulty in complying with it. It is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory*.' (para 30) – emphasis added. This paragraph actually reflected the *Cassis de Dijon* approach as it resorted to a necessary evaluation of the discriminatory effect of the national decisions under scrutiny. The Court also added that, '*[e]ven if the criteria considered above are not in themselves incompatible with the directive* [on public

[658] Case C-155/80 *Oebel* [1981] ECR 1993.
[659] *Oebel*, para.12.
[660] *Beentjes*, para.37(iii).
[661] Apparently, Case C-24/85, *Spijkers v Gebroders Benedik Abbatoir CV* [1986] ECR 1123, and Case C-324/86, *Tellerup* [1998] ECR 739 were. They were soon followed by a long line of other cases where the Court expanded the scope of the 'Acquired Rights Directive' (*ie*, Directive 77/62 [1977] OJ C61/26, as subsequently amended) to the public procurement contractual relations. Relevant in this regard are, Case C-29/91, *Dr Sophie Redmond Stichting v Bartol* [1992] ECR 3189, Case C-209/91, *Rask v ISS Kantinservice* [1993] ECR 5735, Case C-382/92, *Commission v United Kingdom* [1994] ECR 2435, Case C-392/92, *Schmidt v Spar und Leihkasse der fruherer Amter Bordersholm, Kiel und Cronshagen* [1994] ECR 1320 or Case C-48/94, *Rygaard v Stro Molle Akustik* [1995] ECR 2745. These, together with Concordia Bus (which acknowledged the possibility to discourage competiton by the setting of certain restrictive environmental standards) are considered as 'two instances where the rule of reason as applied in public procurement brought the relevant regime in line with European policy' - C Bovis, '*The principles of public procurement regulation'*, in C Bovis (ed), 'Research Handbook on EU public procurement law', Edward Elgar, 2016, 57.

procurement then in force], *they must be applied in conformity with all the procedural rules laid down in the directive* (...)'. (para 31) – emphasis added, that is, with all those rules edicted specifically with the purpose of ensuring the necessary level of transparency and non-discrimination (a hint at the difference between the *procedural* and the *substantial* rules governing EU public procurement).

It is however surprising that the Court did not apply, in *Beentjes*, the *Cassis de Dijon* formula ─ as further refined in *Webb*[662] and *Seco*[663], leaving to the national court the task of determining the concrete existence (and nature) of discrimination, without going further into details. It thus shunned any reference to any eventual justifications based on the public policies applicable to that case or, alternatively, to other possible justifications (mandatory requirements) – which might have exempted the use of the social criterion under scrutiny (as it did for example in other cases), and instead preferred to remain in the comfortable area of the Treaty rules.

What the Court did in fact in *Beentjes* was to confirm that social considerations may be included in a public procurement equation, but only provided that such considerations are *not discriminatory* (*ergo*, restrictive)! It is not very clear why the Court refused to go further and seek justification in the relevant social public policies that were applicable in that case. It could have, for example, investigated or elaborated more on the possibility that the Netherlands Ministry of Agriculture and Fisheries apply a scheme crafted under a national public policy aimed at combating long-term unemployment (even if unemployment or, more to the point, long-term unemployment was not, at least not explicitly, on the agenda of the Single European Act, hence not specifically protected at the EU's primary law level). Or, it could have gone deeper into seeking for other, justified mandatory requirements (for example, the particularly severe economic conditions in that region which would have prevented the creation of new jobs *etc*, and which could have been tackled by strong measures to the contrary, including by using public procurement to boost employment). However, it didn't. And it is highly improbable that such an additional investigation would have prompted other responses (especially since, as already mentioned, the combating of long-term unemployment was not a policy developed at the EU level and, on the other hand, the Court was very reluctant in including measures built under a regional

[662] Case C-279/80 *Webb* [1981] ECR 3305.
[663] Joined Cases C-62/81 and 63/81 *Seco* [1982] ECR 223.

development policy into the select category of justified mandatory requirements[664]). But Pandora's Box had been opened…

2.2 *The Nord-Pas-de-Calais case*

The case involved the award, by the Nord-Pas-de-Calais Region of France, and the Northern Department (Département du Nord), of a public works contract for the construction of several schools. The relevant notices stated that the tenders would be assessed by taking account various award criteria, including the 'quality/price ratio of the technical response and the services', the 'time-limit for completion of the works of construction and renovation excluding maintenance, and the mode of action' and an 'additional criterion relating to employment' (in fact with the fight against long-term unemployment).[665]

The Court thus touched, in its decision, on what was to become the 'theory of additional award criteria', an aspect which was not echoed as such in the EU's hard law (neither in the 2004 set nor in the latest package of Directives of 2014), but which was, surprisingly (probably encouraged by the Buying Social Guide of the European Commission of 2011 which promoted such possibility in explicit terms), included in the national legislation of various Member States that transposed the 2014 Directives.[666]

So, after dismissing, surprisingly, the argument adduced by the Commission (which resumed to cite the considerations offered by the *Beentjes* decision) with regard to the fact that such a criterion might be used only as a condition for the performance of the contract, the Court concluded, practically reinterpreting its own line of reasoning laid down in *Beentjes*, that, owing to a *non-exhaustive* harmonization, the authorities are in fact free to set whatever *award* criteria they like, under the condition that, in doing so, they comply with the fundamental principles deriving from the Treaties and ensure an adequate publicity (again, a clear depart from the doctrine of admissible exceptions to the internal market rules).

The Court confirmed thus, for the first time, in explicit terms, that a social criterion such as that applied in the procedure that made the object of the *Nord-Pas-de-Calais* case may as well be used as an *award* criterion, provided that the said conditions are met.

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[664] See for ex. the conclusions offered in the *Du Pont de Nemours Italiana* case, cited above.
[665] *Nord-Pas-de-Calais*, para 18.
[666] See for example Article 187(10) from the Romanian Law No.98/2016 on public procurement. Unfortunately, this very elliptic provision has not been accompanied by much expected application norms, which renders it rather inapplicable.

Apart from this clarification, it shunned any other considerations on the circumstances that might dispel the presumption of discrimination which such a criterion is inevitably prompting. It did so mainly in consideration of the fact that the 'criterion related to employment' had been used not as a principal award criterion but as a merely 'additional' one, and not with the purpose to determine the best offer but just to help the authority select one of two or more offers that had been awarded the same score after applying the principal award criteria. Seen in this particular context, the 'discriminatory' effect of such a solution had been diluted to the point of becoming irrelevant, whence probably the silence of the Court.

But the greatest merit of *Beentjes* and *Nord-Pas-de-Calais* resides essentially in the fact that they confirmed for the first time, in unequivocal terms, that social policy considerations and, in particular, the combating of long-term unemployment, *may* be used as contract performance conditions or, alternatively, as award criteria, in a public procurement equation, especially when (in the latter case) the contracting authority is seeking for the most economically advantageous tender (as the only method that offers sufficient latitude for 'quality'-related criteria, beyond price). The Court based its conclusions, as already mentioned, on the non-exhaustive harmonization proposed by the Directives on public procurement then in force ─ which supposedly allowed, even in that 'incipient' form, enough discretion for contracting authorities to choose any 'quality' features they would have liked *as long as the basic rules of the internal market are not breached and the use of such criteria has no direct or otherwise indirect discriminatory effect*.[667] Unfortunately, this dichotomy (between rules and exceptions and between discriminatory and non-discriminatory effects) is, in fact, the only key to the door that opens to sustainability (in public procurement), and the Court failed, once again, to offer too many details which could have secured the access. As such, in *Beentjes*, the Court threw the case back to the national courts for further investigations (and the application of the Cassis test) whereas, in the *Nord-Pas-de-Calais* case, it tacitly assumed the validity of the described criterion not by applying the mandatory requirement test but mainly owing to the fact that that criterion was ancillary, additional.

On the other hand, the two cases clarified (*Beentjes* in particular), that such considerations cannot be used as *selection* criteria, since the latter are exhaustively described in the Directives and comprise a limited list of financial and technical requirements.

[667] C Bovis, 'The drivers and boundaries of discretion in the award of public contracts', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law'*, Hart Publishing, 2019, 66.

On another level, *Beentjes* and *Nord-Pas-de-Calais* kindled an interesting debate on the 'integral dimensions of contract compliance'[668] in the context opened by the selection of bidders based on social-policy considerations, delineating the differences between positive approaches (reflecting, in principle, the possibility to impose measures and policies on tenderers, beyond or beside the legal standards, as suitability criteria for their selection – a practice common in many Member States such as the UK or The Netherlands, which the Court preferred to set aside) and negative approaches (which the Court allegedly encouraged).[669]

2.3 *The Concordia Bus case*

In this case, the municipality of Helsinki had decided to award a number of supply contracts by which to re-new the entire bus transport network of the city of Helsinki. The new buses were supposed to meet certain technical and environmental standards, and the award procedure was built around the MEAT criterion, which included three types of sub-criteria: (a) the price; (b) the quality of the vehicles; and (c) the quality of the bidder (the latter seeking proofs that bidders had implemented certain quality management standards and also a system for the protection of the environment). As regards the second sub-criterion, it

[668] The term 'contract compliance' is defined as 'the range of secondary policies relevant to public procurement, which aim at combating discrimination on grounds of sex, race, religion or disability. When utilized in public contracts, contract compliance is a system whereby, unless the supply side (the industry) complies with certain conditions relating to social policy measures, contracting authorities can lawfully exclude tenderers from selection, qualification and award procedures' – C Bovis, 'The principles of public procurement regulation', in C Bovis (ed), '*Research Handbook on EU public procurement law'*, Edward Elgar, 2016, 53. At a more general level, contract compliance appears to have American origins, it being usually used by the US government as a policy instrument to generate significant improvements in terms of equality – see P E Morris, *'Legal regulation of contract compliance - an Anglo-American comparison*', (1990) 19 Anglo-American Legal Review 87. The use of public procurement as a policy instrument (hence a determinant of contract compliance) has been harshly criticized in the prime years of integration, and regarded with scepticism by the European legislature itself. However, following the landmark CJEU decisions in *Beentjes*, *Nord-Pas-de-Calais* or *Concordia Bus etc*, both the legislative and the practice approach have taken a U-turn. There is now no doubt about the valuable instrumentality of public procurement in the area of contract compliance with various legal and policy requirements (take, for example the case of set-asides which are explicitly regulated in the public procurement Directives although '*The protection of socially deprived groups through the use of set asides is not a mechanism designed to prevent discrimination; it is an overtly political and socially inclusive objective*'! – see A Sanchez-Graells, '*Public procurement and the EU competition rules'*, 2nd ed., Hart, 2015, vii, emphasis added). In spite of this, there still are some who manifest a degree of reluctance with regard to the possibility of using public procurement to pursue various *social* policy goals (see A Sanchez-Graells, '*Public procurement and the EU competition rules'*, 2nd ed., Hart, 2015, S L Schooner, '*Desiderata: objectives for a system of government contract law*' (2002) 11 Public Procurement Law Review, or H Handler, *'Strategic public procurement: an overview*', WWWforEurope Policy Paper No. 28, WWWforEurope, 2015).

[669] C Bovis, 'Introduction', in C Bovis (ed), '*Research Handbook on EU public procurement law*', Edward Elgar, 2016, 17-18.

basically required that the level of nitrogen oxide emissions be below 2 g/kWh and the noise level, below 77 dB.

Inasmuch as the sustainability requirements were concerned, the national court asked the CJEU if: (i) a contracting entity 'may, among the criteria for awarding the contract on the basis of the economically most advantageous tender, take into account, in addition to the tender price and the quality and environment programme of the transport operator and various other characteristics of the bus fleet, the low nitrogen oxide emissions and low noise level of the bus fleet'; and (ii) the fact that it is known beforehand that the department operating bus transport belonging to the city which is the contracting entity meets the sustainability criteria which only very a few undertakings in the sector are otherwise able to offer suffices to conclude that the establishment of such criteria collides with the fundamental rules of the internal market and in particular with the principle of non-discrimination and equal treatment.

The discussions before the Court focused, inter alia, on other sensitive aspects, such as: (a) if award criteria must always have an economic nature; and (b) if aspects exceeding the concrete circumstances of the contract, ordained to respond to certain external needs of the authority, *ie*, that stem from other, specific public policies, such as social policies, or those concerned with the protection of the environment, *etc*, may be set as award criteria in the relevant procurement procedure.

The Court settled the first of the two problems by carrying out an extensive, systemic and literal interpretation of the applicable legal provisions, reiterating that contracting authorities are in principle free to choose their award criteria and clarifying therewithal that such criteria must not necessarily have an economic substance. It pointed, to this end, to the 'aesthetic characteristics' to which Article 36(1)(a) of the Directive 92/50 referred in explicit terms, underlying that such characteristics were, similarly to other 'functional characteristics', not purely economic but could have, effectively (and validly, since they were cited by the very applicable law), 'influence the value of a tender from the point of view of the contracting authority'[670]. The Court insisted however that these criteria must, regardless of their nature or substance, have necessarily led to the most economically advantageous tender in rapport with the *concrete necessities exposed via the tender documentation* – whence a necessary link to the subject matter of the contract[671].

[670] *Concordia Bus*, para 55.
[671] See *Concordia Bus*, para 39.

The Court then moved to establish that, since the main objective of the Directives on public procurement was the coordination, at the Community level, of the relevant national legislations with purpose to 'eliminate barriers to the free movement of services and goods'[672], but also since Article 6 TEC (now Article 11 TFEU) obliged the Commission to integrate environmental protection requirements into the definition and implementation of all Community policies and activities, the Directives on public procurement must be interpreted as 'not exclud[ing] the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender'[673], provided however that several conditions are met. These conditions referred to: (i) the link of these criteria to the subject-matter of the contract (a principle postulated for the first time in explicit terms); (ii) the effect of *not* conferring on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer;[674] (iii) the need to be advertised correspondingly;[675] and (iv) the need to *comply with the 'with all the fundamental principles of Community law, [and] in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services*'[676] – emphasis added.

Finally, the Court, after reiterating that 'the duty to observe the principle of equal treatment lies at the very heart of the public procurement directives, which are intended in particular to promote the development of effective competition in the fields to which they apply and which lay down criteria for the award of contracts which are intended to ensure such competition'[677], came up with a smiting conclusion. In short, it resolved that a criterion such as that in the case before it may have been applied in a procurement procedure even if it was in practice satisfied by just a small number of undertakings, one of which being the in-house vehicle of the contracting authority itself! And it did so by insisting that *the mere fact that that criterion was satisfied by a small number of bidders was not 'in itself such as to constitute a breach of the principle of equal treatment'*.[678]

So, even if, in that particular case, there was only one, or at the most a very limited number of suppliers that met the *green* criterion set by the Finish municipality (and

[672] *Concordia Bus*, para 56.
[673] Ibidem, para 57.
[674] See para 61.
[675] See para 62.
[676] Para 63.
[677] Para 81.
[678] Para 85.

even if, of them all, the most reliable one was an in-house vehicle of the contracting authority itself!), which made that criterion restrictive as such, the Court considered that the level of restriction was acceptable! Unfortunately, it came to this conclusion rather abruptly, after hinting, in vague terms, to several circumstances which would hardly hold water in an attempt to crystalize it into a generally applicable test. Basically, after unearthing the very bones of the reasoning offered in *Concordia Bus*, we may conclude that: (i) the assumption of conformity with the internal market rules is supposedly valid only where the contracting authority uses also *other* criteria, *much less restrictive* (as a sort of a trade-off), under an integrated scoring system[679]; (ii) such a criterion must not be eliminatory, but only offer access to merely *additional* points; and (iii) the restrictive criterion must necessarily refer to certain specific and *objectively quantifiable requirements*[680] and must *apply without distinction to all tenders.*[681] It thus appears that the Court followed, in *Concordia Bus*, the same path as in *Beentjes* and *Nord-Pas-de-Calais* and, instead of resting its reasoning on the theory of admissible exceptions (as laid down, superbly, in *Webb*), it forced a wrenched argumentation in an attempt to conclude that even that that criterion had an evidently restrictive character, the scheme under which it was used made it compatible with the internal market rules due to some specific (yet unsatisfactorily detailed) conditionalities.

The difference between this line of cases and that which includes *Laval*, *Rüffert*, *Bundesdruckerei GmbH*, or especially the *Regio Post* case, is obtrusive. If, in the first case, the Court struggled to argue that the use of social criteria would be possible particularly owing to the discretionary latitude offered to contracting authorities by the Directives on public procurement under a non-exhaustive harmonization in the area of award criteria and contract performance conditions (but only provided that the internal market rules are observed), in the latter case, the same Court appears to have run withershins as, acknowledging that the use of those criteria *was* restrictive — in the internal market context, it resorted instead to the mandatory considerations test to find justification. It thus came to the conclusion that, even if restrictive, the use of such criteria may in fact be admissible (see for ex. *Regio Post*), or not (see for ex. *Laval* or *Rüffert*), depending on whether the values at stake correspond (or not) to certain *fundamental* social rights which are (or not) *superior* to the basic internal market rules.

[679] See, to this end, para 83.
[680] See para 66.
[681] Para 83.

In fact the same approach (as in *Beentjes* and *Concordia Bus etc*.) was used in other two cases, where the Court found, as opposed to the first cases cited above, that the internal market rules were in fact infringed, hence the scheme under which social criteria were used were not admissible. Yet neither in these two ensuing cases did the Court bothered to seek for justification. They are C-448/01, *Wienstrom* and C-368/10, *Max Havelaar*.

2.4 *The Wienstrom case*

This case concerned the award of a framework agreement for the supply of electricity for all the administrative offices located in the Austrian Land of Kärnten (Carinthia). The contract was supposed to be awarded to the bidder who would have submitted the most economically advantageous tender which, in turn, was to be assessed, *inter alia*, based on the impact, on the environment, of the services provided thereunder. This particular criterion comprised of two distinct sub-criteria: (i) the price per Kwh; and (ii) the source of electricity. In connection with the latter sub-criterion, the tender documents established that the electricity supplier had to undertake to supply the Federal offices with electricity produced from renewable energy sources.[682] The second sub-criterion had a significantly high degree of generality (it was not required that the supplier submit proof of his electricity sources; the documents contained no hints on the purpose for which additional quantities of electricity were required, or on the target consumers, or the additional supply period, so that the bidders to be able to make a necessity estimation).

The Court resolved rather quickly on the first question, reiterating its conclusions in *Concordia Bus* (in the sense that a criterion such as that requiring that the supplied electricity be produced from renewable energy sources may be used in the award of a public contract but only under the conditions enumerated thereunder, including that of complying with all the fundamental principles of Community law, and in particular with the principle of non-discrimination). It also clarified that any horizontal consideration, in order to be admissible, must be intrinsically connected with the subject matter of the contract, so that criteria which refer, in general, to the internal, corporate policies of suppliers or which compel them to contribute to various projects that have no connection with the subject-matter of the contract, cannot be accepted.

[682] *Wienstrom*, para 16.

The Court also adduced the arguments it had already used in *PreussenElektra*[683] to conclude that criteria such as that used in *Wienstrom*, which are meant to cater to various sustainable goals corresponding to specific objectives set under various policies, may indeed justify a higher score in the procurement equation even if they do not have a pure economic substance or respond to purely economic goals. In doing so, the Court explained that '*the use of renewable energy sources for producing electricity is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat*'[684] (emphasis added).

It also added that 'as is clear, in particular from Recital 18 and Articles 1 and 3 of Directive 2001/77, it is for precisely that reason that that directive aims, by utilising the strength of market forces, to promote an increase in the contribution of renewable energy sources to electricity production in the internal market for electricity, *an objective which, according to Recital 2 of the directive, is a high Community priority*.'[685] It is thence obvious that a measure aimed at responding to a public policy objective set at the Union's level or to 'a high Community priority' is not only justified (so that to be able to be used in the award of a public contract even if restrictive — *ie*, the public policy exception), but can also receive a substantial weighting in the award equation. The Court insisted, once more, on the idea that, inasmuch as such non-economic considerations are concerned, contracting authorities are, in general, free not only to choose their award criteria (a *qualified* discretion, as explained above) but to also set their weighting, as long as such weighting is, objectively speaking, effectively serving to the identifying of the most economically advantageous tender, taking into consideration the concrete objectives which such authorities would want to attain via public procurement (including those that stem from *external* public policies such as social or environmental *etc*).

Thus, according to the *Wienstrom* decision, policy goals set at the Union's level are presumed to justify as such the use of relevant horizontal considerations in public procurement, whereas national policies, are not (or, at least, not immediately). In this context, it is worth re-visiting the Court's decision in *Simmenthal*[686] where it had asserted that '*Article 36 [TEEC] is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods*

[683] Case C-379/98, *PreussenElektra* [2001] ECR I-2099.
[684] *PreussenElektra*, para 73; *Wienstrom*, para 40.
[685] *Wienstrom*, para 41.
[686] Case C-35/76 *Simmenthal* (para 14, second sub-paragraph).

to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that article.' (emphasis added). This might bring additional clarity on the difference between the measures prompted by various policies and actions developed under, for example, an European social model and other measures which, without having a correspondent at the EU's level, are part of a national strategy which a Member State decides to implement. The last ones will always have to pass a justification (and, of course, proportionality) test ─ whereas in the first case, the justification is checked *ex ante*.

Anyway, since *Wienstrom*, it has become common ground that sustainable criteria need, too, to be crafted in such a way so that to place all bidders on equal footing. This equality of treatment entails equal positions both when the bidders formulate their offers (*ie*, all suppliers must have equal access to all information, in the sense that they should all have equal chances to understand what it is requested from them) and when those offers are being assessed by the contracting authority (in the sense that all bidders must understand how, or on what grounds, or criteria, are their bids assessed)[687]. Or, put otherwise, pursuant to the *Wienstrom* decision, the principles of transparency and equal treatment require that contracting authorities formulate the relevant criteria in such a way so to create all the needed premises for an *identical* interpretation thereof by all offerors. That means full transparency throughout the entire process (so that the impartiality of the contracting authority may be measurable at *any* moment). In other words, all the evaluation criteria must be *objective* and *verifiable* following that, in case the contracting authority cannot, or refuses, to verify the effective fulfilment thereof, the principle of equal treatment is breached precisely due to the infringement of the transparency principle necessary for guaranteeing the impartiality of that procedure. Based on this argument, contracting authorities cannot ask for more than they need, since asking for more might put all those who can deliver the minimum requirement, but nothing more, in a clear disadvantage.

The Court has also concluded that the mere fact that a criterion fails, *in concreto*, to serve the envisaged scope (*ie*, the determining of the most economically advantageous tender), does not make it unlawful.[688] It thus considered that the effectiveness of a criterion in achieving its objectives was not relevant to determine its compatibility with

[687] See *Wienstrom*, para 47. This actually reiterates the conclusions developed earlier by the Court in *SIAC Construction* (Case C-19/00 *SIAC Construction* [2001] ECR I-7725, para 34).

[688] Some may see here a pointer to the fact that the Court disregarded the 'traditional' proportionality test. We simply consider that this is not, as such, a matter of proportionality but rather one of efficiency (effectiveness). It is not the fact that a criterion succeeds *in concreto* to serve the envisaged scope that makes it proportional, but the burden that it places on the potential suppliers (measured against that scope).

EU law which, in some authors' opinion, contrasts with the 'more pragmatic approach displayed in cases concerned with supply-side schemes which support renewable energy generation, notably *PreussenElektra*, °*Alands Vindkraft*[689] or *Essent Belgium*[690], where the Court considered that measures restricting free movement could be justified based upon the Treaty commitment to environmental protection and the specific need to increase renewable energy production.'[691]

On a general level, it is considered that, by its rulings in *Concordia Bus* and *Wienstrom*, the Court broadened considerably the scope for secondary policies in public procurement, not only with regard to environmental considerations but also for social and ethical standards. It is submitted that this development is only logical considering the general change in focus in EU law, from a purely economic free movement perspective, towards a much more social one.[692]

2.5 *The Laval case*

In this case[693], Laval, a company incorporated under Latvian law, whose registered office was in Riga, posted – between May and December 2004 – around 35 workers, to Sweden, to work on building sites operated by L&P Baltic Bygg AB, a company incorporated under Swedish law whose entire share capital was held by Laval. The secondment was done for the specific purpose to allow the Swedish company to deliver a public contract that had been awarded to it for the refurbishment and the extension of several school premises in the Stockholm suburb of Vaxholm. In short, the Swedish company was supposed to deliver the necessary works for the construction of several school premises, and it did so using workers posted by its mother company, the Latvian Laval. The apparent motive for doing so was the fact that the posted workforce implied significantly lower costs (since the level of salaries in Latvia was way below the Swedish one). The workers posted by Laval earned almost 40% less than their Swedish colleagues. On the other hand, even if Laval had entered into a collective agreement, in Latvia, with the building sector's trade union, the

[689] Case C-573/12 °*Alands Vindkraft AB v. Energimyndigheten*, ECLI:EU:C:2014:2037.
[690] Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, ECLI:EU:C:2014:2192.
[691] A Semple, 'The link to the subject matter. A glass ceiling for sustainable public contracts?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 59.
[692] K Pedersen and E Olsson, 'The role of the European Court of Justice in public procurement', in C Bovis (ed), '*Research Handbook on EU public procurement law'*, Edward Elgar, 2016, 420.
[693] Case C-341/05 *Laval* [2007] ECR-I 11767.

Swedish correlative union wanted it to apply the Swedish law and, to that purpose, to enter into the relevant Swedish collective agreement. Anyway, since that agreement contained an obligation for each employer to pay a 'special building supplement' to an insurance company to finance group life insurance contracts and such a pay was left to be negotiated at local level between the local trade union and the respective employer, on a case-by-case basis, Laval refused to act on the Swedish union's request, contending that that clause would hieratically influence its own wages policy. Laval's refuse to join the Swedish contract made the 'no-strike' clause contained therein irrelevant for the posted employees, hence for the works contract they have been transferred to deliver. The Swedish unions reacted by picketing the school sites and instituting a blockade with purpose to prevent Latvian workers from entering there. Even more, the Swedish electricians' unions took 'sympathy action'[694] and precluded their members from providing services to Laval. Other trade unions followed suit. Under all that pressure, and due to the extended blockade, L&P Baltic Bygg AB went bankrupt and Laval's posted workers returned to Latvia, leaving the site and the contract. Meanwhile, Laval brought proceedings in the Swedish Labour Court. Laval found valuable support from the Swedish employers' association. The Labour Court decided to stay the proceedings and referred several key questions to the Court of Justice of the Union. It essentially asked whether Articles 12 and 49 TEC and the Posted Workers' Directive 96/71 precluded trade unions from attempting, by means of collective action, to force a foreign undertaking posting workers to Sweden to apply a Swedish collective agreement.

The CJEU had, thus, to respond to four punctual issues:

(a) do the internal market rules law apply to the exercise of fundamental social rights, in particular the right to take industrial action?

(b) if they do, are they applicable to trade unions as well?

(c) if they are, can a collective action be construed to constitute a restriction on free movement? and

(d) if so, can it be justified and are the steps taken proportionate?[695]

Before anything, it is important to explain that the decision in the *Laval* case (similar to that rendered a few days earlier, in *Viking*[696]) came in the aftermath of a wrenching political struggle, when some of the most determined attempts of the European

[694] *Laval*, para 37.
[695] C Barnard, '*Viking and Laval: An Introduction*', (2008) 10 Cambridge Yearbook of European Legal Studies, 466.
[696] Case C-438/05 *Viking* [2007] ECR I-10779. The judgement in *Viking* was rendered on 11 December 2007 while that in *Laval*, on 18 December 2007.

legislature to re-arrange the fundamental *economic* structure of the Union met an unexpected opposition from many Member States (concerned with the preservation of certain fundamental social standards and values)[697]. The accession of ten new Member States to the European Union (all former communist regimes) had raised serious concerns with regard to the cheap workforce that some old Member States were afraid would flood Western European labour markets and would hence undermine the relevant wage rates. These concerns had prompted a number of transitional measures aimed in principal at watering down the enthusiasm of the Eastern employees for jobs in the West. These restrictions had however failed to also prevent service providers from the new countries from moving to the richer part of Europe together with their significantly lower paid employees, or employers from the 'EU-15' from going East in order to take advantage of the cheaper labour.[698]

Against this backdrop, and in a context where the hard law of the Union still offered slender indices with regard to the new balance of forces (see for example the still puzzling concept of 'highly competitive *social market economy*' that made the subject of some harsh debates in the homestretch to the revolutionary Treaty of Lisbon[699]), it was the Court of Justice of the Union that was supposed to come with further clarification. The context in which it was called to decide was all the more sensitive as the legitimacy of the whole project, hence the very existence of the Union, became contingent upon the proper slotting of the social dimension into the process of European integration.[700]

In both the *Viking* and the *Laval* cases, the Court maintained, in quite clear terms, that the internal market that makes the core of the Treaties is not just an 'internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital, *but also [a market that includes] a policy in the social sphere*'.[701] (emphasis added). It also made it clear that Article 2 TEEC should be read as *compelling* the Community to promote, inter alia, 'a harmonious, balanced and sustainable development of economic activities and a high level of employment and social

[697] It is worth recalling here the bitter rejection of the proposal launched by the Commission for a Constitutional Treaty (that is, the Treaty establishing a Constitution for Europe, OJ C 2004 310/01) or the surprisingly negative result of the referendum for the approval of the Treaty of Lisbon in countries like Ireland *etc.*, as well as the failure of the proposed amendments to the initial version of the Services Directive (Directive 2006/123/EC on services in the internal market, OJ 2006 L 376/36).

[698] C Barnard, '*Viking and Laval: An Introduction*', (2008) 10 Cambridge Yearbook of European Legal Studies, 463.

[699] The original version of which was published, as already mentioned, on 17 December 2007, hence right between the *Viking* and the *Laval* judgements.

[700] C Joerges and F Rödl, '*On de-formalisation in European politics and formalism in European jurisprudence in response to the "Social Deficit" of the European integration project; reflections after the judgments of the ECJ in Viking and Laval*', in (2008) 4 Hanse Law Review 1.

[701] See *Viking*, para 78 or *Laval*, para 104.

protection'.[702] In other words, after settling that the Community has not only an economic but also a social purport, it pointed out that all 'the objectives pursued by the economic freedoms must be balanced against the objectives pursued by the social policy objectives of the Treaty'[703] and therefore that all Community actions should be construed through the prism of this drive.

The Court also cited its own arguments developed in *Schmidberger* and *Omega* to resolve that, even if '*the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods*'[704] (emphasis added), *the exercise of a fundamental right such as those at issue in that particular case could not, as a matter of principle, fall outside the scope of the provisions of the Treaty but must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality*.[705]

Put otherwise, the Court established, rather eloquently, that the *fundamental nature*[706] *of a right cannot, in itself and by itself, take that right out of the scope of the internal market rules* (not even when that right is consecrated at a constitutional level!)[707] so that any limits that such a right might put on the basic (economic) rules of the internal market must be further justified in accordance with the Community law itself,[708] *ie*, with the relevant provisions of the Treaties allowing of derogations or, in their silence, with the theory of

[702] See *Viking*, para 79 or *Laval*, para 105.
[703] N Hös, '*The principle of proportionality in the Viking and Laval Cases: An appropriate standard of judicial review?*', EUI Working Paper, European University Institute, 2009, 3.
[704] *Laval*, para 93.
[705] *Laval*, para 94.
[706] From a *social policy* standpoint, *Laval's* greatest merit is that of qualifying the right to collective action as a *fundamental* social right. Until then, the Charter has been reluctant to recognise the right to strike as a fundamental right. The most notable case where the ECHR touched upon this issue was UNISON v UK (App no 53574/99) where it stated that 'The Court recalls that while Article 11 § 1 includes trade union freedom as a specific aspect of freedom of association this provision does not secure any particular treatment of trade union members by the State. There is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining. At most, Article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members. While the ability to strike represents one of the most important of the means by which trade unions can fulfil this function, there are others.' (para 35). For more on this, see also V Papa, '*The dark side of fundamental rights adjudication? The Court, the Charter and the asymmetric interpretation of fundamental rights in the AMS Case and Beyond*' (2015) 6 European Labour Law Journal 190.
[707] See S Weatherill, 'From economic rights to fundamental rights', in S A de Vries, U Bernitz, and S Weatherill (eds), '*The protection of fundamental rights in the EU after Lisbon'*, Hart, 2013, pp. 29– 36. In fact, the Court was confronted with a long line of cases dealing with the conflict between fundamental freedoms and fundamental political or social rights protected by national constitutions – see for ex. *Familiapress, Omega, Viking, Laval* or *Rüffert*, but the line of its arguments is, as already detailed in this Chapter, not as straight as one might expect, but rather hieratic and contingent upon various punctual factors (of which the political one seems to have been determinant, as in *Laval* or *Viking*).
[708] *Laval*, para 95.

mandatory requirements developed by the Court (which entails, among others, an assessment of the *proportionality* of the measure that begot those limits).

Thus, owing to *Laval* (and *Viking*), it has become common ground that the exercise of fundamental rights is not absolute but rather subject to various constraints[709] stemming from either the national law (which may create additional burdens, but necessarily without falling outside the scope of the Community law[710]) or the Community law itself (in particular the rules on free movement).[711]

However, in the absence of any substantive transnational labour standards (*ie*, set through positive harmonisation) on which to buttress its evaluation, the Court appears to have applied a 'collage of general principles'[712] and carried out its assessment by offering a direct interpretation of the relevant EU free movement rules[713] only to conclude that 'if the detailed terms of the Directive are not complied with to the letter, there will be a breach of Article 49 [TFEU]'[714] (for which the Court thus acknowledged a horizontal direct effect). It thus seemed to have been 'amalgamating' different types of proportionality tests which led to a 'very controversial' result.[715] Apparently, in *Laval* (just as in *Viking*), the Court ignored its own previously established model and, instead of searching for a reasonable justification in the particular social circumstances of the case (or, more concretely, in the 'established routes

[709] A Davies, '*One step forward, two steps back? The Viking and Laval cases in the ECJ*' (2008) 37 Industrial Law Journal 2, 139.
[710] See in this regard Case C-282/10, *Maribel Dominguez*, ECLI:EU:C:2012:33, where the Court retained that the conditionalities which a national law imposes – in an area subject to non-exhaustive harmonization – for the exercise of a right established at the Union's level cannot take an effect which overpasses the general purpose of the European law. To that effect, a measure taken via a national law transposing a European law, and within the leeway granted by the non-exhaustive harmonization brought by that European law, is not to take effect inasmuch as it remains on a collision course with the EU's legal framework. The Court thus stated that '*when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union*' (see para 24) – emphasis added. It also concluded that the 'principle of interpreting national law in conformity with European Union law has certain limitations. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem' (para 25). Consequently, '*the principle that national law must be interpreted in conformity with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it*' (para 27) – emphasis added.
[711] See *Viking*, para 44.
[712] L Azoulai, *'The Court of Justice and the Social Market Economy: The emergence of an ideal and the conditions for its realization'*, (2008) 45 Common Market Law Review 5, 1337.
[713] N Hös, '*The principle of proportionality in the Viking and Laval Cases: An appropriate standard of judicial review?*', EUI Working Paper, European University Institute, 2009, 14.
[714] C Barnard, '*Viking and Laval: An Introduction*', (2008) 10 Cambridge Yearbook of European Legal Studies, 478.
[715] Ibidem.

to achieve social protection built up over time (…) and (…) only after struggle and sacrifice by marginalized groups in society'[716]), went instead for a downright protection of corporate interests, thus compressing the autonomy of labour unions and curbing many social policy choices.[717] The legislative (and political) context in which the Court had to come with a decision in *Laval* was however not propitious for a solution to the contrary.[718]

So, surprisingly, in *Laval* the Court stumbled upon the provisions of the Posted Workers Directive 96/71 (with which it was not confronted in *Viking*, for example). According to the 13th Recital of the Preamble to that Directive, that norm was bound to establish a 'nucleus of mandatory rules' (as laid down in Article 3(1) thereof) which host Member States were (they still are, of course) compelled to apply to all employees posted there from abroad. Moreover, according to Article 3(7) from the same Directive, 'Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment *which are more favourable to workers*' (emphasis added). This had been, until *Laval* at least[719], believed to contain a 'minimum standards' clause and provide a 'floor of rights'[720] on which host Member States could build to impose even higher standards (subject to the ceiling established under Article 49 of the Directive). However, the Court's read of Article 3(7) departed from that stance. It interpreted the cited Article to impose on the host state an obligation not to enforce terms and conditions of employment beyond the mandatory rules enshrined in Article 3(1) for minimum protection,[721] which made that Article 'not a floor, but [in sooth] a ceiling'.[722]

However, the Court appreciated that the rights under scrutiny, even if fundamental, did not fall into the scope of Article 3(1) of the Posted Workers Directive, while the host Member State did not opt for any of the alternatives offered by Article 3(8) of the same norm. It also failed to offer a substantial interpretation of the public policy derogation provided by Article 3(10) of the Posted Workers Directive (as it did, for example, in

[716] S Weatherill, '*The internal market as a legal concept*' (Collected Courses of the Academy of European Law) Oxford University Press 2017, Kindle Edition, 127.
[717] A McCann, '*The CJEU on trial: economic mobility and social justice'*, (2014) 22 European Review of Private Law 729.
[718] *Laval*, just as *Viking*, had reached the dockets of the Court two years *before* the adoption of the Treaty of Lisbon, but the Court handed down its decisions within days before, respectively after, its publication, so that the entire process of argumentation was inevitably caught in the political struggle around the adoption of that Treaty.
[719] See for example the opinion of AG Bot in *Rüffert* (paras 82-83) – a case contemporaneous with Laval, but on which the Court handed down its decision a year later.
[720] As explained under Recital 17 of the Directive. See also Barnard (n 714), 475.
[721] *Laval*, para 81.
[722] C Barnard, '*Viking and Laval: An Introduction*', (2008) 10 Cambridge Yearbook of European Legal Studies, 475. For more on this issue, see P Syrpis and T Novitz, '*Economic and social rights in conflict: Political and judicial approaches to their reconciliation*' (2008) 33 European Law Review 411.

Luxembourg[723]). The explanation for this resides in the fact that, in *Laval*, it built its entire argumentation on the direct application of Articles 49 and 56 TFEU — which it construed to be applicable to trade unions as well (as emanations of the State), refusing to delve into Article 3(10) of the Posted Workers Directive for additional (or alternative) arguments since it considered that trade unions, unlike Member States, could not avail themselves of such a defence.[724] Or, just to cite AG Mengozzi, a '(…) measure that is incompatible with Directive 96/71 will, a fortiori, be contrary to Article 49 EC [which became Article 56 TFEU], because that directive is intended, within its specific scope, to implement the terms of that article.[725] On the other hand, to hold that a measure conforms with Directive 96/71 does not necessarily mean that it meets the requirements of Article 49 EC, as interpreted by the Court.' (paras 149 – 150 of his Opinion in *Laval*).

The Court also rejected any analogy with the *Albany* case as unacceptable and underscored that the reasoning applied in relation to the competition provisions of the Treaty could *not* be applied in the context of the fundamental freedoms set out in Title III of the Treaty. It therefore concluded that *the exclusion of certain activity from the scope of the provisions on competition does not mean that the same activity falls outside the scope of the provisions on free movement*.[726]

All in all, beyond rendering all social law pundits numb due to a very tenuous interpretation of the provisions of the Posted Workers Directive, *Laval*, as all the other decisions that make what is now captioned as the 'infamous Laval quartet'[727] (including, besides *Laval*, also *Viking*, *Rüffert* and *Luxembourg*[728]) — which, of late, became a quintet if we are to include here as well the recent *Regio Post* — is primarily important for having clarified that, in the balance between a fundamental economic freedom and a fundamental social right, that right might, in some concrete circumstances, weight more. However, in order for the restrictions that such a right may cast on the economic freedom to be lawful, the

[723] C-319/06, EU:C:2008:350.
[724] See *Laval*, paras 83, 84, 98. The Court thus appreciated that '(…) certain terms of the collective agreement for the building sector relate to matters which are not specifically referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71.
[725] See, in the same vein, Case C-341/02, *Commission v Germany*, [2005] ECR I-02733, paras 41 and 42.
[726] See *Viking*, paras 51, 53. See also S Maluhins, '*Free movement and social protection of workers (based on Laval and Viking cases)*', thesis submitted in August, 2008, in partial fulfilment of the requirements for the degree of Master of Law in International and European Labour Law, LL.M., at the Faculty of Law of the University of Tilburg, at: http://arno.uvt.nl/show.cgi?fid=103581, last visited November 21, 2019, 36.
[727] S Feenstra, 'How Can the Viking/ Laval conundrum be resolved? Balancing the economic and the social: One bed for two dreams*?*' in F Vandenbroucke, C Barnard, and G De Baere (eds), '*A European Social Union after the crisis*', Cambridge University, 2017, 310.
[728] Case C- 319/ 06, *Commission v Luxembourg*, EU:C:2008:350.

authority that enforced it may produce justification in line with the EU legal framework – and beyond the mere *fundamental* nature thereof.

In short, in *Laval* the Court departed from *Bosman* (to which AG Mengozzi himself made specific reference in his Opinion) to hold that grounds of public policy can be relied on by, limitedly, public bodies.[729] On the other hand, what the Court did in Laval was to confirm that, in the area of the freedom of movement of goods, services and persons, the so-called 'single regulation principle' is rather fulfilled (since *Dassonville* and, more emphatically, since *Cassis de Dijon*) by the *home* regulation rule. It repeated this reasoning in *Rüffert,* to conclude that, 'in the absence of positive harmonisation by the Union legislature, regulating the internal market implies electing one of two irreconcilable conceptions of equality, which alternatively mould the concept of 'restriction to free movement': either intra-jurisdictional equality, promoted by host regulation (same regulation within every national market, as in *Förster, Collins* or *Rush Portuguesa*); or inter-jurisdictional equality, promoted by home regulation (same regulation 'exported' through the internal market, as in *Laval, Rüffert* or *Centros*)'.[730] The *Laval* judgement thus recalled, even if implicitly, the conclusions firstly set forth in *Cassis de Dijon* and after that reiterated in numerous other cases – such as C-323/93 *Crespelle*, C-299/02 *Commision v Netherlands* (especially paras 17 and 18), or C-393/05 *Commission v Austria* (para 29) *etc*., that, in areas subjected to exhaustive harmonization at the EU level, national measures have to pass a mere conformity test whereas, in the absence of Community harmonisation measures, an economic freedom may only 'be limited by national regulations justified by the reasons stated in Article 46(1)EC or *by pressing reasons of general interest* (…)' – emphasis added (as it had pointed out in C-19/92 *Kraus* – see para 34, cited above).

Unfortunately, the Court, although it retained that the analysed context fell out of the scope of the Posted Workers Directive so that the relevant internal market rules were *directly* applicable to it, dispensed with the mandatory requirements test and, without bothering to search for 'pressing reasons of general interest', jumped directly to the conclusion that, since the derogatory measure was imposed via a private covenant (none of its parties, *ie*., the 'management' and the 'labour, being a body governed by public law), it may not be justified by reasons of public policy.

[729] D Wyatt, '*Horizontal effect of fundamental freedoms and the right to equality after Viking and Mangold, and the implications for Community competence*', in (2008) 4 Croatian Yearbook of European Law & Policy, 30.
[730] A Saydé, '*One Law, two competitions: An enquiry into the contradictions of free movement law*', in (2011) 13 Cambridge Yearbook of European Legal Studies 2010-2011, 390.

The *Laval* case was, on the other hand, concerned with *social action* (as a constraint to the freedom of movement in the internal market, especially in the context of the delivery of a public contract) rather than with the *protection of workers* (or the minimum wages payable to posted employees), which might explain the Court's extra-cautiousness.[731]

2.6 *The Max Havelaar case*

This case involved the award, by the province of Noord Holland in the Netherlands, of a contract for the supply and management of automatic coffee machines, together with the necessary ingredients (coffee, tea, sugar, milk and cups *etc*).

The award was supposed to be done based on the most economically advantageous tender (the 'MEAT') criterion, and the evaluation scheme was rather complex. It involved, among the technical specifications, certain environmental and social requirements plus an obligation to produce, as an evidence of the fulfilment of these requirements, respectively the EKO and the Max Havelaar labels. With regard to the minimum quality standards sought by the contracting authority, one of the sections of the tender file, headed 'Quality conditions', clarified that: 'In the context of sustainable purchasing and socially responsible business[732] the Province of North Holland requires that the supplier fulfil the criteria concerning sustainable purchasing and socially responsible business. (…) It is also necessary to state in what way the supplier contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production …'.[733] That specific condition was further summarised, in the same document, under the wording: '(…) Sustainability of purchases and [socially responsible business: knock-out criterion]'. These qualification criteria were accompanied by

[731] In general, the Court had been much more reluctant in acknowledging the righteousness of such actions, as their precarious effect on the internal market rules was still high at that age. The sensitive nature of collective actions was acknowledged even after the adoption of the Treaty of Lisbon, when the Commission Proposal for a Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (advanced in the hopes of making things a bit clearer) – see COM (2012 130) 21 March 2012 – turned into a bitter failure. For more details, see F Fabbrini and K Granat, '*Yellow card but no foul: The role of the national Parliaments under the subsidiarity protocol and the Commission proposal for an EU Regulation on the right to strike'*, (2013) 50 Common Market Law Review 1, 115.

[732] So, a direct reference to the corporate social responsibility (the 'CSR'). This was allegedly the first time when the Court was confronted with the use of CSR as an award criterion in public procurement, although it did not touch upon this particular element in its decision. However, the case remains relevant also in this respect, especially because, since *Wienstrom*, it became clear that references to the general policies or management of suppliers are, in general, not permitted in the award of public contracts. For more on this issue, see Chapters V and VI below.

[733] *Max Havelaar*, paras 26, 27.

a selection criterion referring, again, to the two labels mentioned above. Finally, the tender file suggested that ingredients that comply with the EKO and/or Max Havelaar labels (*ie*, that are 'green' and come from fair trade) would receive additional points (still without this to be mandatory).

Anyway, with specific regard to the Max Havelaar label and in contrast with its considerations around the EKO label offered in the same decision, the Court clarified that, while the EKO label, which defined the technical characteristics of the tender in terms of performance of functional requirements based on certain environmental standards, and thus fulfilled the conditions listed in Article 23(6) of Directive 2004/18, *did* constituted an 'eco-label' within the meaning of that provision, the Max Havelaar label did *not*, since the concept of technical specifications 'applie[d] exclusively to the characteristics of the products themselves, their manufacture, packaging or use' whereas that label was concerned, limitedly, with the '*conditions under which the supplier acquired them from the manufacturer*' (emphasis added), which fell outside the scope of that concept.'[734] Instead, said the Court, this should have been set forth as a *condition for performance* of that contract. Additionally, the Court settled that both labels had been legally required in connection with the *award criteria* used in the MEAT equation at hand since the aspects they were called to ascertain complied with all the requirements listed under Article 53(1)(a) from Directive 2004/18 (then in force). In concluding so, the Court confirmed, once more, that award criteria may, in general, bear also a social (or otherwise environmental) load and need not be purely economic, the value of such criteria stemming from their capacity to satisfy needs of a social nature pertaining to either the immediate beneficiary of the contract (namely, the contracting authority) or to other persons (the community, in general, as a final beneficiary of public policies).[735]

The Court thus pointed out that, as a matter of principle, *fair trade* labels *may not* be used in a public procurement procedure in relation with the technical specifications

[734] Ibidem, para 74.

[735] In this regard, and in anticipation of the new set of Directives on public procurement (but also of the CJEU decision in *Max Havelaar*), the European legislature and, in principal, the European Parliament, through its Resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI)), had already insisted that '*the fact that whether or not a product or service has been sustainably produced is rightly considered to be a characteristic of the product, which can be used as a criterion for comparison with products or services that have not been sustainably produced, so as to enable contracting authorities to control the environmental and social impact of contracts awarded by them in a transparent way* but at the same time not to weaken the necessary link to the subject matter of the contract' but also shouted 'the need to clarify the scope for including requirements relating to the production process in the technical specifications for all types of contract, where relevant and proportionate, recalling therewithal *the Wienstrom case,* '*which has become the classic example of how and why production characteristics can be categorised as technical specifications*' (see para 18) – emphasis added.

that define the goods to be supplied, but rather with the supply chain itself.[736] They may nonetheless be used in relation with award criteria.

It connection with labels such as EKO and Max Havelaar, the Court however insisted that they may only define the products the supply of which constitutes the subject-matter of that contract but not also be concerned with the 'general purchasing policy of the tenderers'[737]. It is, on the other hand, not necessary that the features which those labels are expected to ascertain refer to the materiality, or to an intrinsic quality, of the supplies in order for the link between them and the subject-matter of the contract to exist.

In this context, the Court reiterated the conclusions offered in *Concordia Bus* and *Wienstrom*, insisting that, in the light of the main purpose of the Directive then in force (*ie*, the opening up of national markets to foreign traders from other Member States), contracting authorities are compelled to define their specifications and criteria as comprehensively and transparently as possible, in order for those foreign traders to be able to fully understand the relevant requirements (the principle of equal treatment). To this purpose, continued the Court, and considering the risk of discrimination that may stem from the mere reference to a label commonly used in the Member State of that authority but rarely used elsewhere (which may put foreign trades in an ingrate position, as this may force them to employ additional resources), contracting authorities should define technical specifications and award criteria by describing each and all necessary details instead of simply making reference to a label that comprises these characteristics. Of course, they may specify that the holding of such labels suffices to attest the fact that the holder complies with the specified requirements.

As a conclusion, the most significant merits of this case is that of having made it clear, for the first time in explicit terms, that given the requirement concerning the necessary link to the subject matter of the contract (consecrated in *Concordia Bus*), a

[736] To conclude that, the Court showed that the requirement to observe the "criteria of sustainable purchasing and socially responsible business" was not connected to any of the factors specified in Article 48 of the Directive, as was *not* a "description of the technical facilities (…) and measures used by the supplier for ensuring quality and the undertaking's study and research facilities" as required by Article 48(2)(c) of the procurement Directive. (see paras 106 *et seq*). For a conclusion that social criteria cannot be used, in general, as technical specifications, see M Müller-Wrede, '*Sustainable purchasing in the aftermath of the ECJ's "Max Havelaar" judgment*', in (2012) 2 European Procurement and Public Private Partnership Law Review, 116. We find this conclusion rather radical, as social specifications such as those linked to *accessibility* are explicitly allowed by Directive 2014/24 (and were also allowed under Directive 2004/18). Inasmuch as other social elements are concerned, it is clear, at least since *Max Havelaar*, that *fair trade* characteristics cannot be used to define technical specifications. However, we find it hard to maintain this conclusion for other characteristics, for example those pertaining to other labels which describe the production process and refer to the quality of the staff, although they 'do not form part of [the] material substance' of the goods to be delivered.

[737] *Max Havelaar*, para 90.

requirement seeking for certain corporate social responsibility arrangements is not possible in the award of a public contract. However, social labels may, according to this decision, be legally used for the *ascertaining* (so, as means of proof) of certain particular features of the subject matter of the contract.

2.7 *The Rüffert*, *Bundesdruckerei* and *RegioPost* cases[738]

Without going into many details, it would be helpful to note, before anything, that all these cases are concerned with the delivery of several *public contracts* with the help of *posted workers*. This particular arrangement pushed each of the three contracts into a very delicate zone, making them governed not only by the fundamental principles of the internal market arising from the Treaties and the specific provisions of the Directives on public procurement (which, in the configuration in force at the time when the cases were discussed by the Court, contained — owing in principal to the previous case law of the CJEU as discussed above — several, even if scarce, indications on how to intersperse, in line with the EU law, social considerations into a public procurement equation[739]) but also — and *hic jacet lepus* — by a special law of a clearly *social* nature to do, specifically, with the protection of posted workers. This actually convinced the Court to give, in all the three cases, more attention to the law on posted workers that to that on public procurement. This prompted an immediate assessment of Article 49 TEC (current Article 56 TFEU) through the prism of *that* directive, and not the one on public procurement[740], which led to the unavoidable conclusion that Article 49 was, at least in *Rüffert* and *Bundesdruckerei*, breached because the Posted Workers Directive itself had been breached. So, basically, while the Directives to do with public procurement permitted, in general, the use of social criteria of the nature identic to those under scrutiny in *Rüffert*, *Bundesdruckerei* and *RegioPost*, the Posted Workers Directive limited that possibility to a specific context. Due to this limitation, the Court

[738] C-346/06 *Rüffert* [2008] ECR I-01989, C-549/13 *Bundesdruckerei*, ECLI:EU:C:2014:2235, and C-115/14, *RegioPost*, ECLI:EU:C:2015:760. We grouped them under the same section (although at least one of them, *ie*, *Rüffert*, preceded *Max Havelaar*), as they are intrinsically linked by their subject matter.

[739] AG Bot crafted his Opinion in *Rüffert* on these indications, which it did not hesitate to cite, just to conclude that, based on the prior case law of the Court itself and the blunt provisions contained in the applicable procurement legislation, the regional legislation in discussion was in line with the EU law and so was the requirement that it established – namely the payment of certain minimum wages to the workers hired to deliver the contract' (see paras 129 – 133).

[740] As AG Bot himself acknowledged, 'I shall not, however, go further in interpreting Directive 93/37, because *that directive is of no assistance with regard to the central issue raised by the question from the court of reference, namely determination of the employment conditions which may, in compliance with Community law, be imposed for the performance of a public contract in a situation where workers are posted in the framework of the provision of services*.' (para 60, emphasis added).

practically concluded that legal arrangements as those discussed in these cases could not have been seen as legal in the EU legal context, even if they *were* endorsed by an international agreement (to which Germany *was* a party).[741]

But the legislative configuration described above is even more intricate. As the dedicated literature insists, each of the cases forming the *Laval* quintet bears also a complex *constitutional* dimension[742], the thick overlapping of texts and provisions involving paragraphs of a different force on a vertical scale: Article 56 TFEU over the Posted Workers Directive and, further, over the public procurement directives, all these in a partial-harmonization context.

The three cases discussed under this paragraph are also interesting as arguments have been raised (during the judicial debates) that Article 56 TFEU and the Posted Workers Directive would not be applicable due to the fact that they all missed a cross-border element (all contracts being awarded to German firms).

In essence, each of the three cases brought forth the legality, in the EU legal context, of a number of German regional laws on the award of public contracts which compelled contracting authorities to ensure that the winning bidders pay their staff (hired to deliver the respective contracts) a certain minimum wage, in an attempt to tackle social dumping and the use of cheap labour as a distortion factor for a fair competition.

Apparently, the most commonly used social criteria in the procurement practice of the German authorities relate to the payment of minimum wages – this being provided for in either the context of compliance with national laws or collective bargains or, generally (and indirectly), with the equal pay principles, the application of the ILO core labour standards, labels and fair trade, gender equality and family or with integration, inclusion and unemployment.[743]

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[741] And to which COM(l998) 143 final, cited above, made explicit reference, insisting on the need to resolve such problematic discrepancies and somehow strike a necessary balance between the EU law and ILO conventions. In spite of this 'official' impulse, the Court concluded in *Rüffert* and *Bundesdruckerei*, in a rather restrictive interpretation of the Posted Workers Directive (and, in any case, in total disagreement with the ILO Convention No.94 (of 1949) on labour clauses in public contracts and Article 27 of Directive 18), that minimum wages stipulated in a collective agreement which is not universally applicable cannot be applied in public procurement contracts – unless they had been endorsed by an administrative act (in those cases, they had not).

[742] P Syrpis, '*The relationship between primary and secondary law in the EU*', (2015) 52 Common Market Law Review 461, or P Syrpis, 'RegioPost – a constitutional perspective', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018. See also G S Ølykke and A Sanchez-Graells (eds), '*Reformation or Deformation of the EU Public Procurement Rules*', Edward Elgar, 2016.

[743] E K Sarter, D Sack and S Fuchs, '*Public procurement as social policy? An introduction to social criteria in public procurement in Germany*', Universität Bielefeld, Working Paper Series "Comparative Governance" 1/2014, available online at: www.uni-bielefeld.de/soz/powi. For a discussion on the extensive use of various

The first of the three cases, *ie*, the *Rüffert* case, generated a real problem in the German procurement practice as wage-setting in Germany was, owing to a longstanding tradition of collective bargaining autonomy, based essentially on collective agreements and, until July 2014 — when the Bundestag adopted a *law* on minimum wages — Germany had no binding regulations on general minimum wages (but only special rules applicable to specific areas of the industry).[744] Anyway, regulations concerning the compliance with collective agreements (the so called Tariftreueregelungen) are among the oldest social criteria integrated in public procurement regulations in Germany, although they have been, since the very beginning, subject to fierce and endless political debate.[745] The first line of such regulations date back to the 1990s, hence far before the *Rüffert* judgment. They engendered a really substantial practice which encouraged contracting authorities to force contractors (and their subcontractors) to pay their staff called upon to perform the services covered by those contracts the minimum wages provided for in the applicable German (regional) law.[746]

However, the *Rüffert* judgment had declared stipulations regarding collective agreements which are not universally binding as not being in line with European legislation. But *Rüffert*, *Bundesdruckerei* and *RegioPost* pose, as opposed to *Viking* or *Laval* (where the accent was rather on collective actions as an obstacle to free movement[747]) particular difficulties of interpretation especially due to their direct public procurement implications.[748]

ILO standards in German procurement, see M Burgi, 'Secondary considerations in public procurement in Germany', in R Caranta and M Trybus (eds), '*The law of green and social procurement in Europe'*, Djøf Publishing, 2010, esp.123 *et seq*.

[744] Sarter *et al* (n 743), 13.

[745] M Trybus, '*Study on social considerations in public procurement*', Country Report for the Federal Republic of Germany, 11 June 2018, 1.

[746] *RegioPost*, para 53.

[747] In fact, in both *Viking* and *Laval*, the Court acknowledged that '*since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy'* (see para 79 in *Viking* and 105 of *Laval*, emphasis added). Nonetheless, 'despite this acknowledgement, the choices which the Court has made in the *Viking* and *Laval* cases – most importantly, interpreting the free movement provisions as binding [on] trade unions; defining the scope of the right to free movement broadly, but not considering the possibility of abuse; while taking a strict line on the requirements for justification and the application of the proportionality test – represent a tipping of the delicate balance between the economic and the social in favour of the former. The case law of the Court appears to prioritise the freedoms of employers over those of workers and their organisations' – see P Syrpis and T Novitz, '*Market Integration and Labour Law: Legislative and Judicial Approaches to their Reconciliation*', (2008) 33 European Law Review, 411 et seq.

[748] O Otting, '*Case comment: Compulsory social standards for public contracts as a restriction on the freedom to provide services: Dirk Rüffert v Land Nedersachsen (Case-346/06)*' (2008) 193 Public Procurement Law Review 5. See also S Arrowsmith and P Kunzlik, "Introduction – a note on Rüffert v Land Nedersachsen", in S Arrowsmith and P Kunzlik (eds), '*Social and Environmental Policies in EC Procurement Law: New Directives and New Directions'*, Cambridge University Press, 2009, R Arthur, 'Rüffert and Luxembourg. The Posted Workers' Directive and ILO Convention 94*'* in K D Ewing and J Hendy, '*The new spectre haunting Europe – the ECJ, trade union rights and the British Government'*, Institute of Employment Rights (2009), R Arthur, '*Third Case unlucky: ramifications of Rüffert'* (2008) 8 Federation News 1, or C Barnard, '*The UK and Posted*

In this regard, it is probably worth noting the atypical way in which Germany had built its legal framework concerning public procurement. The German procurement system was / is, due to its federal system, highly decentralised. This generates a significantly dispersed regulatory framework and gives a substantial level of autonomy to the German Länder, who thus have a lot of discretion in the design of their own procurement laws. Traditionally, the German public procurement rules emerge from two sources: budgetary law (which is still considered a matter of strictly internal policy addressed exclusively to national administration) and the legislation transposing EU internal market rules into national law (such as the Federal Act against Restraints on Competition, or the 'GWB' — which contains a set of elementary procurement principles). An additional source of regulation of public procurement in most federal states is the Wage Loyalty and Procurement Acts (Tariftreue und Vergabegesetze), which started to be adopted following the rejection, in 2002, of the draft law proposed at the state level and aiming at making the minimum wages set via collective bargains compulsory in the delivery of all public contracts. These Acts set a floor of (minimum) wages to be paid to employees involved in carrying out a public contract.

The reform adopted in 1998 moved the focus from the protection of the correct use of public money to the safeguarding of free competition, making the GWB the main source of rules in the public procurement area.[749] It also resulted in a significantly more rigorous regime for the use of social features in a public procurement context.[750] This reform culminated with the decisions rendered by respectively the Federal Supreme Court[751] and the German Constitutional Court[752] which acknowledged the right of the German Länder to adopt laws by which to add to the general criteria regulated by the GWB and thus to promote external social values (as those concerning minimum wages established via collective bargains) in (but not necessarily *through*) public procurement. These decisions cited, *inter alia*, two overriding reasons in the public interest that, in the opinion of the two instances, justified the restriction of competition generated by the use of such a selection criterion,

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Workers: the effect of Commission v Luxembourg on the territorial application of British labour law' (2009) 38 International Law Journal 122.

[749] B Spiesshofer and M Lang, '*The new German public procurement law: commentary and English translation of the text*', (1999) 103 Public Procurement Law Review 8.

[750] Thus, if until June 2000, the promotion of secondary considerations was permitted even without a statutory provision, after that date such elements could not be used based on an administrative authorization alone, but had to be further endorsed by an act of either the state or the regional Parliaments. See in this regard C McCrudden, 'The Rüffert Case and public procurement' in M Cremona (ed.), '*Market Integration and Public Services within the EU*', Oxford University Press, 2011, 122.

[751] See for ex. the decision rendered in June 1999 and published in Der Betrieb 2000, 465 *et seq*.

[752] See for ex. the judgement of 11 July 2006, 1 BvL 4/00.

namely the fight against unemployment and the bolstering of the financial security of the German social security system.

This was basically the national context in which the three cases discussed under this Section occurred. In its assessment, the CJEU thus focused on the balance that must be struck between national labour standards and an effective cross-border competition, in a context where competitors coming from Member States with a barely emergent capitalist economy were trying to take advantage of the lower wage rates practiced in their countries and thus deliver the contract with cheaper workforce, to the chagrin of the bidders coming from much developed economies, including Germany, which could not benefit from the same advantages. With one exception[753], the Court decided to take the Posted Workers Directive into account instead of focusing on Article 49 TEC (now Article 56 TFEU) alone, with purpose to determine the 'acceptability of the contested law *under the Treaty*'.[754] But, as opposed to *Laval*, where it used the said Directive to find justification for a measure otherwise contested as contrary to Article 49 TEC, in *Rüffert* (but also in *RegioPost*) it supposedly used it the other way around, that is, to prove that the measure at stake was *not* justified.[755]

In *Rüffert* in particular, the Court concluded that the Posted Workers Directive was not applicable since the national law at stake did not set out the level of wages but just made blunt reference to the collective agreements that did. More concretely, what the Court basically said was that a measure that thwarts the free movement of services, taken based on ILO Convention No. 94, could pass the mandatory requirements test only inasmuch as it complies with also the Posted Workers Directive.[756] Unfortunately, those agreements were not universally applicable (as required by the Posted Workers Directive), nor could they be deemed to be *de facto* universally applicable since they could hardly apply to *all* undertakings performing in that geographical area and in the industry concerned, but only to those involved in the delivery of *public sector construction* contracts. Consequently, the Court

[753] *Bundesdruckerei*, paras 25 to 27.
[754] C McCrudden, 'The Rüffert Case and public procurement' in M Cremona (ed), '*Market Integration and Public Services within the EU*', Oxford University Press, 2011, 126 (emphasis added). So, as Cremens commented, 'Europe (…) is no longer a unity of Member States with open markets combined with well-defined national social policy systems (a unity in diversity), but a unified economic bloc with a clear hierarchy: *the radical ECJ interpretation of article 49 of the Treaty (now article 56 of the Lisbon Treaty) makes every national host country mandatory provision in principle a restriction on the free provision of services*' – see J Cremers, '*In search of cheap labour in Europe. Working and living conditions of posted workers*', CLR/International Books, 2011, 11 (emphasis added).
[755] Ibidem.
[756] N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case*', (2010) 16 Transfer (ETUI) 4, 481.

sought further to find justification under Article 49 TEC directly. By doing so, it however did not apply the test delivered in C-55/94, *Gebhard* or, before that, in C-19/92, *Kraus*, leaving aside precisely the last element of the test. It thus concluded that the measure taken by the Land of Nedersachsen was not *suitable* (in the sense defined in *Finalarte*[757]) for achieving the claimed purposes (in principal the protection of workers – which it had already acknowledged as an admissible mandatory requirement in C-272/94, *Guiot*[758]) and dispensed with the assessment of whether that measure was indeed *necessary* (*ie*, proportional). Weirdly though, a proper assessment of the proportionality of the national measure at stake is missing not only in the two cases where the Court found the national measures to be contrary to the EU law (so that a proportionality test was not necessary anymore), but also in *RegioPost*, where the Court *did* acknowledged the legitimacy thereof.[759]

Academia manifested a serious concern over the way in which the Court approached the subject matter of these cases: it practically shunned (at least until *RegioPost*) any foray into the realm of public procurement[760] and concentrated solely on the Posted Workers Directive, to the extent where it concluded that the mere breach of that Directive

[757] Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831. In that case, the Court had explained that '(…) *whilst the intention of the legislature, to be gathered from the political debates preceding the adoption of a law or from the statement of the grounds on which it was adopted, may be an indication of the aim of that law, it is not conclusive*. (…) It is, on the contrary, for the national court to check whether, *viewed objectively*, the rules in question in the main proceedings promote the protection of posted workers. (…) In this respect, *it is necessary to check whether those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures it has adopted*.' (paras 40 to 42, emphasis added).

[758] C-272/94, *Guiot* [1996] ECR I-1905. See in principal para 16 stating that '*The public interest relating to the social protection of workers in the construction industry may however, because of conditions specific to that sector, constitute an overriding requirement justifying such a restriction on the freedom to provide services*.' (emphasis added). More on the implications of this assertion, M Howverzijl and F Pennings, '*Double charges in case of posting of employees: the Guiot judgement and its effects on the construction sector'*, (1999) 1 European Journal of Social Security 1.

[759] P Bogdanowicz, 'Article 56 TFEU and the principle of proportionality: why, when and how should they be applied after RegioPost?' in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018. See also A Brown, '*The lawfulness of a regional law requiring tenderers for a public contract to undertake to pay workers performing that contract the minimum wage laid down in that law, Case C-115/14 RegioPost*' (2016) 2 Public Procurement Law Review NA49.

[760] In opposition to the AGs, for example, which, in at least the *Rüffert* and the *RegioPost* cases, made specific reference to the applicability and relevance of the public procurement Directives, pointing to or, better, suggesting a different solution – see above for details. In fact, '*the 2004 [Directive] was not in force for Rüffert and its 1993 predecessor contained no express provision on social considerations at the contract performance stage. Nonetheless, the Advocate General found the 2004 [Directive] and the Court's case law on social award criteria [solid arguments] for rejecting the Commission's argument* that the Lower Saxony law was unlawful because it created discrimination between workers in the construction industry, depending on whether the primary contractor was private or public.' (C Kilpatrick, '*The Court of Justice and labour law in 2010: A new EU discrimination law architecture*' (2011) 40 International Law Journal 3, 225 – emphasis added). See also P Syrpis, 'RegioPost – a constitutional perspective', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, or G S Ølykke and A Sanchez-Graells (eds), '*Reformation or Deformation of the EU Public Procurement Rules*', Edward Elgar, 2016, 15.

means the breach of Article 49 TEC itself, even if the concrete harmful effect of the national laws under scrutiny was far from being evidenced. Some authors even suggested that social issues as those discussed in the three cases must be treated as 'fundamental *human* rights' rather than mere *social* rights[761]. Past case law was cited in this regard, showing that the Court would, in principle, be ready to go into that direction[762]. In any case, we consider the circumstance whether the solutions offered by the Court in all these cases are confined to the posting of workers[763] or are equally valid in also all the other cases which involve the use of public procurement as a mechanism for the delivery of social policy goals[764] to be irrelevant since, especially in the area of the posting of workers, we are concretely dealing with a special regulatory framework (which is missing in other key areas) which the Court cannot ignore so that to measure the applicability of a text of the Treaties through the prism of (only) other relevant laws. We, on the other hand, must concede that both the Posted Workers Directive and the Directives on public procurement share the same purpose, namely 'to provide a politically acceptable set of rules by which the principles set out in general terms in the Treaty can be operated.'[765] It should therefore follow that where a situation falls under both the public procurement and the posted workers rules, the latter shall inevitably take precedence with regard at least to those aspects which are clearly overlapping.[766]

In essence, the problem with *Rüffert*, *Bundesdruckerei* and *RegioPost* is that they all confine the use of a social value such as the payment of a certain minimum wage to

[761] See for ex. C McCrudden, '*Human dignity and judicial interpretation of human rights*', (2008) 18 European Journal of International Law 4, 655 *et seq*., or C McCrudden, 'The Rüffert Case and public procurement' in M Cremona (ed), '*Market Integration and Public Services within the EU'*, Oxford University Press, 2011, 132 *et seq*.

[762] C-36/02, *Omega*, is one of the best examples where the Court decided that some social rights are in sooth matters of *human dignity* which must weigh more than the economic values to which they are usually opposed.

[763] As assumed by Arrowsmith and Kunzlik (S Arrowsmith and P Kunzlik, "Introduction – a note on Rüffert v Land Nedersachsen", in S Arrowsmith and P Kunzlik (eds), '*Social and Environmental Policies in EC Procurement Law: New Directives and New Directions'*, Cambridge University Press, 2009, 1).

[764] C McCrudden, 'The Rüffert Case and public procurement' in M Cremona (ed), '*Market Integration and Public Services within the EU*', Oxford University Press, 2011, 134.

[765] Ibidem, 135.

[766] It even appears that, in the balance between the rules set forth by the Posted Workers Directive in direct application of Article 56 TFEU and the possible mandatory measures or policies which may serve as justification for hindrances to the cross-border trade in a public procurement context 'it is not up to EU Member States to define unilaterally the notion of public policy or to impose all mandatory provisions of pay and working conditions on suppliers of services established in another country. *Rules and requirements that are not specified in the exhaustive list of the PWD have to be judged within the limits of the legislator's definition of mandatory rules*. (…) [It follows that, under the umbrella opened by the Posted Workers Directive,] *foreign service providers do not have to comply with mandatory rules that are imperative provisions of national law and that therefore have to be respected by domestic service providers*.' - J Cremers, '*Economic freedoms and labour standards in the European Union'*, in (2016) 22 Transfer (ETUI) 2, 153 (emphasis added). For a similar conclusion, see J Cremers, '*In search of cheap labour in Europe. Working and living conditions of posted workers'*, CLR/International Books, 2011 or B Bercusson, '*Collective action and economic freedoms before the European Court of Justice*', ETUI, 2007.

posted workers within the frame drawn by the Posted Workers Directive. Based on this reasoning, all schemes not crafted as prescribed by that Directive are to be considered as breaching the very internal market rules. Indeed, in *RegioPost*, the Court found, as opposed to the other two cases, that the scheme at hand *was* in line with the Directive (since the collective agreement which regulated the minimum wages at stake *was* universally applicable). But the reasoning was identic to the previous two cases. Its shortcomings are, nonetheless, more visible *Rüffert*. It would have probably been more helpful if the Court would have simply ascertained that the scheme in discussion – involving a regional law which could have not, by itself, regulate, directly, the value of minimum wages since the regional legislature had no competences in that regard, as underscored by AG Bot in its Opinion – felt outside the scope of the Posted Workers Directive, and would have just passed to the assessment of that scheme through the prism of Article 49 TEC itself, applying the mandatory requirements test developed in its previous, and notably substantial, case law. This might have led to the conclusion that, in all those cases, even if the Posted Workers Directive was, indeed, shunned, and the schemes at hand were, indeed, restrictive (*ie*, harmful for the freedom regulated by Article 49 TEC), they were in fact justified by an overriding interest, which was actually acknowledged by a widely applied international convention – whence its *fundamental* nature. Unfortunately, the Court handed down that all schemes not conform to the boilerplate offered by the Posted Workers Directive were unacceptable, end of story. Seen in this context, the Posted Workers Directive thus appears like a text of a much heavier importance, since the Court took it to regulate, in the specific area of the posting of workers, the regime applicable to basically *all* possible exceptions to the rule enshrined in Article 49 TEC (56 TFEU).

This line of reasoning was more clearly explained in *Bundesdruckerei* where the Court retained that '(…) the imposition, under national legislation, of a minimum wage on subcontractors of a tenderer which are established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay are lower *constitutes an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State*. Consequently, a measure such as that at issue in the main proceedings is capable of constituting *a restriction within the meaning of Article 56 TFEU*. (…) Such a national measure *may in principle be justified by the objective of protecting employees expressly referred to by the legislature of the Land of North Rhine-Westphalia in the draft legislation which culminated in the adoption of the TVgG-NRW, namely that of ensuring that employees are paid a reasonable wage in order to avoid both*

'social dumping' and the penalisation of competing undertakings which grant a reasonable wage to their employees. (…) However, the Court has already held that, in so far as it applies *solely to public contracts*, such a national measure *is not appropriate for achieving that objective if there is no information to suggest that employees working in the private sector are not in need of the same wage protection* as those working in the context of public contracts.'[767] (emphasis added). In a nutshell, the Court explained in *Bundesdruckerei* that a national measure that requires that all providers of services, regardless of their nationality, pay the same wages to their employees hired to deliver a contract in the Member State that took that measure, constitutes a restriction to the freedom pinned in Article 56 TFEU. However, such a restriction *may* be justified by an overriding reason in the public interest (such as the avoidance of social dumping or, in certain conditions, the 'ensuring of the financial balance of the social security systems'[768]). As for 'the objective of ensuring the protection of workers' or that of 'of ensuring protection for independence in the organisation of working life by trade unions'[769], they may be accepted only inasmuch as *the conditions imposed by the Posted Workers Directive are met*[770] (again, an indication of the yardstick against which *all* exceptions to Article 56 TFEU are apparently to be measured, regardless of whether the Posted Workers Directive is effectively applicable or not[771]).

The most noticeable difference between *Rüffert* and *RegioPost*, on the one hand, and *Bundesdruckerei* on the other hand, is that, in the latter case, the Court carried out its assessment in a context characterized by the lack of any cross-border elements which to make the Posted Workers Directive applicable (although the issue at stake was identical, namely a requirement compelling the contractors to pay certain minimum wages to their employees) and thus focused, essentially, on the public procurement aspects.[772] This practically left it in a legislative vacuum, and forced it to conclude that, in a scenario where no services are performed abroad, a 'national legislation [the scope of which] extends to

[767] *Bundesdruckerei*, paras 30 to 32.
[768] *Rüffert*, para 42. The Court, again, appears to have admitted here that, exceptionally, certain economic reasons may be accepted as a policy justification for a restrictive measure.
[769] *Rüffert*, paras 38 and 41.
[770] *Rüffert*, paras 30 to 32. See also *RegioPost*, paras 71 to 74.
[771] As para 32 of the *Bundesdruckerei* decision seems to connote.
[772] Although, 'as the European Commission maintains, *the public contract at issue in the main proceedings appears, in the light of its objective and the amount of the contract, to come within the scope of application of Directive 2004/18, and assuming that the requirements relating to the minimum wage laid down in Paragraph 4(3) of the TVgG-NRW can be classified as 'special conditions relating to the performance of a contract', in particular 'social … considerations'*, which are 'indicated in the contract notice or in the specifications', within the meaning of Article 26 of that directive, *the fact remains that, in accordance with that latter provision, such requirements may be imposed only to the extent to which they are 'compatible with Community law'*.' (para 28, emphasis added).

cover a situation (…) in which *employees carry out a public contract in a Member State other than that to which the contracting authority belongs* and in which *the minimum wage rates are lower*, appears *disproportionate*.'[773] In short, the Court abstained from making its decision contingent (as in *Rüffert*) upon *solely* the circumstance whether that national measure was *universally* applicable or not (since it was not!)[774] and ran instead a basic traditional 'mandatory-requirements' test, only to conclude that such a measure, although acceptable in principle, was disproportionate in rapport to its concrete objectives (*ie*, the protection of employees[775] and the stability of social security systems[776]).

Even more surprisingly, in *RegioPost* (where the Posted Workers Directive was, again, applicable), the Court departed from its previous approach (as manifested in *Rüffert*) and assessed the concrete circumstances laid down before it by reference to Article 56 TFEU this time read through the prism of *both* the Posted Workers Directive *and* Directive 2004/18 on public procurement.[777] In fact, it concentrated all its effort on public procurement while demoting the Posted Workers Directive to an ancillary place. It thus firstly passed the questions addressed by the referring court through the sieve of Article 26 from Directive 2004/18 and only then did it refer to Article 3(1) of the Posted Workers Directive.[778] It thus concluded that, since Directive 2004/18 did not 'lay down exhaustive rules in respect of special conditions relating to the performance of contracts'[779], 'in examining whether the national measure at issue in the main proceedings is compatible with EU law, it is necessary to determine whether, *in cross-border situations in which workers from one Member State provide services in another Member State for the purpose of performing a public contract, the minimum conditions laid down in Directive 96/71* [which, as pointed out in its own Recitals but also in the relevant case-law, is an instrument of

[773] *Bundesdruckerei*, para 33 (emphasis added).
[774] Notwithstanding this, the Court reiterated its considerations previously rendered in *Rüffert* — where it resumed to note that '[t]he case-file submitted to the Court contains no evidence to support the conclusion that the protection resulting from such a rate of pay – which, moreover, as the national court also notes, exceeds the minimum rate of pay applicable pursuant to the AEntG – *is necessary for a construction sector worker only when he is employed in the context of a public works contract but not when he is employed in the context of a private contract.*' (*Rüffert*, para 40 – emphasis added) and concluded that, since the national measure under scrutiny in *Bundesdruckerei* concerned only public contracts, a justified exception to the rule set out in Article 56 TFEU may have been accepted only inasmuch as the Member State that took it managed to prove that 'employees working in the private sector are not in need of the same wage protection' (*Bundesdruckerei*, para 32).
[775] *Bundesdruckerei*, para 34.
[776] *Bundesdruckerei*, para 35.
[777] *RegioPost*, paras 60 and 66.
[778] P Bogdanowicz, 'Article 56 TFEU and the principle of proportionality: why, when and how should they be applied after RegioPost?' in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 34.
[779] *RegioPost*, para 59.

coordination rather than of harmonization][780] *are observed in the host member State in respect of posted workers*.'[781] Subsequently, the Court verified whether the interpretation of Article 26 from Directive 2004/18, made in conjunction with Article 3(1) from the Posted Workers Directive (see in this regard para 66 of the *RegioPost* judgement), holds water also when reading it through the prism of Article 56 TFEU, and concluded that it did (see para 69 of the judgement). This was a 'necessary exercise since Article 26 did not exhaustively harmonise special conditions relating to the performance of the contract.'[782]

Another key element is the fact that all the three cases (just as all the other cases included in the *Laval* quintet) revolve around the notion of 'pay' as used by Article 3(1) from the Posted Workers Directive — which, apparently, grants sufficient discretion for Member States. The Court had the chance to deal with this in several other cases, tightening rather than expanding that discretion.[783] This pecuniary aspect is determinant in a public procurement context (as it may lead to a possible exclusion of bidders otherwise more qualified to do the job). The fact that this aspect is regulated under the Posted Workers Directive makes it even more acute.[784] In this very complex legal framework, to require tenderers to pay their employees posted to perform the contract the 'minimum pay' set by the national law of the host Member State became more complicated than Member States would have wanted[785] as the Court told the components apart and decided that to impose a minimum

[780] See Recital 13 of the Posted Workers Directive. See also C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna (ESA)*, ECLI:EU:C:2015:86, para 31. See, to that effect, also the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, of 25 July 2003, on the implementation of Directive 96/71 in the Member States, COM(2003) 458 final, p. 7. This should mean that, as underscored by the Court itself in C-490/04, *Commission v Germany*, the material content of national rules to do with the posting of workers 'may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law' (para 19).

[781] Para 60 (emphasis added).

[782] C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 206.

[783] See for ex. *Laval*, or C-319/06, *Luxembourg*, or C-396/13, *ESA*, etc.

[784] To the contrary, the Court seems to offer some indices, at least in *Rüffert* and *Bundesdruckerei*, that other forms of discrimination, other than in relation to pay, may be accepted (*eg*, posted workers may be treated less favourably, in terms of working conditions, than local workers) – see A Koukiadaki, '*The far reaching implications of the Laval quartet: the case of the UK living wages*', (2014) 43 Industrial Law Journal 2, 89, 102.

[785] In fact, following the pattern developed by the Court throughout its case law on posted workers, several Member States (all Northern countries) called for the modernization of the Posted Workers Directive and for its alignment with the EU Regulation 883/04 on coordination of social security, pushing for 'even more equal treatment' – see C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 209. In response, the Commission came with a reformed draft proposal - COM/2016/0128 final which was, in the end, and after a strong opposition from an important number of Member States, revamped (see COM(2016) 505). The most important effect of this new Directive is the equal treatment in respect of pay — a principle now generally applicable, with a legal basis for this considerably extended (based on a firm recommendation from the European Parliament who proposed to include, besides the TFEU paragraphs on the freedom to provide services, also Articles 151 to 153 on workers' rights – see

salary is one thing, whereas to require tenderers to pay out also all the necessary ancillary costs associated with the procured work and workers (such as a minimum daily allowance, or meal vouchers, or overtime pay, or transport and accommodation, or insurance costs etc.) is a totally different thing. The Court thus appears to have taken the narrower path, deciding that only those costs closely linked to the posting could be considered as being part of the minimum pay referred to by the cited Article 3.

Unfortunately, none of the three cases discussed under this Section succeeds in clarifying how the relation between Article 56 TFEU, the Directives on public procurement and the Posted Workers Directive should be construed.[786] This in the end might engender serious problems in practice as, although the Posted Workers Directive explicitly endorses its legality, the payment of minimum wages remains a criterion rather fit for the *performance* of a public contract (*ie*, in the post-awarding phase) and can rarely be wielded *before* the contract having been awarded. Moreover, as the CJEU case law has shown so far, the conditions in which it can be applied depend very much on the concretely applicable legal framework (so that, what is apparently legal under the Directives on public procurement might not be legal where also the Posted Workers Directive applies. Certain particular aspects of this assertion have in fact already been discussed above).

As the academia rightly noted[787], the Court shunned, in *RegioPost*, and as opposed to its two previous decisions, any assessment of proportionality. But this might not be *that* weird as these authors claimed.[788] In *Rüffert* and *Bundesdruckerei* it applied the proportionality test because the Posted Workers Directive was either not applied or not applicable, whence the need to go for an additional test which to measure the righteousness of the two national laws *directly against Article 56 TFEU*. In *RegioPost*, on the other hand, the Court acknowledged that the Posted Workers Directive *was* applicable, and was *correctly applied*, so that the national measure under scrutiny was assessed as legal and conform to the Union law *ex officio*, without being necessary to apply further tests. This made some claim that, in doing so, the Court failed to explain why a national measure that applied only to

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http://europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-labour/file-revision-of-the-directive-on-the-posting-of-workers-labour-mobility-package).

[786] See C Barnard, '*More posting*' (2014) 43 Industrial Law Journal 194. The author assumes that there are certain areas which are exhaustively harmonized by the Posted Workers Directive and identifies three possible scenarios which may define the relation between Article 3(1) of Directive 96/71 and Article 56 TFEU. The latter would thus apply only to those areas falling outside the scope of the exhaustive harmonization proposed by the Directive.

[787] P Bogdanowicz, '*Article 56 TFEU and the principle of proportionality: why, when and how should they be applied after RegioPost?*' in A Sanchez-Graells (ed), 'Smart public procurement and labour standards. Pushing the discussion after RegioPost', Hart Publishing, 2018, 40 *et seq*.

[788] Ibidem.

public contracts was assumed as appropriate and necessary for the protection of posted workers in general and, further, why the Court did not comment anything on the difference of treatment between public and private employees,[789] resuming to point to Article 26 from Directive 2004/18 for justification. In response, other authors underscored that it is precisely the fact that the Court took into account the 'public procurement context' in which the national rules had been adopted (this being the first time when the Court factored in this aspect in its reasoning, although many other previous cases entailed a similar context) which made the difference (and justified the confinement of those rules to public contracts).[790] What the Court did in *RegioPost* was in other words to clarify that, although the posting of workers requires, in general, equal treatment in the areas explicitly (and limitedly) indicated in Article 3(1) from the Directive, a condition imposed in a public contract award procedure on tenderers to observe certain minimum pay standards is valid even if those standards were legally fixed only with regard to employers hired to deliver a public contract but not also for those involved in the provision of a private one. This exceptional derogation from the equality of treatment was justified, as clarified by the Court, by the mere fact that public contracts enjoy a special, derogatory regime, which allows of such a specific (and limitedly applicable) form of social protection.

In reality, since *Rush Portuguesa*, 'social dumping' in the form of posting workers for the delivery of a public contract in other Member State has been seen as one of the most problematic issues in the internal market.[791] In *Rüffert*, *Bundesdruckerei* and *RegioPost*, this matter just reached some acute tones given, on the one hand, the applicability of the Posted Workers Directive (the askew interpretation of which had already funnelled a flurry of reactions after *Viking* and *Laval*) and, on the other hand, the intricacy of the German

[789] F. Costamagna, '*Minimum Wage in EU law between public procurement and posted workers: anything new under the sun after the RegioPost case?*' (2017) 1 European Law Review 109. See also A Fratini, 'Minimum wages in the award of public contracts after RegioPost', in M Crew, P Parcu and T Brennan (eds), '*The changing postal and delivery sector. Topics in regulatory economics and policy*', Cham, Springer International Publishing, 2017 who insists on the risks associated with this solution, the most sensitive one being that of inevitably splitting workers (*eg*, even within the same company) into two categories governed by two sets of rules, with two different levels of wages.

[790] See C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 206. According to other authors, the mere fact of imposing, in line with Article 26 from Directive 2004/18, certain minimum wages (with the full observance of the Posted Workers Directive) as a condition for the performance of a *public* contract, would suffice to qualify the national norm that sets it as conform to Article 56 TFEU. Otherwise, to require that any norm that is designed to regulate, limitedly, the performance of public contracts apply in general to all contracts would mean to leave Article 26 devoid of any meaning and applicability – see C Kaupa, '*Public procurement, social policy and minimum wage regulation for posted workers: towards a more balanced socio-economic integration process?*' (2016) 1 European Papers, 135 *et seq*.

[791] For an in-depth discussion, see M Bernaciak (ed), '*Market expansion and social dumping in Europe'*, Routledge, 2015, esp. 94 and 163.

legal system.[792] However, in the actual framework, there are clear indications that both the Court of Justice of the Union and the European legislature are rather tempted to prioritize the principle of equal treatment (at least with regard to pay) — consecrated in also Article 18(1) from Directive 2014/24, to the chagrin of that of differentiation — on which the Posted Workers Directive is based.[793] The differentiation principle implies, in the essence, that posted workers are *not* to be treated similarly to national workers, including migrant workers (as explicitly stipulated by Article 45 (2) TFEU), but according to the rules of their home State. This rule is explicitly buttressed by also the Rome I Regulation (see for ex. Article 8(2) thereof). Article 45 TFEU, on the other hand, allows of limitations – to the principle of equal treatment – only where they are 'justified on grounds of public policy, public security or public health'. To the principle of differentiation, the Posted Workers Directive consents a few exceptions too. This would make applicable, to posted workers, the law of the *host* State. In *Bundesdruckerei*, on the other hand, the scheme was not black-and-white clear, but distorted by the lack of a necessary cross-border element: the contract was, indeed, awarded by a contracting authority located in another Member State than the winning bidder, but the services which made the object thereof were to be provided in that bidder's own State, with national employees. This situation excluded any conflict of principles, and the Court was firm in deciding that the State where the authority was headquartered had no competences to force the application of its own rules to the employees of another State which were hired to deliver the contract, since there was no interest to protect them and such a condition would infringe Article 56 TFEU.

Interestingly, in both *Rüffert* and *Bundesdruckerei* the Court pointed straight and without any hesitation to the internal market rules, insisting on the idea that home companies and their employees should not be discriminated against by measures which prevent them from participating in public procurement procedures on reasons to do with their nationality. The Court thus saw, as it did in *Laval*, the possibility to impose higher standards through sectoral collective agreements as a holdback for economic performance (a perspective which, seen especially through the eyes of social law pundits, appears to be

[792] See T Novitz, 'Collective bargaining and social dumping in posting and procurement. What might come from recent Court of Justice case law and the proposed reform of the Posted Workers Directive?', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 219 *et seq*.

[793] C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 196.

disregarding the importance of collective action for the health of any economy in general).[794] It hence considered that the improvement of wage standards cannot be pursued independently in the context of the internal market, a conclusion which some took to go against the idea of a 'social market economy'.[795]

In a nutshell, it appears that, in line with the views of the Court, it is, in principle, possible to require tenderers to pay their workers the *legal* minimum wage in place in the country where the contracting authority is located, but this becomes problematic when the minimum wage is not applicable to all categories of operators or where the contract is supposed to be delivered, at least partly, in another Member State. This possibility was however discussed by the Court only as a condition for the performance of contracts, leaving the debate open with regard to the possibility of using the same wages not as an obligation but as a right, or an alternative (*eg*, by setting it in the form of an award criterion based on which tenderers who refuse to engage to pay their workers wages over the minimum threshold indicated by the contracting authority receive no points while the tenderer who pays the highest wages receives the best scoring *etc*).[796]

3. Some necessary conclusions

Throughout its case law (especially since *Cassis de Dijon*), the Court confirmed that Member States can successfully submit justification arguments on any public interest grounds they might consider relevant, for basically any national measures that do not fall within the scope of Articles 36, 45 and 52 TFEU but are discriminatory or, without being discriminatory, obstruct the free intra-Union trade (*ie*, which are discriminatory 'in effect').[797] The Court has confirmed that such measures may be justified 'in order to meet imperative

[794] L Rodgers, 'The operation of labour law as the exception: the case of public procurement', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 161.
[795] Ibidem.
[796] Some authors consider, based mainly on the *Max Havelaar* judgement (which refers to certain fair trade criteria which supposedly include the payment of a wage premium not set out in a mandatory or otherwise generally applicable legislation) that award criteria to do with the payment of a living wage may also be justified, provided that they meet all the conditions required by law for award criteria, in general – see A Semple, 'Living wages in public contracts: impact of the RegioPost judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 71.
[797] N Nic Shuibne and M Maci, *'Proving public interest: The growing impact of evidence in free movement case law*' (2013) 50 Common Market Law Review 4, 971.

requirements'[798] or by 'overriding reasons in the public interest capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty'.[799]

Basically, the Court found in most of these cases that the objectives fixed through the national laws at stake were in principle incompatible with the Community law (which it had granted full priority anyway) because, *in effect*, they made the access of foreign traders to those domestic markets more difficult ― as compared to national traders. It thus concluded that, even if, in theory, social considerations *may* be given a central place in public procurement competition, many of the solutions chosen by Member States were, in the particular contexts under scrutiny, wrong. The Court however pointed to the correct solutions barely occasionally and, where it did, it did it rather circumstantially and indirectly (see, for example, the *Max Havelaar* case).

In other cases, though, the same Court preferred to simply dismiss the national rules under scrutiny under the argument that they were incompatible with the Community law, without a further assessment of their importance in responding to a fundamental public interest. It is worth citing here the cases C-21/88 *Du Pom* [1990] ECR I-889, C-351/88 *Laboratori Bruneau* [1991] ECR I-3642, or C-360/89 *Commission v Italy* [1992] ECR I-3401.[800]

Anyway, where the Community policy objectives at hand were strong enough to supersede the national policy interests, things were pretty simple. The Court had always pronounced, in such cases, in favour of the first. Things got gnarled when the substance of the two policies in collision was equally important. This sort of collision was acknowledged most often in the area of the freedom to provide services – although the Court applied the same matrix developed in the freedom of movement of goods line of cases, most prominently in *Cassis de Dijon* and, following that, in *Keck* – and, even more specifically, in the area of public procurement of services (where some sensitive issues have however been solved by the adoption of the Posted Workers Directive which clarified that 'Member States shall ensure that, *whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and*

[798] See *Trailers*, para 59.
[799] See Case C-384/08 *Attanasio Group Srl v Comune di Carbognano* [2010] ECR I-2055, para 51. In this case, the Court confirmed, in explicit terms, that 'a restriction on the fundamental freedoms enshrined in the Treaty may be justified only if the relevant measure is *appropriate* to ensuring the attainment of the objective in question and *does not go beyond what is necessary* to attain that objective'.
[800] For a critical assessment, see J M F Martin and O Stehmann - "*Product market integration versus regional cohesion in the Community*" (1991) 216 European Law Review 16, 70.

conditions of employment covering the following matters – which, in the Member State where the work is carried out, are laid down:(…)' emphasis added.

In this context, it would probably be useful to recall the Alexy's 'law of balancing', according to which in handing down in favour of one principle (or value) versus another, it is not the weight (*ie*, the 'value') of a fundamental right that should count (or its 'fundamental' nature), but the gravity of the infringement and the importance of the 'favoured' right in meeting a general interest.[801] Of course that, as clamoured by others, this approach would leave the Court with an unacceptable wide arbitrary judicial discretion which is difficult to justify based solely on the basic principles of democracy, respect for human rights and the rule of law.[802] Consequently, the CJEU avoided this trap by resorting, occasionally, to 'categorization'.[803] Unfortunately, this alternative was not used to its fullest extent. In *Laval*, for example, the Court adopted instead a functional approach, rejecting the arguments raised by the Swedish labour unions and the Danish and Swedish Governments (that the right to take collective action fell outside the scope of Article 56 TFEU since, according to Article 153(5) TFEU, the Community had no competence to regulate that right) and deciding that, regardless of the fact that in the areas in which the Community does not have competence the Member States remain, in principle, free to set the conditions for the existence and exercise of rights as that at issue, they must nevertheless stay close to the Community law, avoiding any forms or 'arbitrary discrimination or a disguised restriction on trade'.[804] In hindsight, however, the Court appears to have applied the 'law of balancing' in most of the cases to do with the protection of fundamental rights (and in particular of social rights) as an exception to the principle of free movement.[805] It used to this purpose a —

[801] R Alexy, '*A theory of constitutional rights*', Oxford University Press, 2002, 102.
[802] S Greer, *'"Balancing" and the European Court of Human Rights: A contribution to the Habermas-Alexy debate*', (2004) 63 Cambridge Law Journal 2, 413.
[803] It did so for example in those cases where it has chosen to classify certain activities as non-economic therefore falling outside the scope of the internal market rules. See for ex. cases C-159/90, *Society for the Protection of Unborn Children Ireland* or C-137/09, *Josemans*, [2010] ECR I-13019. But, as remarked by some authors, 'The substantive public procurement rules and mainly the public sector Directive suffer from legal porosity as a result of [non-] exhaustive harmonisation. Exhaustive harmonisation represents a de lege lata approach to public procurement regulation on the part of the Community legislature. Such approach has developed certain deficiencies. The effectiveness of the procurement rules is thus compromised and the Court has applied, through a rule of reason approach, a hybrid transplant of Community principles on the public procurement Directives in order to control their porosity. However, this treatment is temporary and not conducive to legal certainty and legitimate expectation.' – see C Bovis, '*The challenges of public procurement reform in the single market of the European Union*', (2013) 14 ERA Forum 1, 35 *et seq*, at https://link.springer.com/article/10.1007/s12027-013-0286-z, 56.
[804] S A de Vries, '*Balancing fundamental rights with economic freedoms according to the European Court of Justice*', (2013) 9 Utrecht Law Review 1, 171.
[805] S A de Vries, '*Tensions within the internal market: the functioning of the internal market and the development of horizontal and, flanking policies'*, Europa Law Publishing, 2006.

riskily flexible — 'proportionality test', which it usually applied in stages. Under this test, it first used to seek for relevance (pertinence), that is for a connection between the contested measure and the aim pursued (irrelevant measures had to be stifled); once that notched, it usually moved to check for alternative measures which to be less restrictive for the intra-Community trade (if such less restrictive alternative were there, the contested measure could not pass the test); lastly, provided that the previous two elements were met, it would verify the 'proportionality' of that measure *stricto sensu*, that is, whether the resulting restriction is (or not) disproportionate to the purported aim. However, the intrusiveness of the proportionality test applied by the CJEU in its case law appears to have been contingent upon several aspects among which the most important ones were the public interest at stake and the regulatory instrument used by Member States.[806] The stronger the public interest, the wider the margin for discretion.

With particular regard to social rights and social policy goals, the Court allegedly made a slight detour, applying the proportionality test 'with a touch', turning it into a 'double proportionality test'[807] (as already anticipated in *Schmidberger*). It thus preferred not to confine its analysis to a mere unidimensional assessment of the pertinence and the necessity of the restriction to a fundamental freedom as required by the protection of a fundamental (social) right but moved further and assessed fundamental rights as prime objectives of the Treaties, placed on a par with the four fundamental (economic) freedoms, and hence applied the same test, upon the concrete circumstances, also *vice-versa*[808]. This

[806] de Vries (n 804), 173.
[807] Ibidem, 191.
[808] See, for ex,, the Opinion of AG Trstenjak of 14 April 2010 in Case C-271/08, *Commission v Germany*, [2010] ECR I-7091, paras 189-193. Mrs Trstenja stressed there that '[f]or the purposes of drawing an exact boundary between fundamental freedoms and fundamental rights, the principle of proportionality is of particular importance. In that context, for the purposes of evaluating proportionality, in particular, a three-stage scheme of analysis must be deployed where (1) the appropriateness, (2) the necessity and (3) the reasonableness of the measure in question must be reviewed. (…) *A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom*. (…) Having regard to the broad convergence between fundamental freedoms and fundamental rights, in the event of a conflict, only this analysis based on the principle of proportionality is capable of producing an outcome which ensures the optimum effectiveness of fundamental rights and fundamental freedoms. (…) In the light of my observations above, I conclude that *a restriction on a fundamental freedom must be regarded as justified if that restriction arose in the exercise of a Community fundamental right and was appropriate, necessary and reasonable for the attainment of the interests protected by that fundamental right. Conversely, a restriction on a fundamental right must be regarded also as justified if that restriction arose in the exercise of a fundamental freedom and was appropriate, necessary and reasonable for the attainment of the interests protected by that fundamental freedom*. (…) Moreover, confirmation of this approach characterised by an equal ranking of fundamental rights and fundamental freedoms in which the principle of proportionality serves as the basis for the resolution of conflicts between the exercise of fundamental freedoms and the exercise of fundamental rights

exercise made it conclude that 'it must be presumed that the realisation of a fundamental freedom constitutes a legitimate objective which may limit a fundamental right. Conversely, however, the realisation of a fundamental right must be recognised also as a legitimate objective which may restrict a fundamental freedom.'[809] Surprisingly though, in *Laval* and *Rüffert* the Court seemed to have gone the other way around, hinting at the idea that '*Community fundamental social rights as such may not justify – having due regard to the principle of proportionality – a restriction on a fundamental freedom* but that *a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found*', which '*sit[s] uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms*.'[810]

On the other hand, by 'individualising' the four freedoms that lay at the foundation of the internal market, the Court actually turned them into genuine *rights* (which it proclaimed as directly applicable — see for ex. *Laval*), transforming these principles, from mere instruments, or *means*, to *an end* in itself and by itself.[811] This appears to have had the perverse effect of rendering the internal market rules prevalent over other fundamental rights (see, again, *Laval*, *Rüffert*, or *Bundesdruckerei GmbH etc.)* even where a normal axiology (or, in the logic of the Alexian rule of balancing) would have demanded otherwise.

In other specific circumstances however (particularly where concrete *social* rights, especially those consecrated by the Treaties, were assumed as fundamental for the *economic* integration of the internal market before anything else[812]), the Court was ready to make concessions, deciding in favour of the social rights at hand. An eloquent example is the case of social dumping — the effects of which on competition were stressed even during the negotiations of the EEC Treaty[813] which led to the inclusion of Articles 119 and 120[814] in the Treaty of Rome (now Articles 157, 158 TFEU). This might explain for example the decisions

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would not constitute a fundamental reorientation in the case-law. Instead, this analysis implies a return to the values already inherent in *Schmidberger*. (…) In addition, in *Rüffert*, one can detect the first signs of a need to qualify the approach taken in *Viking Line* and *Laval un Partneri*.' (emphasis added).

[809] Ibidem, para 188.

[810] Ibidem, para 183 (emphasis added).

[811] A Ward, 'More than an infant disease? Individual rights, EC Directives and the case for uniform remedies', in J Prinssen and A Schrauwen (eds), '*Direct effect – rethinking a classic of EC legal doctrine'*, Europa Law Publishing, 2002. See also T Eijsbouts, 'Direct effect, the test and the terms: in praise of a capital doctrine of EU law', in J Prinssen and A Schrauwen (eds), '*Direct effect – rethinking a classic of EC legal doctrine'*, Europa Law Publishing, 2002.

[812] See C Barnard, 'Fifty years of avoiding social dumping? The EU's economic and not so economic constitution', in S Currie and M Dougan (eds), '*50 years of the European Treaties: looking back and thinking forward'*, Hart, 2009.

[813] See the Report of the Heads of Delegation to the Ministers of Foreign Affairs (the so-called 'Spaak Report'), (Brussels, 21/05/1956), 62-63.

[814] Respectively on equal pay for men and women and paid holiday schemes.

rendered in *Defrenne*[815] (where the Court postulated for the first time the direct effect of Article 119) or *Lilli Schröder* (cited above), but not also (at least not directly) those handed down in *Laval* or *Rüffert* (two typical examples of social dumping that called into question the legality of the advantage that a foreign service provider could have secured over all domestic competitors by posting in the host State national workers placed under lower standards of employment). The evolution from *Defrenne* to *Laval* and *Rüffert* shows that the Court's case law suffered a (per)mutation: from treating fundamental social rights as a dampener or hedge against the drawbacks of the unrestricted freedom of movement (or establishment) — in the context of economic integration — to an acknowledgement of the dual (economic *and* social) purpose of the internal market (which actually resulted in the need for striking a balance between two *fundamental rights*[816]). In is therefore quite interesting to see how the CJEU case law on various aspects of labour law (in the context of the EU's economic integration) has evolved from *Rush Portuguesa* or *Albany* (where social rights were simply found to fall outside the competition rules) to *Viking*, *Laval* or *Rüffert*, *etc* (where the same rights have been found to be in open conflict with the internal market rules, which made the Court enter into a balancing exercise that proved detrimental to the national labour laws at stake).

Even more interesting, in the context occasioned by the exercise of the Union citizenship rights, and following the *Baumbast* ruling[817] which exposed Member State measures (taken in the implementation of a Directive) to a stricter proportionality test (at the centre of which laid the personal, human feature of the citizenship rights), some claimed that the same (more personal prone) test should also be applied to other social measures that accompany the exercise of economic activities, including Article 3(1)(c) of the Posted Workers Directive.[818] This suggestion was apparently ignored by the Court in *Laval*, *Commission v Luxembourg* or *Rüffert* where it put on the scale the fundamental freedom of movement against the national social measures aiming at workers' protection and referred to the anti-social dumping scope of the Posted Workers Directive to conclude that the economic freedom should prevail (but not because the social right was weaker, but because the conditions set for its exercise went beyond the boundaries set by the Union law!).

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[815] See Case 43/75 *Defrenne*, para.9.
[816] See for ex. the arguments adduced in *Viking* – in particular paras 77 to 79 and 87.
[817] Case C-413/99 *Baumbast*, [2002] ECR I-07091.

[818] See M Dougan, '*The constitutional dimension to the case law on Union citizenship'*, (2006) 31 European Law Review 5, 613, 618, and 636. To wit, the Court had already imposed, even before the coming into force of the Posted Workers Directive, a proportionality test in relation to minimum pay – see Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189.

Given the continuously moving boundaries within which social criteria may be promoted via public procurement — as a perusal of the CJEU case law would demonstrate, especially in those areas where the Court was called to clarify the scope left for Member States to pursue social policy objectives and use social criteria of a national import through public procurement in either the context of Articles 36, 45 or 52 TFEU, or beyond them, that is, in the moving-sands zone of mandatory requirements — Member States and contracting authorities are often confused and need to find safe harbours. For example, national minimum wages are quite common in the EU.[819] On the other hand, there still is a very sensitive difference between 'minimum wages' and 'living wages' (with the latter carrying an even more obtrusive social load).[820] However, choosing the latter to the detriment of the first might result in an unacceptable restriction on competition hence in an irremediable breach of the EU internal market rules. This because the view that 'labour and social standards flow from economic development but do not generally contribute to it'[821] made the European institutions adopt a cautious stance and remain, maybe for a too long time, as close as possible to the original meaning of the 'value for money', requiring in general an as close a connection as possible between social policy benefits and the goods or services that are being procured.[822] In this light, a requirement to pay living wages would be much harder to justify than that to pay minimum wages which enjoys a legal consecration.[823]

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[819] For an in-depth discussion, see A Semple, 'Living wages in public contracts: impact of the *RegioPos*t judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 69 et seq.

[820] See C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 204. The author adduces the example of the 'national living wage' consecrated by the UK budgetary law v. the 'UK living wage' not legally binding but heavily used in practice.

[821] H Kountouros, '"Quality at Work" after the Lisbon Strategy: is there a future*?*' in M A Moreau (ed), '*Before and after the economic crisis: what implications for the European Social Model?*' Edward Elgar Publishing, 2011, 60.

[822] A Ludlow, '*Social procurement: policy and practice'*, (2016) 7 European Labour Law Journal 3, 480.

[823] This discrepancy is even more evident after ILO Convention No.94 (which, without speaking explicitly of the possibility to set living wages, lets all stakeholders presume that it is not impossible) was brushed aside in the context of the adoption of the new Directives on public procurement – see for ex. P Clarke and C Jakob, '*The new EU Directives on public procurement: a step forward for green and social public procurement'*, EPSU, 2016, who consider that 'The absence of a reference to ILO Convention 94 means that the application of collective agreements and other social clauses such as 'living wages' to posted workers remain contested'. But, according to other authors, it nevertheless *is* possible to require that tenderers pay their workers a living wage (not legally binding), but only for local and migrant workers, in the conditions laid down in Articles 56 and 45 TFEU. This would, on the other hand, *not* be possible with regard to posted workers, since the Posted Workers Directive specifically requires that such wages be laid down by law or collective agreements universally applicable (which automatically throws them into the definition of 'minimum rates of pay' used by Article 3(1)(c) from the Posted Workers Directive). For a detailed argumentation, see C Barnard, 'Fair's fair: public procurement, posting and pay*'*, in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 204. Anyway, we see very relevant, in this context, the response of Commissioner McCreevy (to a question raised by Mr. Jean Lambert, MEP), who

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The case law discussed above only demonstrates that there are no risk-free zones. Not even the patterns developed by the CJEU are a constant (as the Court moved from a rather rigid interpretation of Articles 18, 34, 45, 49 or 56, *etc* TFEU, to a significantly more flexible – hence more unpredictable – one, where the assessment focused not on the presence or, upon the case, the absence, of *discrimination*, as such but, rather, on the concrete *effect* of various national rules on the access of foreign traders to the domestic market of their issuers. And, as if it wasn't enough, this 'market access' test was, occasionally, altered or completed with other elements, or even accompanied with other additional tests – especially in the context of 'fundamental rights', which only made it even more instable and harder to grasp.

Unfortunately, nor is the CJEU case law to do, concretely, with public procurement more helpful. In fact it is even more evasive ─ at least when it comes to clarifying exactly how much social can public procurement take in in the current EU legal context. The Court appears, in all those cases, to be conceding, in merely general terms, that there *is* certain compatibility between the economic and the social dimensions of the EU laws on public procurement, yet without going further to see how this 'legal' compatibility is reflected in practice in *functional* terms, and without evincing a *straight* compatibility with the *EU law in general*.[824] Thus, at least in its earlier decisions, while acknowledging the compatibility of various social (in principle, labour law) considerations with the Directives on public procurement, the Court refused to verify whether they have a concrete discriminatory effect *in practice* (see for ex. *Beentjes* or *Nord-Pas-de-Calais* where the Court left the discrimination test on the national courts) and, once the presence of discrimination evidenced, to further check for eventual justifications.

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insisted that '[l]iving-wage conditions *may* be included in the contract performance clauses of a public procurement contract provided they are not directly or indirectly discriminatory and are indicated in the contract notice or in the contract documents' – see the European Parliament, 'Answer given by Mr McCreevy on behalf of the European Commission', 11 March 2009, at http://www.europarl.europa.eu/sides/getAllAnswers.do?language=EN&reference=P-2009-0922 (emphasis added). In his response, Mr. McCreevy also clarified that, '[i]n addition, [the living wages] must be related to the execution of the contract. In order to comply with this last condition, contract performance clauses including living-wage conditions must concern only the employees involved in the execution of the relevant contract, and may not be extended to the other employees of the contractor.'

[824] R Caranta, 'Sustainable public procurement in the EU', in R Caranta and M Trybus (eds), '*The law of green and social procurements in Europe*', DJØF, 2010, 15, 19-26.

In reality, local employment conditions are, by their nature, discriminatory and any test would confirm that.[825] And, although the Court conceded, in a number of cases (see for ex. the *PreussenElektra* case discussed above), that punctual restrictive measures could be permitted in a public procurement context, depending on the concrete circumstances, even when directly discriminatory, this could be much harder to accept in relation with social and, in particular, labour law considerations.[826] The decisions in *Laval*, *Rüffert*, or *Bundesdruckerei* are relevant in this regard.

Even more importantly, the lack of clarity with regard to the test applied by the Court in each of these cases makes all these decisions very hard to codify for a *safe* future use (for example it is not very clear whether it treated the national measures brought under its scrutiny as pertaining to specific social policies – which could have placed them under the realm of Articles 36, 45 or 52 *etc* TFEU, or just as occasional examples of 'mandatory requirements'). On the other hand, without (or outside) a clear, uniform model assumed at the EU level, all the restricted measures which the Court accepted as compatible with the EU law are doomed to remain isolated (*ie*, in their own contexts, being rather hard to replicate in other, non-identical circumstances). In the case of the exceptions offered by Articles 36, 45 or 52 TFEU, for example, a finding suggesting that a policy developed by a Member State is justified would probably save (subject to that concrete situation) many restrictive measures taken under its umbrella (inasmuch as they are, of course, inevitable and proportionate to the relevant scope), including those imposed through public procurement schemes. But this is not enough to make that policy a safe harbour *forever*, with regard to *all* measures, without distinction, and in *all* Member States.[827] In the specific case of mandatory requirements, a similar finding would be pregnant with even more randomness and risks.[828]

A particular attention ought to be paid also to the socio-political-economic contexts in which the majority of CJEU decisions came out. Influenced by either economic, or political, or, finally, social crises, many of these decisions were in general used to entrench the trust in the internal market, especially in times when the trust in the European institutions themselves was low. Moreover, in the aftermath of the repeated *economic* crises (which

[825] L Rodgers, 'The operation of labour law as the exception: the case of public procurement', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 158.
[826] Ibidem.
[827] As national contexts differ from one moment to another and from one state to another and what in one state may be opportune at a particular moment, in others may be not *etc*.
[828] As such 'requirements' usually require extemporaneous measures (not subsumed under a concrete policy, hence unsystematic), which are hard to replicate, legitimately, in other circumstances, or political, economic or social arrangements *etc*.

inflicted serious damages on national economies and communities), public procurement was inevitably seen as a good way to re-balance budgetary austerity and a very efficient means of implementation for stringent social policy goals. So, after a decade of repeated assaults aimed at protecting the internal market[829], starting with the 2000s, public procurement has started to be touted, at both the EU and the Member States' level, for, among others, its capacity to help reducing unemployment and skills shortages.[830] This change at the political level started, hence, to be, inevitably yet surprisingly hesitantly, reflected also in the CJEU case law.

In parallel, social tensions that accompanied the successive ways of EU's enlargement necessitated the adoption and the subsequent adaptation of new dedicated instruments. The Posted Workers Directive was initially devised to respond to the difficulties raised by the posting of workers in the context of the freedom to provide services throughout the internal market. But, after the accession of the Eastern European countries after 2004, the Western market was flooded with an impressive mass of cheap workforce.[831] The problems that came with that 'invasion' made it clear that a reform was needed, as the social problems that accompanied in general the posting of workers were not to be solved without damages. A compromise was hence vital.[832] The CJEU struggled, indeed, to conciliate the surging tensions, but many of the solutions it offered were rather controversial and not a trustful source of 'good practice'.

In this context, the European social model started to shape up and get more and more substance, as the solutions developed thereunder have grown to offer sufficient leeway for Member States to adopt policies protective of their own nationals and pursue the goals thus established through also public procurement mechanisms.[833] We will insist, in the

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[829] C McCrudden, '*Buying Social Justice: Equality, Government Procurement and Legal Change'* Oxford University Press, 2007, 330 to 334. The author cites the repeated infringing proceedings brought by the Commission against Member States for allowing their contracting authorities to use public procurement in the pursuing of various social (or environmental *etc*) goals.

[830] A Semple, 'Living wages in public contracts: impact of the RegioPost judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 72.

[831] According to the EC's staff working document 'Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services - SWD(2016) 52 final, between 2004 and 2007 the number of posted workers surged with 45%.

[832] As the same Impact Assessment document sets forth: 'The general objective [of the reform in the field of labour law and in particular the posting of workers] is to ensure the smooth functioning of the Internal Market by adapting the terms and conditions set by the 1996 Directive to the new economic and labour market conditions, *diverting the basis of competition away from wage costs and workers' working conditions and thereby increasing the fairness of the Internal Market*.' (20, emphasis added).

[833] A collection of very good examples of good practice developed in the Member States based on national policies crafted under a European social model is offered by Landmark Projects like '*Success Stories in Socially Responsible Public Procurement*' or '*Moving Towards Socially Responsible Public Procurement*' (2014)

next Chapter, on the evolution of this model and on the specific instruments that it has brought forth (instruments that were eventually used to force the inclusion of social elements into public procurement and give this process an apparent legality). We will also argue that the elements of certainty and uniformity brought by the European social model are, or can be, an efficient cure for the limitations and risks usually associated with the development of national policies (and that such limitations still remain, but only ― or mainly ― with regard to those policies or measures implemented outside its scope).

available at https://landmark-project.eu/en/landmark-in-action/successful-examples/ and https://iclei-europe.org/projects/?c=search&uid=txrW2DTh respectively etc. For a very recent collection, see the volume '*Making socially responsible public procurement work: 71 good practice cases*', available at https://op.europa.eu/en/publication-detail/-/publication/69fc6007-a970-11ea-bb7a-01aa75ed71a1.

CHAPTER IV
THE EUROPEAN SOCIAL MODEL AND ITS ROLE IN THE SHAPING OF THE INTERNAL MARKET.
(FUNDAMENTAL) SOCIAL RIGHTS v FUNDAMENTAL FREEDOMS

In spite of what Article (2) of the Treaty of Rome stipulated, it was not until 1974 – when the first Social Action Programme (SAP) was adopted – that the European Union (then only a 'Community') began to take a more active role in the promotion of a 'social dimension', and not until 1980 that the idea of a 'social space' (′espace social') which to complement the 'economic space' of the Community became a core feature of the reformed European policy structure. This 'social space' was seen by its father, Mr. Jaques Delors, as an efficient escape from the impasse in which the Community and Member States were trapped over the social dimension of the European integration process.[834]

As a consequence, the Single European Act introduced several key social-policy 'flanking measures' with the aim to complement the Community's economic policy and thus to complete the single market. This was the context in which the idea of creating a pool of structural funds (which to reach both economic but also social targets) saw the light. The effort became nonetheless more visible in 1989, when the Social Charter was adopted.[835] The Social Charter laid the basis for the elaboration of a distinct Agreement on Social Policy which was enclosed into the Treaty of Maastricht and which occasioned the extension of the EU's competence in new areas. Soon thereafter, in the mid-1990, the European Commission released two important White Papers, insisting on the need to find an efficient way to reduce unemployment and increase employment opportunities through radical changes in the EU economy[836] and to acknowledge employment as the key to both economic and social integration.[837] Later on, the Agreement on Social Policy became an integral part (Title VIII) of the Amsterdam Treaty and thus the social face of the Union was officially (and definitively) exposed and assumed at the highest (constitutional) level. The apex of this evolutionary process was nonetheless reached in the Treaty of Lisbon.

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[834] R Sykes, '*Crisis? What crisis? EU enlargement and the political economy of European Union social policy'*, in (2005) 4 Social Policy and Society Review 2, 208, 209.
[835] Ibidem, 210.
[836] White Paper on Growth, Competitiveness, Employment (1993), at https://op.europa.eu/en/publication-detail/-/publication/0d563bc1-f17e-48ab-bb2a-9dd9a31d5004.
[837] European Social Policy - a way forward for the Union - a White Paper (1994), at https://op.europa.eu/en/publication-detail/-/publication/16dfe2c0-7fc9-4079-9481-e5de54a3805a/language-en.

In spite of these efforts to bring together the economic and the social dimensions of the European construct, many aspects were left uncovered and so the integration process, exposed to failure ─ largely because these gaps left the inevitable conflict between the two fundamentally different dimensions of the Union, one enshrined deep in the economy of the internal market (the economic facet) while the other, at the core of the national welfare states (the social facet), unsolved.[838] In this conflictual environment, it is the Court of Justice of the Union who was left with the ingrate role of shaping the most sharped edges in order for all these pieces to interpose smoothly. This nevertheless entailed some inherent important risks since, as Prof. Catherine Barnard put it, "the type of federalism that the Court of Justice is responsible for shaping must leave space for the sub-units (the states) to regulate and develop at least the matters which form the core of the welfare state, as well as social policy more generally, largely unhindered by the application of EC law. *Failure to do so may well lead EU citizens blaming the EU for the failure of the European social model which is so dependent on national welfare policies for its substance*'.[839] (emphasis added).

One thing is sure: in time, the European *social* model grew to overlap the European *economic* model. Their common boundaries are in a continuous evolution, at the same pace with the world we all live in. The continuous expansion of the social dimension of the European space took place in both directions: from the European Union to the Member states and, vice-versa, from the national level of each Member State to the European one. This multi-level evolution brought *people* to the front, as the real beneficiaries of the European project and showed that they are (or must be) now on the same footing with traders and, in certain conditions, above them. Moreover, concepts like 'fundamental (human) rights' (with its array of particularities brought forth by the advent of the European citizenship) and 'social economy' gained a central place in the integration process.

In parallel, the 'internal market' construct suffered several subsequent dramatic transformations, especially in the context of the latest economic and social crisis, as the European legislature (forced by a bigger and bigger *political* pressure from the national governments) decided that it is time to change the initial structure and re-balance it in order for the European Union to stay alive. The fact that key social values now lay at the core of

[838] S Giubboni, '*Social rights and market forces*', Cambridge University Press, 2006. See also S Deakin, 'Labour law as market regulation: the economic foundations of European Social Policy', in D A Lyon-Caen, S Sciarra and S Simitis (eds), '*European Community labour law: principles and perspectives'*, Clarendon Press, 1996.
[839] C Barnard, '*Restricting restrictions: Lessons for the EU from the US?*' (2009) 68 Cambridge Law Journal 3, 575.

the European Union, doubled by a continuously enlargement of the competences thereof in the social sphere, led to an (otherwise asymmetric) integration of social values into substantially all the corners of the internal market (including, or especially, in the public procurement area, which is one of the most important dimensions thereof). In this process, some values proved easier to integrate while others, not. The Court tried hard to find a safe path out of this gridlock, but its case law remained bitterly incongruous. However, through several landmark judgements, it appears to have been promoting the idea that, in general, the social values acknowledged at the EU level form a sui generis European social model which seems the safest harbour (and source of solid justifications) for many mandatory requirements. Or national public policies.

1. The European social model and its role in the shaping of the internal market

1.1 *Between national welfare systems and the neoliberal foundation of the EU*

As it started to engulf swathes of social policy values and objectives since the late '80s, public procurement became more and more influenced by the changes occurred in the political discourse developed at the EU level starting with the establishment of the European Employment Strategy (the 'EES') in 1997 – which was later to become an integral part of the Europe 2020 growth strategy[840]. In fact, one of the most important accomplishments of the EES is cited to be that of 'build[ing] bridges between employment legislation (imperium measures) and the European Social Fund (dominium measures)."[841]

The reality shows that the welfare model has a quite long tradition across the European states. The European welfare models are in fact among the most evolved and complex systems. In spite of this, each state tried to implement its own version, adapted to the national specificities. It is therefore not a surprise that, at the formation of what was to become the European Community, its founders were highly determined not to lose their 'social sovereignty'.[842]

[840] More on this, at https://ec.europa.eu/social/main.jsp?catId=101&langId=en.
[841] C Kilpatrick, 'New EU employment governance and constitutionalism' in G. de Búrca & J. Scott (eds.) *Law and new governance in the EU and the US - Essays in European law'*, Hart Publishing, Oxford, UK, 2006, 139.
[842] R Latham, "*Social sovereignty*", in (2000) 14 Theory, Culture and Society, 1-17.

Their concerns were explicitly put on the table during the negotiations that preceded the adoption of the Treaty of Rome. After an intense debate, the final decision was to exclude almost any competences for the new entity to intervene in the social field[843]. The only exception was made by the conferral, to the EEC, of a limited set of 'basic social powers' necessary to ensure the functioning of the internal market. This only created a deep furrow between the social and the economic dimensions of what was to become the internal market, with the former left in the Members States' arms, while the latter was reserved to the (almost) exclusive intervention of the EEC. However, "the deterioration of the economic situation in the '70s exposed all the flaws of the original compromise, forcing a progressive abandonment of the 'double track' model".[844]

On the other hand, free trade was supposed to be promoted through mechanisms such as that of the direct effect and primacy of the EU law (for the first time acknowledged by the European Court of Justice in its landmark decisions rendered in respectively *Van Gend en Loos*[845], *Costa v ENEL*[846] and *Simmenthal*[847]). But, in the *sui generis* European context (characterized by political democracy and universal suffrage in all Member States), this freedom could not have been (hence it is not!) absolutized.[848] Consequently, as the Community's interest for these areas grew wider and stronger, national regulation of some of the most important social areas, like the labour market and trade union rights, which have been traditionally regarded as obstacles to the EU's internal market rules, became obstacles *that could be justified*. 'This has (…) been an important premise for broad support for EU cooperation and forms the basis of a compromise that historically was the solution to the tension between free trade and national democracy'.[849]

So, if during the prime years of integration, the 'social' element was completely ignored[850], it became more and more visible on the European agenda starting with

[843] F Scharpf, "*The European Social Model: Coping with the Challenges of Diversity*", (2002) MPIfG Working Paper 02/8, Max Planck Institute for the Study of Societies.
[844] F Costamagna, '*The internal market and the welfare state after the Lisbon treaty*', 2019, at https://www.researchgate.net/publication/265362521, 3.
[845] Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1
[846] Case C-6/64 *Costa v ENEL* [1964] ECR 585
[847] Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629).
[848] According to the German political scientist Fritz Scharpf (see '*The asymmetry of European integration, or why the EU cannot be a 'social market economy*', in 2010 8 Socio-Economic Review 2, Oxford University Press), the European Union has two primary (apparently divergent) goals: 'free trade community' and 'policy community', where the first implies de-regulation while the latter, re-regulation.
[849] J Danielsson, '*Democracy as an obstacle for free movement within the EU – is free movement of services compatible with the Swedish labour market model?*', LO-Tryckeriet, Stockholm, 2013.
[850] Apparently, voluntarily. The decision to keep social aspects, and in particular those to do with labour and welfare state expenditure levels, away from the scope of the EU institutions was based on several reasons (pinpointed in the Ohlin report of ILO experts and the Spaak report of foreign ministers prepared in anticipation

the adoption of the Employment chapter of the Treaty of Amsterdam. From that point onwards, the European discourse became more and more engaged with big themes such as employment, labour market, social assistance and unemployment insurance, or social services *etc*. In fact, the evolution of the European social agenda goes hand in hand with that of the internal market itself. This unfortunately ended up in a structural conflict (between the economic and the social dimension of the internal market on the one hand, but also between the different levels of competences and jurisdictions shared by the Union and the Member States on the other hand) which is, despite the generous avenues of consideration opened by the CJEU through its case law (e.g. *Viking*[851], *Laval*[852], *Bosman*[853], *Rüffert* and *Regio Post*, or *Albany*[854], *Centros*[855] *etc*) and the Commission's determined efforts, still unsettled.[856]

In reality, especially owing to the decisive texts introduced by the Treaty of Lisbon with regard to the delimitation of competences between the Union and the Member States, the Commission was left with a limited number of arms in its efforts to get (and stay) also at the helm of the EU's *social* integration (seen now as one of the structural elements of the internal market). As rightly observed in the literature, 'despite 40 years of EU social legislation, there is still a lack of a clear narrative as to why the EU should act in the social field.'[857]

This forced it to adopt a dissuasive strategy and adapt to the ongoing political discourses, moving from 'a position of political invisibility'[858] to blatant activism.[859] In the public procurement zone, this activism took particular shapes, especially due to the limited scope of any hard-law intervention – as a matter of principle, the main scope of regulation in

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of the Treaty of Rome) among which: 'scepticism towards market-failure type arguments for harmonization; optimism concerning the capacity of the common market to generate convergence on wages and incomes of its own accord; and confidence in the strength of political pressures within member states for the maintenance of effective labour standards and welfare state systems' etc – see C Barnard, S Deakin '*In search of coherence: social policy, the single market and fundamental rights*', in (2000) 31 Industrial Relations Journal 4, 332.

[851] Case C-438/05, *Viking*, EU:C:2007:772.

[852] Case C-341/05 *Laval* [2007] ECR I- 11767

[853] Case C-415/93 *Bosman* [1995] ECR I-4921

[854] Case C-67/96 *Albany* [1999] ECR I-05751.

[855] Case C-212/97 *Centros* [1999] ECR I-1459.

[856] See again Barnard (n 839).

[857] C Barnard, '*EU Employment Law and the European Social Model: The Past, the Present and the Future*', (2014) Current Legal Problems, Oxford University Press, 16.

[858] F Scharpf, '*Governing in Europe: Effective and democratic?*', Oxford University Press, 1999, 31-32.

[859] 'When reality proved otherwise, however, the political will to make social protection an essential element of the internal market expressed itself through other channels in legislation, including directives derived from the legal basis for the internal market set out in Article 95 of the EC Treaty (now Article 114 TFEU). (...) Although the EU's legislative power to implement social policy was and still is limited, for example in relation to employment policy and social security, the Union legislator has interpreted its competences in internal market matters broadly so as to guarantee the social rights of workers as well. In that sense, we can say that the EU has a certain social *acquis*.' - E Hirsch Ballin, E Ćerimović, H Dijstelbloem and M Segers, *'Variation in the European Union*', The Netherlands Scientific Council for Government Policy, The Hague, 2019, 79.

this area has a purely economic background – but also to the structural changes ushered in by the Treaty of Lisbon.

1.2 The third way: a political compromise

The Treaty of Lisbon made indeed the decisive step forward[860], moving the entire integration effort from the mere protection of 'undistorted competition' to the implementation of a 'social market economy' (see Article 3 TEU – which represents, in fact, the outcome of the efforts put into the reformation process by the European Christian Democrats and Social Democrats[861]). The new text apparently dispenses with the idea of establishing a "*a system ensuring that competition in the internal market is not distorted*", giving therewithal "unprecedented visibility to a wealth of social objectives and values".[862] In fact, as the dedicated literature shows, the omission from the text of any references to the idea of 'undistorted competition' was only fortuitous[863], coming as a result of crossing out the entire Article 3 TEC. The text was nevertheless eventually endorsed by the French delegation who put the idea back on the table for further discussions. These discussions led to the adoption of Protocol 27 to the Treaty of Lisbon. The demotion of the principle of 'undistorted competition', from the Treaty to a mere Protocol, is seen by some authors as eroding severely its importance in the internal market context[864], while others simply consider that the adoption of Protocol 27 'confirms that the protection of undistorted competition remains a

[860] As underscored by Prof. Mario Monti in his report called '*A New Strategy for the Single Market at the Service of Europe's Economy and Society - Report to the President of the European Commission José Manuel Barroso, 9 May 2010*' (Ref. Ares(2016)841541 - 17/02/2016), "(…) *it is undeniable that the single market, by fostering economic integration, does contribute to creating, at least temporarily, winners and losers, in the context of a positive overall process of growth and job-creation. Member States, through their social policies, try in various ways to compensate the losers financially and to retrain them for active participation in the process. But the budgetary means to enact redistribution policies may be eroded by some pronounced forms of tax competition, which in addition tilt the tax burden to the advantage of the more mobile tax bases, like capital income or very high professional incomes, and to the disadvantage of less mobile bases, like labour income, unskilled labour income in particular. Hence some tensions between market integration and social objectives. These are even more vividly exposed, now that the Lisbon Treaty has introduced, even formally, the objective of achieving a "highly competitive social market economy". If the market and the social components do not find an appropriate reconciliation, something has to give in. Following the crisis, with the declining appetite for the market and the increasing concern about inequalities, it is by no means clear that it would be the market, i.e. the single market, to prevail*." – emphasis added (p.26).

[861] The hybrid proposed by Article 3 TEU was though to encapsulate both the general ordo-liberal aim to keep the market out of the direct political influence and the social democrat redistributive practices. For more on this, see C Joerges and F Rödl, '*Social Market Economy' as Europe's Social Model*?', (2004) 8 EUI Working Paper.

[862] F Costamagna, '*The internal market and the welfare state after the Lisbon treaty*', 2019, at https://www.researchgate.net/publication/265362521, 5.

[863] Ibidem.

[864] See A Weitbrecht, "*From Freiburg to Chicago and Beyond – The First 50 Years of European Competition Law*", in 2008 European Competition Law Review 2, pp. 81-88 or A Riley, "*The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law*", 2007 CEPS Policy Brief No. 142.

fundamental objective of the European Union'.[865] In reality, as emphasised by the then Commissioner for Competition Neelie Kroes after the approval of the Lisbon Treaty by the European Council, these two elements "simply cannot exist without the other"[866]. Or, put differently, 'a market that is not socially embedded is structurally instable.'[867]

The shift to a social Europe was for the first time explored in palpable terms in the European Commission's White Paper on completing the internal market.[868] It nonetheless became manifest in the Commission's Strategic Agenda 2019 - 2024[869] which 'is intended to guide the work of the Institutions in the next five years' and focuses on four main priorities: (i) protecting citizens and freedoms; (ii) developing a strong and vibrant economic base; (iii) building a climate-neutral, green, fair and social Europe and (iv) promoting European interests and values on the global stage. According to this Strategic Agenda, 'Change towards a greener, fairer and more inclusive future will entail short-term costs and challenges. That is why it is so important to accompany the change and to help communities and individuals adjust to the new world. *This requires keen attention to social issues. The European Pillar of Social Rights should be implemented at EU and Member State level, with due regard for respective competences. Inequalities, which affect young people in particular, pose a major political, social and economic risk; generational, territorial and educational divides are developing and new forms of exclusion [are] emerging. It is our duty to provide opportunities for all. We need to do more to ensure equality between women and men, as well as rights and equal opportunities for all. This is both a societal imperative and an economic asset. Adequate social protection, inclusive labour markets and the promotion of cohesion will help Europe preserve its way of life, as will a high level of consumer protection and food standards, and good access to healthcare*.' (emphasis added). All these are clear signs that there is no way back.

Unfortunately, the model postulated by Article 3 TEU has no edges and no handles, which requires a multivalent approach. The answer to the question whether, in this

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[865] F Costamagna, '*The internal market and the welfare state after the Lisbon treaty*', 2019, at https://www.researchgate.net/publication/265362521, 8.

[866] N Kroes, '*Competition Policy. Achievements in 2006, Work Program in 2007; Priorities for 2008*', European Parliament Economic and Monetary Affairs Committee, Speech/07/425 of 26 June 2007 at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/425&format=HTML&aged=0&language=EN&guiLanguage=en.

[867] F de Witte, '*The architecture of the EU's social market economy*', 2015 LSE Legal Studies Working Paper 13, at https://ssrn.com/abstract=2613907 or http://dx.doi.org/10.2139/ssrn.2613907.

[868] EU Commission, 'White Paper: Completing the Internal Market', 14 June 1985, COM (85) 310 final, available at http://aei.pitt.edu/1113/1/internal_market_wp_COM_85_310.pdf

[869] Available at https://www.consilium.europa.eu/en/press/press-releases/2019/06/20/a-new-strategic-agenda-2019-2024/.

context, the 'social' element must be exploited, limitedly, to the benefit of trade (as neoliberals would like to suggest), or also to reach a far more ambitious set of goals, *eg*, those to do with a more generous 'redistributive agenda' (as advocated by social democrats) or, in other words, whether social policies must, in general, be used to serve merely economic purposes or economic policies, and rules, may, in turn, be censured to make more room to social considerations is, in the end, a matter of blunt *politics*.[870]

The 'social market economy' desideratum, much debated in the literature, appears to have initially been proposed by the European Convention Working Group on Social Europe (for what was purported to become the Constitutional Treaty)[871]. The proposal was later embraced by the authors of the Treaty of Lisbon and thus became eventually binding. The Working Group failed nonetheless to come with a proper definition of this term, or at least with additional clarification with regard to its origins (which appear to have at least some common points with the German concept[872]), and so did the fathers of the Treaty of Lisbon. But it offered some hints on its scope, which appears to be directly linked to the concrete need to ensure a 'greater coherence between [EU's] economic and social policies' while preserving Member States' diversity.[873]

Anyway, read in the light of Articles 26(2) and 7 TFEU and 6 TEU, Article 3 TEU seems to suggest that the postulated 'social market economy' should not be construed as a field of battle between economic and social values and goals, but rather as entailing a convergent, *integratory* approach. On the other hand, it is equally true that a systemic interpretation of Articles 34, 35, 45, 49, 56 or 63 *etc* TFEU (in also the light of the exceptions consecrated via Articles 36, 45 or 52 *etc* TFEU) would rather encourage the idea of an inevitable 'binary conflict', these provisions implying that *any* restrictions on free movement and trade (*ie*, including those aimed at protecting fundamental rights of a social nature) be subjected to a thorough process of evaluation, to see if they are justifiable and proportionate.[874] What is, in the end, evident is that the Treaties fail to provide guidance on how to reconcile various policies and objectives, or at least how to prioritize them in an

[870] F de Witte, '*The architecture of the EU's social market economy*', 2015 LSE Legal Studies Working Paper 13, at https://ssrn.com/abstract=2613907 or http://dx.doi.org/10.2139/ssrn.2613907, 120.
[871] See CONV 516/1/03 Rev 1, para 10.
[872] The term 'social market economy' is attributed to a German professor of economics, Alfred Müller-Armack, who appears to have first used it in 1946.
[873] J Snell, 'The Legitimacy of Free Movement Case Law: Process and Substance' in M Adams, H de Waele, J Meeusen, and G Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the case law of the European Court of Justice*, Hart Publishing, 2013, 119.
[874] N Nic Shuibhne - *The social market economy and restriction of free movement rights: plus c'est la même chose?* 2018 Journal of Common Market Studies, 3.

eventual conflict. This is even more sensitive since, from a *political* point of view at least, the evolution of the European 'social space' is due to change over time, as the values that define it evolve, transform and change to respond to similarly evolving needs, and this inevitably influences the very *scope* of the internal market rules.

Since the relation of the EU's new social market economy with the key principles of the internal market (including that of unrestrained competition) remained so far unsettled, the socio-economic models adopted by Member States may, some authors warned, be distorted by an inappropriate or otherwise a too wide interpretation of the so vague texts of the Treaties.[875] The CJEU appears to have anticipated this conflict and, as it transpires from its past decisions, it already started (even since the late '70s) to look for outlets through which to let the pressure out (and which would have allowed it to proclaim the supremacy of the social over the economic).[876] It thus came with valuable escape doors like *fundamental rights* (with a particular variation in the case of fundamental *social* rights and *workers'* rights) and the rights entailed by the *EU citizenship*. But their use was rather hesitant.

The Court has also had the chance to express its views on, and understanding of, the social market economy concept itself. In *AGET Iraklis*[877], it has chosen to depart from AG Wahl's opinion (in the sense that the EU is '*based on a free market economy, which implies that undertakings must have the freedom to conduct their business as they see fit'*)[878] but also from its own previous case law where it established that justifications to do with economic crisis and any priorities deriving therefrom could not be adduced in order to escape the internal market rules. The *AGET Iraklis* decision is in this context even more interesting as, traditionally, even if social protection is, as a matter of principle, an *independent* objective of the EU law and policy[879], in practice, the traditional (*ie, economic*) EU internal market principles have been intensely used, by the Court, to challenge national measures and policies too often seen as posing insurmountable obstacles to the free trade in the internal market.[880]

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[875] Ibidem.

[876] As underscored by some scholars, 'the Community legal order is an emerging and developing legal order in which a formally binding, rigid precedent of the Court's case law would be hardly feasible. The stability of the case law must be reconciled with the requirements of an emerging Community and the corresponding development of its law.' – see G Bebr, '*Development of judicial control of the European Communities*', Martinus Nijhoff Publishers, 1981, 12-13.

[877] Case C-201/15 *AGET Iraklis*, ECLI :EU:C:2016:972.

[878] *AGET Iraklis*, ECLI:EU:C:2016:429, para 1 of the Opinion.

[879] C Barnard and G de Baere (2014) '*Towards a European Social Union: Achievements and possibilities under the current EU constitutional framework'*, Euroforum Policy Papers, at: https://www.kuleuven.be/euroforum/viewpic.php?LAN=E&TABLE=DOCS&ID=937>.

[880] D Schiek, L Oliver, C Forde, and G Alberti, (2015) '*EU social and labour rights and EU internal market law*', Directorate-General for Internal Policies, Study for EMPL Committee, at: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU(2015)563457_EN.pdf, 27.

Thus, in order to solve the conflict between these fundamental rights and principles, the Court crafted a complex test ― discussed in detail in Chapter III above ― which, in its standard form, comprises two key phases (one, where it seeks to determine whether the national law or policy at stake constitutes a restriction of the free movement rights or not, and the other, aimed at measuring the justification and proportionality thereof).[881] That is why the decision rendered in *AGET Iraklis* may be conceived as a reflection of the 'conciliation between economic freedoms in the single market and workers' rights' mentioned by Mario Monti in its famous paper[882] and, thus, of the new balance stroke in Article 6(1) TEU between the economic values enshrined in the Treaties and the social ones promoted by the Charter.[883]

But, beyond demonstrating the importance, in the Lisbon context, of the formal uplift of the Charter of Fundamental Rights to a constitutional status, this approach also underlines the extraordinary import of the new contents of Article 9 TFEU which now basically compels the Union to include the promotion of a high level of employment and the guarantee of adequate social protection in the definition and implementation of all its policies *etc*.

Inasmuch as the Charter is concerned, it appears that Members States were at first afraid that the Charter (especially its paragraphs on social rights) will be further used 'as a Trojan horse for imposing further limitations on Members States' social sovereignty'.[884] On the other hand, its new constitutional status is expected to facilitate its role as a counterweight to the impact of EU law on the national social policy schemes.[885] As for the Court, it supposedly shunned so far using the Charter as a *material* justification for its decisions,

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[881] S Reynolds, '*Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights*' 2016 53 Common Market Law Review 3, 643–77.

[882] M Monti, 'A New Strategy for the Single Market at the Service of Europe's Economy and Society - Report to the President of the European Commission José Manuel Barroso, 9 May 2010', Ref. Ares (2016)841541 - 17/02/2016, 8.

[883] N Nic Shuibhne, **'***The social market economy and restriction of free movement rights: Plus c'est la même chose?'*, in 2018 57 Journal of Common Market Studies 1.

[884] F Costamagna, 'The internal market and the welfare state after the Lisbon Treaty', 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 11.

[885] D Damjanovic and B De Witte, "Welfare integration through eu law: the overall picture in the light of the Lisbon Treaty", in U Neergaard, R Nielsen and L M Roseberry (eds), '*Integrating welfare functions into EU law'*, Djøf Publishing, Copenhagen, 2009 53-94. For the same conclusion on the defensive role of the Charter, shared even before Lisbon, see M Poiares Maduro, (2003), "The Double Constitutional Life of the Charter of Fundamental Rights of the European Union", in T Hervey and J Kenner (eds), '*Economic and social rights under the EU Charter of Fundamental Rights. A legal perspective'*, Hart Publishing, 2003, 269-299.

although it cited it, more and more frequently, even if erratically[886], throughout the relevant reasoning.[887] Sadly, although it was solemnly proclaimed in December 2000 and has become fully legally binding (to both the EU institutions and the Member States - when implementing the EU law) upon its integration into the Treaty of Lisbon, the results of a recent Eurobarometer survey on Charter awareness showed that only 42% of respondents have heard of the Charter and barely 12% know what it is. Moreover, the number of people who can name at least one of the fundamental political, social and economic rights and principles enshrined in its 50 articles remains stuck somewhere between the single digits.[888]

As for the 'horizontal social clause' contained in Article 9 TFEU, it simply requires the EU institutions to "take into account", when defining and implementing their policies, a number of social objectives, such as the guarantee of adequate social protection or the fight against social exclusion.[889] 'In other words, the clause asks the EU lawmakers to perform, already during the legislative phase, the same balancing exercise that has been mainly used by judges in the application of EU law'.[890]

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[886] See for ex. the cases *Metock* (Case C- 127/08 *Metock and others* [2008] ECR I- 6241) vs *Laval*. In the first case, the Court did not refer to the Charter at all, although the subject matter thereof dealt specifically with a fundamental (social) right, *ie*, the protection of family life), whereas in the second, it draw consistently from the Charter, although the case had to do with collective bargaining and not necessarily with a *personal* right etc. On the other hand, in *Grzleczyk*, the Court set forth in an indubitable manner that "*Union citizenship is destined to be the fundamental status of nationals of the Member States*" (emphasis added) – see Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 31.

[887] T Tridimas, 'Primacy, fundamental rights and the search for legitimacy', in M P Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, 2010, 98. Anyway, the Court referred instead explicitly to the European Convention on Human Rights and Fundamental Freedoms – see to this effect, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71 or Case C-36/02 Omega [2004] ECR I-9609 para 33.

[888] Council Conclusions on the Charter of Fundamental Rights after 10 Years: State of Play and Future Work, Brussels, 20 September 2019, at https://data.consilium.europa.eu/doc/document/ST-12357-2019-INIT/en/pdf?utm_source=dsms-auto&utm_medium=email&utm_campaign=10th+anniversary+of+the+Charter+of+Fundamental+Rights%3a+Council+reaffirms+the+importance+of+EU+common+values. This document was drafted based on the conclusions of Commission's Annual Report on the Application of the EU Charter of Fundamental Rights (10064/19), and on those of the Fundamental Rights Report adopted by the EU Agency for Fundamental Rights 2019 (10116/19).

[889] According to Hettne (see J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 34), Article 9 TFEU, just like all the other Articles from 7 to 11 TFEU, '(…) rather clarify that, in the European integration project, many different interests must be taken into account. The EU legal framework is the result of a comprehensive reconciliation of different interests, not only an expression of free trade and competition. *Articles 7–11 TFEU provide instructions aimed at the Union legislator and are therefore not directly applicable.*' (emphasis added).

[890] F Costamagna, '*The internal market and the welfare state after the Lisbon Treaty'*, 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 13. See also M E Bartoloni, 'The horizontal social clause in a legal dimension', in F Ippolito, M E Bartoloni and M Condinanzi '*The EU and the proliferation of integration principles under the Lisbon Treaty'*, Routlege, 2019.

All these changes in EU's new constitutional arrangement are in effect seen as a catalytic factor in the pursue of social goals, including or especially in the public procurement context. Thus, encouraged by the new 'rapport of forces' and especially by the place of the social dimension in the internal market context, Member States are expected to challenge more vigorously the traditional internal market rules with new and new schemes and mechanisms, forcing their limits to the fullest extent.[891]

It only remains to be seen how will the Court of Justice of the Union react to all these challenges since, as so elegantly put in the literature, the principle of subsidiarity, placed in the heart of the Treaties at the insistence of the German Länder[892], could eventually limit national legislative initiatives but in any case not the liberty of the CJEU to interpret the Treaty principles.[893]

It is expected that the traditional approach demonstrated in a long array of cases (see esp. Case 26/62 *van Gend & Loos*[894], Case 294/83 *Les Verts v Parliament*[895], Case C-405/02 *P Kadi v Council and Commission*[896], or CJEU's Opinion 2/13[897]) where it was called to express its view on the EU's constitutional order, will finally change. Pundits thus hope that, inspired by the new status of the social rights in the EU's constitutional frame, the Court will find in the provisions of the Charter 'an even firmer 'anchor' for the re-balancing of economic freedoms and social objectives'.[898] The Court already showed that it is ready to

[891] O De Schutter, 'The Implementation of Fundamental Rights through the Open Method of Coordination', in O De Schutter & S Deakin (eds), *Social Rights and Market Forces: Is the Open Method of Coordination of Employment and Social Policies the Future of Social Europe*? Bruylant, Brussels, 2005. Also recent economic analysis confirm that, owing to the determined and steadfast consolidation of the European social model, social inequalities in the EU tend to level up to a common denominator – see M Sandbu, *'Europe's social model is still doing its job*', in the Financial Times of May 9, 2019.

[892] F W Scharpf, '*The asymmetry of European integration, or why the EU cannot be a 'social market economy*', in Socio-Economic Review (2010), Vol. 8, Issue 2, Oxford University Press, 230.

[893] G. Davies '*Subsidiarity: The wrong idea, in the wrong place, at the wrong Time*', (2006) Common Market Law Review, 43.

[894] EU:C:1963:1.

[895] EU:C:1986:166.

[896] EU:C:2008:461.

[897] EU:C:2014:2454. By this Opinion, the Court found that the Draft Agreement for the EU accession to the ECHR was *not* compatible with the Treaties. For discussion on the importance of this Opinion in the context of the post-Lisbon social market economy and the primacy of fundamental social rights over the traditional economic ones, see E Spaventa, '*A very fearful Court? The protection of fundamental rights in the European Union after Opinion 2/13*' (2015) 22 Maastricht Journal of European and Comparative Law 1, 35 *et seq*.

[898] F Costamagna, '*The internal market and the welfare state after the Lisbon Treaty'*, 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 12. The backhround of the CJEU judges, especially of those coming from the 'new' Member States may delay this transformation, although the long history of the Court shows that it is much sensitive to the concerted political signals, *eg*, spread via the official channels of the Union (such as the Council and the Parliament), than to isolated points of pressure (from each Member States), and also that newcomers have rarely succeeded in changing, alone, the trend.

leave the 'purely binary market/social reasoning' and move to a 'fair balance' method[899], as suggested in *Sky Österreich*[900] where it clearly stated that *'[w]here several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them*'. This, while AG Cruz Villalón already proposed an adapted proportionality test in *Santos Palhota*[901], insisting on 'the equal status of economic and [fundamental] social values'. Such equality would derive, considered Mr. Cruz Villalón, directly from the entering into force of the Treaty of Lisbon which brought with it a fundamentally changed hierarchy, in which 'working conditions constitute an overriding reason (…) [which may justify] a derogation from the freedom to provide services (…). [and must therefore] no longer be interpreted strictly.'[902]

Some are nonetheless still afraid that, as demonstrated in the *Laval* case[903] (where, departing from the *Omega*[904] and the *Schmidberger*[905] cases, it acknowledged the *fundamental* nature of the right to collective action but still gave priority to market freedoms), the Court may still be tempted to preserve the traditional approach on the differences between political and civil rights[906], and further between rights and principles (as marked by the Charter itself)[907]. Not to mention that, as rightly underscored in the dedicated literature, the Court 'can annul a policy measure if it judges that [the organs that adopted it] have acted

[899] N Nic Shuibhne - *The social market economy and restriction of free movement rights: plus c'est la même chose?*, 2018 57 Journal of Common Market Studies 1.
[900] C-283/11 *Sky Österreich*, EU:C:2013:28, para 60.
[901] Case C-515/08 *Santos Palhota* (EU:C:2010:245), para. 53 of the Opinion.
[902] It appears that this 'fair balance' method had been tried out even before Lisbon – see Case C-112/00 *Schmidberger*, EU:C:2003:333, paras 81–82. This while the Court appears to still have used the 'conciliation' method also after Lisbon – see Case C-172/11 *Erny*, EU:C:2012:399, para. 50.
[903] It is worth recalling that the judgment in this case was handed down on 18 December 2007 while the decision in the *Viking* case had been rendered, as explained above, only a week earlier and that, in spring 2008, the Court ruled in a further two cases concerning posting of workers: the *Rüffert* and the *Luxembourg* cases. The solutions offered by the Court in all these cases are, inevitably, an echo of the larger political and economic context in which they have been pronounced.
[904] Case C-36/02 *Omega* [2004] ECR I-9609.
[905] Case C-112/00 *Schmidberger* [2003] ECR I-5659.
[906] As some authors concluded, the Court has allegedly developed, on the basis of the *acquis communautaire*, a 'European Social Framework', which does not correspond entirely to the European Social Model proposed by the European legislature. The Court's own Social Model appears to be 'based on access justice not on social justice'. Finally, from its recent case law (see for ex Case C-450/93, *Kalanke*, [1995] ECR I-3053, Case C-409/95 *Marschall v. Land Nordrhein Westfalen* [1997] ECR I-6363, Case C-183/00, *Gonzales Sanchez*, [2002] I-3879, or Case C-205/07, *Gysbrechts*, [2008] ECR I-09947) it appears that the Court is rather tempted to 'substitute national social models with its own European Social Model' (see H-W Micklitz, *'Judicial activism of the European Court of Justice and the development of the European Social Model in anti-discrimination and consumer law*', European University Institute (EUI) Working Paper LAW 2009/19).
[907] For more on this, see C Barnard, 'Derogations, justifications and the four freedoms: Is State interest really protected?' in C Barnard and O Odudu (eds), '*The outer limits of European Union Law*', Hart Publishing, 2009.

beyond or in excess of their jurisdiction'.[908] It is precisely this extraordinary power of the Court that makes some anticipate the resurrection of the welfare models[909] characterized by less regulation (such as the Anglo-Saxon one), to the detriment of those more regulated (such as the Swedish one), which will in the end lead to increased integration and increased liberalisation across the European internal market.[910]

1.3 To the front through the backdoor: from harmonization and coordination to OMC and flexicurity via soft law and aggressive activism

It is in fact the dramatic changes in the EU's constitutional construction brought about by the Treaty of Lisbon that drove the Commission to depart from the easy path and embark on a quest to change the legal framework, where possible, but also traditions and mentalities. It hence soon started with a number of direct interventions (where the sensitive nature of the brought it under the Union's competence), but also with a number of coordination and harmonization measures (where Member States' jurisdiction remained intact), and accompanied this assault with determined forays into areas more close to the core of the internal market, especially linked to the freedom of movement and competition (such as public procurement).

Much earlier, encouraged by the terrible post-war crisis, social rights and policies adopted at national level had flourished. This made the Community adopt, at first, a relaxed, non-interventionist stance, which generated a so called 'social deficit'[911]. However, the Commission became active in the late '70s (following a period of economic instability which put many businesses in difficulty – which further reflected in the labour market; this

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[908] G Tridimas, '*A Political Economy Perspective of Judicial Review in the European Union: Judicial Appointments Rule, Accessibility and Jurisdiction of the European Court of Justice*', 2004 18 European Journal of Law and Economics July 1, 99.

[909] According to the Belgian professor André Sapir (see '*Globalisation and the reform of European social models*', background document for the presentation at ECOFIN Informal Meeting in Manchester, on 9 September 2005, available at https://graspe.eu/SapirPaper.pdf), there may be spotted four European social models or, in the author's own terms, four different versions of 'social market economies': Continental, Nordic, Mediterranean and Anglo-Saxon, with only two of these, the Nordic and Anglo-Saxon, really competitive in the modern economy.

[910] As the tensions between the economic and the social dimensions of the internal market will tend to aggravate, the Court will be even more interested in finding more efficient new levers which to help it strike the required balance. To this extent, it will most probably put an even greater pressure on Member States, pushing for de-regulation and extensive integration. This need for uniformity and generally shared values will also enhance the role of the European social model itself (as a source of stability). If so, the Anglo-Saxon model will prove its efficiency even after Brexit. For a discussion, see also n.937 below and the passage to which it refers.

[911] C Barnard, '*EU Employment Law and the European Social Model: The Past, the Present and the Future'*, Current Legal Problems, Oxford University Press, 2014, 10.

stage of intervention is seen as a form of 'economic fairness'[912]) and then, again, in the '90s (*ie*, in the Delors period, when many important action plans and laws in the area of employment, such as the Social Charter Action Programme of 1989 which led to the adoption of the Working Time Directive, the Young Workers Directive and the Pregnant Workers Directive, together with the wealth of health and safety directives, were launched or adopted; this second stage of interventionism is defined as a form of 'political insulation'[913]). Finally, in a third stage (that coincide with the outburst of the Euro crisis), the Commission intervened with much more vigour, in an attempt to stabilize the monetary policy of the Union.[914] All these measures laid down a 'floor of rights' concerning worker protection.[915] Anyway, starting with the mid-1990s, the EU changed the initial paradigm and started to insist on the idea that employment measures and economic growth were 'mutually reinforcing', instead of social policies being a burden on the 'productive process'.[916] Or, as the Commission itself acknowledged in its White Paper on Social Policy, 'the pursuit of high social standards should not be seen as a cost but also as a key element in the competitive formula'.[917] This particular formula is said to have 'paved the way for the advent of [the so-called] 'flexicurity''[918] (see below) which the Commission itself started to prize as an enhanced instrument destined to replace, in a piecemeal fashion, traditional, less-efficient solutions.[919]

In the evolution of EU's social policy however, the period or 'economic fairness' is usually ignored due to its lack of substance and vigour. Thus, the first consistent stage is considered to be that which started in the mid-'1990's and was characterized by the crafting and implementation of the EES (the European Employment Strategy mentioned

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[912] F de Witte, '*The architecture of the EU's social market economy'*, 2015 LSE Legal Studies Working Paper 13, at https://ssrn.com/abstract=2613907 122.
[913] F de Witte, '*The architecture of the EU's social market economy'*, 2015 LSE Legal Studies Working Paper 13, at https://ssrn.com/abstract=2613907 124.
[914] Ibidem, 128. See also C Barnard, '*EU Employment Law and the European Social Model: The Past, the Present and the Future'*, Current Legal Problems, Oxford University Press, 2014.
[915] This line of action is specific to most labour law directives. They usually set a 'basic or minimum standards as a 'floor of rights' which member states must not derogate from, but upon which they may improve by setting superior standards. These directives, then, implicitly encourage a 'race to the top', while ruling out less socially desirable aspects of regulatory competition. The form of harmonisation which has been termed 'reflexive harmonisation' (…) makes explicit the idea that the aim of Community-level intervention is not an end to regulatory competition as such. Rather, the aim of harmonisation is to preserve a space for local level experimentation and adaptation, contrary to the 'levelling-down' agenda of negative harmonisation, but also in contrast to the idea that harmonisation in the form of a 'European labour code' must occupy the field at the expense of local autonomy' – see C Barnard and S Deakin, '*In search of coherence: social policy, the single market and fundamental rights*', (2000) 31 Industrial Relations Journal 4, 340 to 341.
[916] Ibidem, 12.
[917] COM (94)333, Introduction, para 5.
[918] C Barnard, '*EU Employment Law and the European Social Model: The Past, the Present and the Future'*, Current Legal Problems, Oxford University Press, 2014, 12.
[919] See for ex.COM (98) 592, para 3.

above), later incorporated into the incipient phase of the Lisbon Strategy (initiated in 2000). The second one started in 2005 (after a process of evaluation) and basically consisted of the EES being merged with the Broad Economic Policy Guidelines and the 'inclusion OMC'[920], with the coordination of pensions and healthcare reforms. This stage ended in the wake of the 2008 crisis, when the Commission, 'weakened especially over a period during which the Lisbon Treaty had been rejected in Ireland (pending its subsequent approval late in 2009) – was left to merely contemplate national initiatives and feign some attempt at their coordination'.[921] The third stage started in 2010, with the launching of the Europe 2020 Strategy. This third stage is basically at its apex, the recent launching of the European Pillar of Social Rights[922] being seen as one of its most triumphant accomplishments.[923]

So, as Member States started to develop and implement social policies in a variety of shapes and targeted a variety of objectives, the European Union decided (in principal owing to a series of dramatic events, especially crisis, that led to significant changes in the political and economic evolution worldwide) to intervene firmly in order to ensure their convergence. It did so by crafting and implementing a more and more ambitious social

[920] 'The Open Method of Coordination (OMC) on Social Inclusion, which was launched in 2001, can be seen as an attempt to reconcile the ambition to realise a truly European social model with the traditional concern for subsidiarity, including in the domain of income distribution. OMC means that social policy objectives, including objectives with regard to minimum income protection, are formulated at the EU level, thus instantiating a European conception of justice; national diversity is accepted, both in terms of policy inputs and policy outcomes, but Member States are asked to justify their performance with regard to those principles. Thus, the OMC presupposes a commonality in objectives with regard to national distributive policies, which constitutes a conception of European justice, but without rigidly imposing these objectives.' - F Vandenbroucke, 'The idea of a European Social Union: a normative introduction', in F Vandenbroucke, C Barnard and G De Baere (*eds*), *A European Social Union After the Crisis*, Cambridge University Press, 2017, 34. For an interesting discussion, see also T Sakellaropoulos, 'The Open Method of Coordination: A sound instrument for the modernization of the European social model', in T Sakellaropoulos and J Berghman (eds), '*Connecting welfare diversity within the European social model*', Intersentia, 2004, 55 *et seq.*

[921] J-C Barbier, '*Changes in political discourse from the Lisbon Strategy to Europe 2020: Tracing the fate of 'social policy'?*', ETUI aisbl, Brussels, 2011, 13.

[922] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions establishing a European Pillar of Social Rights, Brussels, 26 April 2017, COM(2007) 250 final. The Pillar 'must be conceived as part of the most recent social rights developments having emerged in the so-called "Turin process for the European Social Charter", which harmoniously focuses joint efforts of the Council of Europe and the EU to consolidate the European Social Charter as a veritable European pact for the social stability of the Council of Europe's three pillars: social democracy, the welfare state and social rights.' (L J Quesada, *'The asymmetric evolution of the social case-law of the Court of Justice: new challenges in the context of the European pillar of social rights*', (2017) 3 UNIO - EU Law Journal 2, 5).

[923] However, as correctly observed by some stakeholders, '*Although the Commission invoked the Charter as the precedent for the EPSR's proclamation, there does not seem to be any intention for the latter to follow the path of the former and to be incorporated into the Treaties at a later stage. Instead even a provision like Article 51(1) Charter that would clearly designate a duty for the EU institutions and the member states to follow the EPSR's principles and obey its rights is visibly missing. Instead what we find in the EPSR is a clear statement that for the Pillar's principles and rights to be legally enforceable, they first require dedicated measures or legislation to be adopted at the appropriate level* (recital 14)' – Z Rasnača, *'(Any) relevance of the European Pillar of Social Rights for EU law?*', 2017, at https://europeanlawblog.eu/2017/11/17/any-relevance-of-the-european-pillar-of-social-rights-for-eu-law/ (emphasis added).

policy. And, as it was clear that its access to all the necessary legislative instruments which would have allowed it to *impose* solutions was pretty limited, but also considering that a decisive action in the areas which were, pace by pace, brought into its competence (such as that revolving around the basic workers' rights *etc*) would have hardy sufficed for the fostering of an efficient and well-balanced social policy, it resorted to, and took advantage of, a surprisingly wide range of 'indirect' (soft) tools, such as interesting instances of soft law, a generous range of financial instruments (in principle gathered under the European Structural Funds under the Cohesion policy) as well as other *policy* tools. These implements have basically been used to serve at: (i) the expansion of the sphere of fundamental (social) rights; (ii) the implementation of a complex European solidarity system aimed at ensuring a balanced redistribution of European social funds; (iii) the establishing of a more flexible and better coordinated agenda between member states (through the so-called 'open method of coordination', or the 'OMC'[924]); (iv) the developing of a dynamic space for social dialogue at the European level; and (v) the change in the status of the fundamental social rights (in the sense of endowing them with constitutional force, through the adoption of essential social charters).[925] One of the most interesting forms of 'indirect' interventionism in the area of social policies is that of the MoUs, which the Commission (in cooperation with the IMF and the ECB) may enter with Member States in order to fix the terms of the latter's access to the Union's bailout funds.[926]

[924] Although the OMC was designed to cater for policy areas remained under the responsibility of *national* governments (and where the EU itself has no, or few, legislative powers) it served well also (or mainly) the Commission's interests. The latter thus used the OMC to "get a foot in the door" of national policies. The OMC was first applied in EU employment policy, as regulated in the Amsterdam Treaty, although it was referred in different terms. Its official name, definition and endorsement came, for the realm of social policy, with the Lisbon Council. Since then, it has been applied in the European employment strategy, social inclusion, pensions, consumer care, immigration, asylum, education and culture and research, and its use has also been suggested for health as well as environmental affairs. Historically, the OMC can be seen as a reaction to the EU's *economic* integration in the 1990s. The OMC was a creation of the Member States (who were weary of delegating more powers to the European institutions and thus designed the OMC as an alternative to the existing EU modes of governance). Owing to the success that OMC had in the social policy area, there has been launched the idea of using the same system for the implementation of the Charter of Fundamental Rights itself – see N Büttgen, '*Which mode(s) of governance for a floor of rights of worker protection?',* presented in June 2013 at the ILERA congress in Amsterdam, and available at: http://ilera-europe2013.eu/uploads/paper/attachment/294/Article_ILERA_congress_final_paper_Buttgen.pdf, 2.

[925] D Vaughan-Whitehead 'Is Europe losing its soul? The European social model in times of crisis', in D Vaughan-Whitehead (ed), '*The European social model in crisis: Is Europe losing its soul?'*, Edward Elgar, 2015, 15.

[926] See for example the second MoU signed with Greece, which contained a series of key social measures imposed by the Commission – Council Decision 2011/734/EU on Greece's excessive deficit, in particular Art.2(1)d). For an example to the contrary, see the Technical MoU signed with Portugal in 2012, which led to a significant decrease in the labour protection of public employees. These forms of 'EU-sponsored financial assistance programmes' are, in fact, seen as giving rise to a 'conditionality regime' which appears to collide with 'some fundamental objectives of the Treaties' as well as with the Charter of Fundamental Rights – for discussion, see F Costamagna, '*The European Semester in action: Strenghtening economic policy coordination*

This smart approach by the Commission[927] (who took, intelligently, advantage of the weak instruments put at its disposal and, in principal via framework directives[928] – officially aimed at ensuring a proper degree of coordination and harmonization between the systems and policies adopted by national governments – succeeded, especially since the '90s, to shape the face of a *unitary* social model) won soon the support of ad-hoc political coalitions formed in the European Parliament but especially in the Council. This in fact appears to be part of a wider strategy by which the Commission has been, since its very conception, trying to build, at the EU level and behind the internal market veil, a political stronghold for various purposes, including social ones.[929]

Allegedly, since the introduction of qualified majority voting in the Council (through the SEA), over 70 labour regulations and other legislative instruments have been adopted at the European Community/Union level. These occurred in several main areas: free movement of workers[930] and workers' rights (including the right to establishment and that to provide services throughout the internal market)[931]; working conditions and health and safety in the workplace[932]; equal opportunities for men and women and non-discrimination at

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while weakening the EU social dimension?', LPF Working Papers, Centro Einaudi, 5/13, at http://www.centroeinaudi.it/lpf/working-papers.html.

[927] As wittily assessed by one author, 'The European Union's quiet revolution was the product of an innovative political strategy by an actor that used market ideas as a way to compensate for a lack of power resources' – see J Nicolas, '*Playing the market: A political strategy for uniting Europe, 1985–2005'* (Cornell Studies in Political Economy), Cornell University Press 2012, Kindle Edition, 140.

[928] Combining the OMC (as soft law) with framework agreements (as instruments of coordination and harmonization, useful in the lack of a direct means of intervention) would have been, according to Scharpf, the most appropriate solution to reinvigorate the European Social Model. He insisted on the idea that this would have allowed Member States to group themselves with purpose to act together for a coherent regulatory and policy coordination, in line with the principles established at the EU level, creating a streamline of coordinated welfare measures – see F W Scharpf, '*Governing in Europe. Effective and democratic?*', Oxford University Press, 1999.

[929] J Nicolas, '*Playing the Market: A Political Strategy for Uniting Europe, 1985–2005*' (Cornell Studies in Political Economy), Cornell University Press 2012, Kindle Edition, 155.

[930] Several important Directives and Regulations have been adopted in this area, many of them repealed or replaced with other legislation. Just to name a few: Directive 68/360/EEC; Regulation 1612/68/EEC; Regulation 1251/70/EEC; Directive 64/221/EEC; Directive 2004/38/EC; Regulation 492/2011 etc.

[931] The law with the heaviest impact in this area being Directive 2006/123/EC on services in the internal market, OJ L 376, 27.12.2006, p. 36–68 (the 'Services Directive').

[932] The legislation elaborated in this area is among the richest as compared with other labour-related fields. It concerns areas like: *health and safety in the workplace* (Framework Directive 89/391/EEC which was followed by as many as 20 other Directives and Regulations on specific or punctual aspects – see for ex. Directive 89/654/EEC, Directive 89/655/EEC; Directive 2009/104/EC; Directive 89/656/EEC; Directive 90/269/EEC; Directive 90/270/EEC; Directive 2004/37/EC; Directive 2000/54/EC; Directive 92/57/EEC; Directive 92/58/EEC; Directive 92/85/EEC; Directive 92/91/EEC; Directive 92/104/EEC; Directive 93/103/EC; Directive 98/24/EC; Directive 1999/92/EC; Directive 2002/44/EC; Directive 2003/10/EC; Directive 2006/25/EC; Directive 2013/35/EC); other Directives of interest here would be Directive 94/33/EC; Directive 2012/18/EU or Regulation 2062/94 etc.); *wages and working time* (see Regulation 2744/95 and, in the particular area of migration and migrant workers, Directive 96/71/EC – modified by Directive 2018/957 – which, together with Directive 2014/67, impacted heavily on the procurement market, especially after the Court's interpretation offered in the famous cases *Viking*, *Laval*, *Rüffert*, *Luxembourg* or *RegioPost* etc.). Of equal interest are

work[933]; This legal framework has been extended over time, for instance establishing new social rights on transnational questions (such as free movement, European works' councils; posting of workers) or better coverage of new forms of employment (such as independent work or tele-work, job sharing, casual work, voucher-based work, employee sharing, interim management, ICT-based mobile work, Portfolio work, Platform work, collaborative self-employment etc.) *etc*.[934] Other important legislation has been adopted in the area of social security[935], professional training and mutual recognition of qualifications, or the rights of the migrants and those coming from third countries[936]. Many of these norms may have, due to their influence on the labour and work-related market, a direct impact on public procurement too.

Anyway, as the specific literature very interestingly shows, 'the transition to qualified majority voting was not preceded by a striking tendency of competitive national deregulation. In all cases in which a directive was contested, the UK was among the contestants. Various indices show that the UK has the least regulated labour market. More generally, the anti-regulation coalition also includes Ireland, the Scandinavian countries and the Netherlands. There are examples showing that if the coalition is too small to block the regulation, its members prefer not to record their dissent officially'.[937]

Directive 2003/EC; Regulation 450/2003; Directive 2008/104/EC etc.); *atypical work* (see for ex. Directive 97/81/EC; Directive 99/70/EC; or Directive 2008/104/EC etc.); *social dialogue and professional relations* (see Directive 91/533/EC; Directive 2009/38/EC; EC's Decision 98/500/EC; Directive 2001/86/EC; Directive 2002/14/EC; *unemployment* (Council Decision 2015/772; Council Decision 2016/1859; Regulation 453/2008 or the European Semester framework); or *worker's protection* (Directive 2008/94/EC; Directive 94/33/EC; Directive 98/59/EC; Directive 2001/23/EC).

[933] Article 119 TEEC, actual Article 157 TFEU, consecrated for the first time, at the primary law level, the principle of equality between men and women, namely in the labour field. Article 157 TFEU comes to complement Article 8 TEU which, now, guarantees equality (as a matter of general principle) between all EU citizens. It has soon been completed with several key secondary norms, among which Directive 2000/78/EC, Directive 2000/43/EC, Directive 2006/54, Directive 2010/18/EU or Directive 2010/41/EU.

[934] D Vaughan-Whitehead 'The European Social Model in times of crisis. An overview', in D Vaughan-Whitehead (ed), '*The European Social Model in Crisis: Is Europe losing its soul?*', Edward Elgar, 2015, 15.

[935] See for ex. Directive 79/7/EEC.

[936] See for ex. Directive 2000/43/EC but also Regulation 1052/2013; Regulation 1987/2006; Regulation 810/2009; Regulation 343/2005 with Regulation 1560/2003 and the application Regulation No.118/2014; Regulation 514/2014; Regulation 399/2016; Regulation 369/2016; Regulation 1624/2016; Regulation 2018/1726; Regulation 2018/1806; Regulation 604/2013 – the so-called Dublin III Regulation; Directive 2003/86/EC; Directive 2003/109/EC; Directive 2004/81/EC; Directive 2008/115/EC; Directive 2009/50/EC; Directive 2009/52/EC; Directive 2011/36/EU; Directive 2011/95/EU; Directive 2011/98/EU; Directive 2012/29/EC; Directive 2013/32/EU; Directive 2013/33/EU; Directive 2014/36/EU; Directive 2014/66/EU; Directive 2016/801/EU.

[937] R Vaubel '*The political economy of labor market regulation by the European Union'* in 2008 3 The Review of International Organizations, December 4, 445.

Diachronically speaking, however, in the social area, the strongest political messages (from the EU part) were enclosed in the 'Lisbon Strategy'[938] and, more recently, the European Pillar of Social Rights. As many have noted, all these changes were the result of long political negotiations between the main actors (namely, the Commission, the Council and the Parliament, but also the Member States and social partner organizations along with various 'political entrepreneurs' and 'members of a cross-national and supra-national group[s] of top politicians').[939]

But, if at the launching of the EES (as a *policy* instrument) everybody fell prey to the charms of the original instrument introduced thereby under the name of 'Open Method of Coordination' (*ie*, the 'OMC')[940] and especially to its apparently apolitical features (in spite of the obvious political veins of Mr. Delors' agenda and the explicit social democratic roots of his European Employment Strategy which some authors have seen as omens of deregulation and negative integration, specific to neo-liberalism[941]), it soon became obvious that, after 2005 (when the 'flexicurity'[942] came to the front while the OMC was diluted into the Broad Economic Policy Guidelines and plied with the coordination of pension and

[938] Launched during the European Council in Lisbon in March 2000 with the aim to make the EU the world's most competitive economy. The first deadline for this was set to 2010. This strategy, adapted over time in line with the changing needs of the Community, followed in general three lines of action: an *economic* one, devised to pave the way towards a competitive economy; a *social* one, aimed at modernizing the European social model by urging Member States to nurture human resources and combat social exclusion by investing in education and training and by conducting an active policy for employment; and an *environmental* one, added at the Göteborg European Council in June 2001, oriented towards a decoupling of economic growth from the use of natural resources. More on this, at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm. The High Level Group established for the drafting of a coherent agenda for the implementation of the Lisbon strategy expressed explicit concerns about the importance of ensuring that the market integration will also benefit citizens – workers and consumers. In its report 'Facing the challenge: The Lisbon strategy for growth and employment, Report from the High Level Group chaired by Wim Kok, Luxembourg, 2004', the Group concluded that, '[*c*]*learly, special attention should be paid to concerns in society, as it would be inconsistent with the Lisbon model to achieve competitiveness gains at the price of social dumping. It must be ensured that the free movement of services serves the interests of consumers*.' (emphasis added).

[939] J-C Barbier, '*Changes in political discourse from the Lisbon Strategy to Europe 2020: Tracing the fate of 'social policy'?*', ETUI aisbl, Brussels, 2011, 12, and the literature cited there, in particular: S Sylla Ndongo, Rapport de Recherche CEE No 16, Noisy-le-Grand, 2004; A Guillén and B Palier '*EU Enlargement, Europeanization and Social Policy*', in (2004) Journal of European Social Policy, 14 (3), August, 203-209; M Ferrera, '*National Welfare States and European Integration: In Search of a 'Virtuous Nesting*', in (2009) Journal of Common Market Studies, 47 (3), 219-233; M Mailand, '*Coalitions and policy coordination. Revision and impact of the European Employment Strategy*', DJØF Publishing, 2006, C Radaelli, '*The Open Method of Coordination, a new governance architecture for the European Union?*', SIEPS Report No 2003-1; V Schmidt, '*Democracy in Europe*', Oxford University Press 2006 or F Scharpf, '*The Asymmetry of European Integration, or why the EU cannot be a social market economy*', (2010) 8 Socio-Economic Review 2, 211-250, *etc*).

[940] See on this D Preece, '*Dismantling social Europe: The political economy of social policy in the European Union*', First Forum Pres, 2009.

[941] Ibidem.

[942] More on this, at https://ec.europa.eu/social/main.jsp?catId=102&langId=en. Flexicurity is, in fact, a welfare state model with a pro-active labour market policy. The term was allegedly proposed by the social democratic Prime Minister of Denmark, Poul Nyrup Rasmussen, in the 1990s and refers to a combination of labour market *flexibility* (construed in a dynamic economic environment) and *security* for workers.

healthcare reforms[943]), elements of social policy had to rank high on the European *political* agenda, especially in the middle of the recent economic crisis.[944] This only re-fuelled the conflict between the EU, on the one hand, and the Member States, on the other hand, as the first was more and more tempted to thrust its influence, owing to a favourable case law coming from the CJEU, over areas until then placed into the incontestable realm of the national authorities. Unfortunately, even at the EU level the main discourse stayed on the *economic* path for a long period, even after Lisbon and the postulation of the 'social market economy', as the political actors involved in negotiations at this level used to see (and treat) the social policy totally separated from the economic field and as an ancillary part thereof. Moreover, the 'soft' potential of the OMC, as clamoured by many in the context of an obvious limited room for action left for the Union in the social sector, and a very weak political will at the highest institutional level doubled by the negative integration induced by the CJEU through its case law ─ which eroded any substantial national initiatives, contributed to the inefficiency that characterized until very recently the implementation of the European social model.

Anyway, the franticness and the activism that characterized the first years of the EU social policy discourse re-surfaced after 2010, owing to the need to alleviate the social aftermath of the economic crisis. And, starting with the adoption of the European Pillar of Social Rights (the concrete substance of which has been criticised by many[945]), things seem to be getting more substance.

Interestingly, this new approach resembles to a hybrid combination. Inasmuch as public procurement is concerned, the Commission appears to have restricted itself to integrating a number of *general* principles and rules (usually endorsed by the previous CJEU case law) – which practically define the traditional non-exhaustive harmonization model, to which it attached a adapted version of OMC by using certain soft law instruments and projects aimed at coordinating national actions and policies.

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[943] The European Employment Strategy (EES) was launched in 1997 and reviewed in 2002. Following the review of the Lisbon Strategy in 2005, the EES guidelines were combined with the Broad Economic Policy Guidelines and these Integrated Guidelines for Jobs and Growth (2005–08) were published in 2005 (COM(2005) 141 final). For more on this, see also C Annesley, '*Lisbon and Social Europe: Towards a European 'adult worker model' welfare system*', (2007) 7 Journal of European Social Policy 3, and N Adnett and S Hardy, '*The European Social Model: modernisation or evolution*', Edward Elgar, 2005.

[944] J-C Barbier, '*Changes in political discourse from the Lisbon Strategy to Europe 2020: Tracing the fate of 'social policy'?*', ETUI aisbl, Brussels, 2011, 11.

[945] See, again, Z Rasnača, '*(Any) relevance of the European Pillar of Social Rights for EU Law?'* 2017, at https://europeanlawblog.eu/2017/11/17/any-relevance-of-the-european-pillar-of-social-rights-for-eu-law/.

This only demonstrates that, as one author said it rightly, 'social policy discourse, when it changes, is the symptom of the changing interests of changing coalitions of actors in the general intergovernmental bargaining process.' In the meantime, '[a]t the EU level, a discourse is crafted little by little as a result of inputs by relevant actors and this product represents a discursive settlement of conflicts; the final discourse (e.g. the Europe 2020 so-called guidelines) is then available for actors to use in their national forums and arenas, to be wielded as a power resource in national negotiations and conflicts'.[946]

So, to conclude, given the limited latitude for *direct* action granted to the Commission by the Treaties, even after Lisbon, its actions took the shape of either hard law instruments adopted for merely coordination and (partial) harmonization purposes - see the legislation cited above – or elements of soft law and explicit political discourse[947] through which the Commission tried to give a vigorous trend and push for a coordinated action at national level. For the latter case, are worth citing The Community Charter of Fundamental Social Rights of Workers (1989), the Charter of Fundamental Rights of the European Union (2000), the OMC and the flexicurity discourses and actions, including the Partnership for Growth and Jobs launched in February 2005 and the renewal of the Sustainable Development Strategy, in December 2005, as well as the Renewed Social Agenda (2008)[948], the measures taken under the agenda for the Corporate Social Responsibility (including the Green Paper on Promoting an European Framework for Corporate Social Responsibility – 2001, the Communication on making Europe a pole of excellence on corporate social responsibility - 2006[949], the Communication on the renewed strategy for CSR - 2011[950], which have met the support of the other EU institutions – see for ex. the EP's Resolutions on CSR[951]), the Interpretative communication of the Commission on the Community law applicable to public

[946] J-C Barbier, '*Changes in political discourse from the Lisbon Strategy to Europe 2020: Tracing the fate of 'social policy'?'*, ETUI aisbl, Brussels, 2011, 12.
[947] Which has been acknowledged as a key instrument of intervention/manipulation/coordination starting with the EU's White Paper on Communication of 2006 – COM(2006) 35 final.
[948] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Renewed social agenda: Opportunities, access and solidarity in 21st century Europe - COM(2008) 412 final.
[949] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility - COM(2006) 136 final.
[950] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A renewed EU strategy 2011-14 for Corporate Social Responsibility - COM(2011) 681 final.
[951] European Parliament resolution of 6 February 2013 on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth (2012/2098(INI)) - 2016/C 024/06, and European Parliament resolution of 6 February 2013 on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery (2012/2097(INI)) - 2016/C 024/07.

procurement and the possibilities for integrating social considerations into public procurement[952] (2001) together with its *Buying Social* guide (2011) and the European Pillar of Social Rights (2017).

We may hence say, along with other authors[953], that 'ever since the launch of the Lisbon Strategy in the year 2000, the EU has paid full regard to the fight against poverty and social exclusion when formulating policy objectives and instruments. It was a central theme within the context of the Open Method of Coordination in the field of social protection and social inclusion as well as in employment strategy, [and it soon became a central theme in public procurement too[954]]. This objective was further confirmed in 2010 by the conclusions of the European Council of 17 June 2010 on the Europe 2020 Strategy.'[955]

1.4. The European social model: a barb in the flesh of the internal market?

In the context described above, at both political and doctrinal levels, a new concept started to take shape: that of a "European social model" (ESM).[956] This unfortunately was and remained an elusive notion, with as many a meaning as the interpreters.[957] The European Commission, in its White Paper on Social Policy (1994), pointed to the following values which, in its opinion, reinforce the ESM: democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity. 'These values - which were encapsulated by the Community Charter of the Fundamental Social Rights of Workers – are held together by the conviction that economic

[952] /COM/2001/0566 final, Official Journal No.333 of 28/11/2001.
[953] H Verschueren, 'EU migrants and destitution:the ambiguous EU objectives', in F Pennings and G Vonk (eds), *'Research handbook on European security law*', Edward Elgar, 2015, 416.
[954] See above, especially starting with the Interpretative Communication of 2001 and the ensuing case law, and ending with the current set of directives.
[955] H Verschueren, '*Free movement of EU citizens - including for the poor?*', in (2015) 22 Maastricht Journal of European and Comparative Law 1, 15.
[956] 'The 'European social model' is a phrase often heard in European discourse. (…) While it was first invented to symbolise Mr. Delors's vision of a social-democratic Europe, it was then increasingly used to legitimise a predominately neoliberal integration process, before becoming a justification for the cutting back of existing welfare systems. The popularity of the European social model, however, still stems from the fact that it articulates an alternative to US-style freemarket capitalism. The concept is therefore also used by left forces in order to formulate their vision of an alternative Europe' (C Hermann and I Hofbauer, *'The European social model: between competitive modernisation and neoliberal resistance*', in (2007) 31 Capital & Class 3, 125).
[957] As rightly synthetized by Anthony Giddens (in its '*Turbulent and mighty continent: what future for Europe?*' (2014) Polity, 88), '*It has been aptly said that the ESM is not wholly European, not wholly social and not a model.*' (our emphasis).

and social progress must go hand in hand. Competitiveness and solidarity have both to be taken into account in building a successful Europe for the future.'[958]

But for the heads of state meeting at the Nice European Council in December 2000, the European social model was primarily about employment and employment policies[959] (in spite of the fact that job creation fell, as such, outside the EU's legislative competences). Later on, the European social model included the agreements between the social partners in the law-making process, the Luxembourg European Employment Strategy (EES), the open method of co-ordination on the subject of social exclusion, and greater co-operation in the field of social protection. In sooth, '[t]hese (…) indicate that there is no single EU concept of the ESM. Rather, the ESM is a flexible idea which embraces an eclectic range of policies from employment law, as narrowly defined, to the creation of the welfare state, including education, healthcare and social security.'[960]

The ESM is now a palpable reality, in spite of several voices that contest its existence or, at least, its effectiveness.[961] It involves, in a nutshell, shared values, in particular those listed in Article 3 of the Treaty on European Union (including social justice, equality, and solidarity) and high standards. It is delivered in part through EU legislative initiatives, but also by the Member States and by the social partners ─ at national and sub-national level. '(…) *Despite the lack of clarity as to what precisely is included under the rubric of the ESM, it is at least implicit in the EU institutions' observations that the social dimension is an integral part of the European Union project.*' (emphasis added).[962] Consequently, as some authors have pinpointed, all these desiderates would remain impossible to implement (for sure not to the ambitious levels and in the substantial manner envisaged in all official documents) as long as the fundamental freedoms enshrined in the Treaties continue to be pursued mechanically and without a proper adjustment and adaptation.[963] Only a right balance between the two dimensions of the EU's internal market may lead to full integration.

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[958] European Social Policy - A Way Forward for the Union. A White Paper. Part A. COM (94) 333 final, 27 July 1994, para 3.
[959] C Barnard, '*EU EmploymentlLaw and the European social model: the past, the present and the future*', (2014) Current Legal Problems, Oxford University Press, 200.
[960] Ibidem.
[961] 'What type of social model is it that has 20 million unemployed in Europe; productivity rates falling behind those of the USA; that is allowing more science graduates to be produced by India than by Europe? The purpose of our social model should be to enhance our ability to compete, to help our people cope with globalisation, to let them embrace its opportunities and avoid its dangers. Of course we need a social Europe. But it must be a social Europe that works' (T Blair, speech to the EU parliament, 23 June 2005, at http://www.number-10.gov.uk, in the Tony Blair archive). See also K J Lauk, '*The European social model: in urgent need of redefinition*', (2009) European View 8, 53 *et seq*.
[962] Ibidem, 201.
[963] Ibidem, 202.

Anyway, raw elements of an incipient European social model were sowed early, in the Treaty or Rome (in particular a general commitment to equal pay between men and women, similar to the actual Article 157 TFEU, and a single provision on holiday pay, which is now reinforced by Article 158 TFEU). But the basis for a fully-fledged European social model was practically set by the Treaty of Amsterdam, which came with a brand-new title requiring the development of a 'co-ordinated strategy for employment'. This followed right after the Luxembourg European job summit (held in November 1997) where the participants voted for a common employment strategy the punctual goals of which were to be established on an annually basis and further transposed into policies by each Member State in a National Action Plan for Employment.[964]

An array of ensuing Council meetings developed relatively quickly the path to a ripe yet modern European social model which to respond to the new challenges brought by globalization and a rapid and continuous transformation of the world's economy, which a too rigid Europe seemed not to keep up with. The decision to move to an uniformly articulate and functional European social model took into account the serious gaps and inconsistencies between the multitude of policies and regulations adopted in the social area in each Member State (concerning a wide diversity of issues, from minimum wages and maximum working time, to job security and equality, health and safety at work, maternity and parental rights, but also the regime of collective bargaining and collective agreements, and further to the crafting and implementation of complex welfare systems) but also the fact that, taken separately, all these policies had the potential to influence and change the labour market in very different ways.[965]

But the modernization process was not simple.[966] Several attempts were made to find the right path,[967] with the Lisbon stage (starting in March, 2000) representing the fifth

[964] N Addnett, '*Modernizing the European social model: developing the guidelines*' (2001) Journal of Common Market Studies, Vol.39, Issue 2, 354.
[965] Ibidem, 357.
[966] See for ex. see F Scharpf, '*The European social model: coping with the challenges of diversity*' (2002) 40 JCMS 645, D Wincott, '*European political development, regulatory governance, and the European social model: the challenge of substantive legitimacy*' in (2006) European Law Journal, Vol. 12, No. 6, pp. 743–763, D Vaughan-Whitehead (ed), '*The European social model in crisis: is Europe losing its soul?'*, Edward Elgar, 2015 (esp. p.10-11 where the author synthesizes the relevant conclusions of the European Councils on the ESM, starting with the Lisbon one, in March 2000 and until December 2012 in Brussels), or D Damjanovic, '*The EU market rules as social market rules: why the EU can be a social market economy*' (2013) 40 Common Market Law Review, 1685.
[967] As pointed by some authors (see for ex. P Pochet, 'The Open Method of Coordination and the construction of social Europe: a historical perspective' in J Zeitlin and P Pochet (eds) *The Open Method of Coordination in action*, 2005, Peter Lang, Brussels, 41, or J Zeitlin, 'Towards a stronger OMC in a more social Europe: A new governance architecture for EU policy coordination', in E Marlied and D Natali, '*Europe 2020: towards a more*

and the most important step. The Lisbon agenda (adopted in a moment when the social democratic governments dominated the European political spectrum and insisted for a shift from the traditional social security systems, which were allegedly encouraging home staying, early retirement and a deep disinterest for job searching, to an 'active welfare state' promoting occupational behaviour and labour (re)integration and 'encouraging all adults into employment')[968] basically reactivated the European Employment Strategy agenda[969], insisting on the importance of the OMC mechanism in the process of reshaping the social model at a EU scale, especially in the context where the welfare models adopted across the Members States were quite diverse and disparate.[970]

Six main pillars have been identified as defining the modern European Social Model: (a) increased minimum rights on working conditions; (b) universal and sustainable social protection systems; (c) inclusive labour markets; (d) strong and well-functioning social dialogue; (e) public services and services of general interest; and (f) social inclusion and social cohesion.[971]

It basically refers to a complex scheme of welfare models which tends to crystalize at the Union's level, independently of the models practiced in each Member State. At the core of the ESM sit welfare services. As a matter of principle, the broad notion of 'welfare services' appears to encompass two discrete categories of 'social' services: the *core* welfare services, which are traditionally provided by the public sector[972] and the services *provided by public utilities* which used to be, in most countries, State monopolies but which are now largely liberalised and considered as satellites to the core welfare services and an important arm of the welfare state. The first category includes services like social assistance to the poor and social security schemes which provide protection in case of sickness,

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social EU', Peter Lang, Brussels, 2010, 253), each of these phases is 'more a story of failure than great success' (Pochet, 39).

[968] According to M Rhodes ('*Lisbon: Europe's "Maastricht for welfare?*', 2000, *ECSA Review* 13, 3), 'if the political will is there' then 'Lisbon may one day be considered Europe's "Maastricht" for the welfare state'. However, as others argued (see for ex. P Manow, A Schäfer, and H Zorn, ,*European social policy and Europe's party-political center of gravity 1957–2003',* (2004) MPIfG Discussion Paper, Issue 6), the critical mass of social democratic governments in Europe during the 1990s succeeded in putting social Europe back on to the agenda; but because they opted for, or were required to, choose the soft governance tool of OMC rather than legislation, the substance of social democratic preference has not been locked in so that it could effectively commit their successors.

[969] D Wincott, '*Beyond social regulation? new instruments and/or a new agenda for social policy at Lisbon?*', (2003) Public Administration Review, Vol 81 Issue 3, 533–53.

[970] C Annesley, '*Lisbon and social Europe: Towards a European 'adult worker model' welfare system*', (2007) Journal of European Social Policy, Vol.7, Issue 3, 196.

[971] D Vaughan-Whitehead, 'The European social model in times of crisis. An overview', in D Vaughan-Witehead (ed) '*The European social model in crisis. is Europe losing its soul?*', Edward Elgar, 2015, 12 *et seq*.

[972] See the Commission staff working document: Frequently asked questions concerning the application of public procurement rules to social services of general interest, SEC (2007) 1514.

invalidity, old age, unemployment or parenthood (supplemented by family-supporting services in general), as well as public health care and public education, whereas the second category covers public broadcasting, basic telecommunications services, basic postal services, electricity and gas, public transport, waste disposal, water and sanitation, *etc*. In close vicinity of these welfare services sit labour market regulation – including the social dialogue and equality policies.[973]

It is hence no wonder that, given the importance of these issues for the good functioning of the internal market itself, the European legislature tried to exploit to the fullest extent the use of various 'economic' instruments in the promotion of a uniform model of 'hardcore' social values. Thus, owing to its huge potential and heavy implications on multiple levels, public procurement could not be ignored. The adoption, in 2014, of the latest package of Directives in this field was seen as a 'creative and imaginative marriage between social policy and the single market'.[974]

However, when, in 1999, Professor Scharpf proposed combining the framework directives mechanism with the OMC in order to resuscitate the European social model[975], he insisted on the opportunities that such an approach would bring about for Member States, especially in the area of policy coordination. Such a process would facilitate, he claimed, a tailoring of those policies according to the particular needs of each Member State, but necessarily in strict alignment with the standards set through the directives. This proposal was not, at first, openly embraced at the political level. But, in the actual political-economic context, the EU institutions (and in particular the Commission) appear to be ready to resuscitate Scharpf's idea. In the public procurement area, for example, the Commission, forced to stop short before the restrictive rules that govern the classical non-exhaustive harmonization and, inspired by the efficiency of the mechanisms specific to the ESM, has been endeavouring for some years to fill the gaps with intelligent combinations of hard law (such as the recent package of directives on public procurement) and quasi-OMC tools (including elements of soft law – such as detailed guidelines, declarations, communications, instructions or collections of goods practice *etc*, but also several key projects aimed at better coordinating the national policies and practices – see for ex. the Study on the Strategic Use of

[973] D Damjanovici, B De Witte, '*Welfare integration through EU law: The overall picture in the light of the Lisbon Treaty',* EUI Working Paper LAW No. 2008/34, the European University Institute, Badia Fiesolana, available at http://cadmus.eui.eu/handle/1814/10008.
[974] C Barnard, '*EU employment law and the European social model: the past, the present and the future'*, Current Legal Problems, Oxford University Press, 2014, 21-2.
[975] F W Scharpf, '*Governing in Europe. Effective and democratic*?', Oxford University Press, 1999.

Public Procurement in Europe (Final Report to the European Commission),[976] or the project '*Public procurement in Europe. Cost and effectiveness. A study on procurement regulation*' finalized in 2015,[977] or the BSI - Buying for Social Impact project carried out between 2017 and 2019[978] and the ensuing collection of examples of good practice[979] *etc*, all designed to encourage the pursue of sustainable and, in particular, social goals through public procurement by an enhanced exchange of information and know-how, and to level up policies and practice across Member States in an attempt align them with the highest common denominator).

In parallel, the economic policy coordination procedures that functioned until 2010 were carried out independently of each other, which created convergence failures and discrepancies among EU and national policies. Due to these shortcomings, this system was replaced, in 2010, with the European Semester, a new mechanism destined to ensure a better coordination of the EU's economic and fiscal policies. Under this mechanism, Member States are due to align their budgetary and economic policies with the objectives and rules agreed at the EU level.[980] The construction that captures best the essence of its functioning is the 'integrated coordination',[981] which was assumed in explicit terms as the key of the whole EU's governance framework,[982] and which entails the full incorporation of the EU employment and social policies into the EU's general economic governance structure. Public procurement is explicitly mentioned as a strategic tool to this end.[983]

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[976] MARKT/2010/02/C.

[977] At https://op.europa.eu/en/publication-detail/-/publication/05d1e581-571e-43ad-8597-649a7b655bd9/language-en/format-PDF/source-search.

[978] The conclusions of which are available at https://www.aeidl.eu/docs/bsi/index.php/.

[979] https://op.europa.eu/en/publication-detail/-/publication/69fc6007-a970-11ea-bb7a-01aa75ed71a1.

[980] https://www.consilium.europa.eu/en/policies/european-semester/

[981] 'This notion refers to the integration of different policy fields, notably of fiscal, economic and employment policies, within the framework of Europe 2020 and, amongst others, by means of "integrated guidelines"' - N Büttgen, '*Which mode(s) of governance for a floor of rights of worker protection?*', presented in June 2013 at the ILERA congress in Amsterdam, and available at: http://ilera-europe2013.eu/uploads/paper/attachment/294/Article_ILERA_congress_final_paper_Buttgen.pdf, 9.

[982] As the Council underscored in its Recommendation of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union (2010/410/EU, OJ L 191, 23.7.2010, p. 28–34), the successful implementation of the Europe 2020 Strategy requires that economic and social reforms go hand in hand. The policies "which Member States and the Union should implement fully and at a similar pace, in order to achieve the positive spill-over effects of coordinated structural reforms, and more consistent contribution from European policies to the Strategy's objectives, taking into account national starting positions" have to be pursued via efficient instruments and public procurement is assumed to be one of the most powerful tools for this purpose; to the same effect see also Council Conclusions on Governance of the European Employment Strategy within the context of Europe 2020 and the European Semester (2010), available at https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/lsa/117240.pdf.

[983] This only goes perfectly along the lines drawn by Titles IX and X TFEU and in particular by Articles 145 and 151 TFEU.

2. Social economy and the role of social enterprises in the internal market

Social enterprises[984] lay at the core of both social economy and the social market economy. The place of these vehicles in the Union's economy has evolved enormously, especially after the adoption of the European Social Business Initiative. EESC's[985] recent recommendations on social enterprises[986] capture the gist of this evolution, and the key policy recommendations comprised therein show the determination of the EU institutions to create a both institutional and policy environment which to give thick substance to the to the social (market) economy promoted in and through the Treaties[987]. As the EESC itself acknowledged throughout its afore-cited recommendations, the EU citizens and social enterprises "must be at the heart of European Strategies aimed at promoting social cohesion, social inclusion and well-being"[988]. This assertion just underscores the extraordinary role which social enterprises must have in the delivery of the strategic goals set through the Treaties and hence shed a little light on their place in the public procurement equation.

Social enterprises are ordained to pursue objectives with a barely marginal economic input but with a great added social value[989], so it has only become normal to gain,

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[984] Although there is no clear definition for social enterprises, it is common ground that one of their main characteristics and purposes is the pursuing of various *social* goals. However, what differentiates them from traditional social economy organisations, is the fact that social enterprises are predominantly oriented "*towards addressing not only the needs of their owners or members, but also of the entire community (including the needs of the most fragile segments of society), as they put more emphasis on the dimension of general interest rather than on purely mutualistic goals*" emphasis added (Social Europe Guide – Vol.4 - ISSN 1977-2343, 32, available at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7523> accessed 27 November 2018). Also, for a general presentation of the EU policies crafter around this concept, see <https://ec.europa.eu/growth/sectors/social-economy/enterprises_en> accessed 27 November 2019.

[985] The European Economic and Social Committee, an European consultative body created pursuant to Article 193 of the TEEC 1957.

[986] EESC recommendations on Social Enterprise (2014), available at <https://www.eesc.europa.eu/resources/docs/qe-04-14-860-en-n.pdf> accessed 23 November 2019.

[987] The efficiency of social enterprises in the delivery of their social mission is periodically assessed at the EU level, in order to fine-tune the future evolution of the European social policies for an as deep an impact as possible. For a deeper understanding of this assessment mechanism and its importance in the economy of the evolution of social enterprises and of the entire social market economy that depends on their fine functioning, see the European Commission's "Proposed Approaches to Social Impact Measurement" (2015) available at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7735> accessed 23 November 2018.

[988] EESC's Recommendations (n 985), 2.

[989] More on the sensitive role played by social enterprises in the social (market) economy, see https://www.rreuse.org/the-social-economy/ accessed 27 November 2019. According to this material, one of the most important features that define social enterprises is that „*Often (...) [they] operate in economic niches which might not, at first, seem profitable. [But], [i]f this changes, (...) the competition from different actors can push them out of the market and destroy their social value*")." – emphasis added. In fact, what confers social sector

in the framework marked out by the Treaty of Lisbon, a central place in the EU's social market economy. They seem to have emerged as a result of the boost of the third-sector economy, in the context of the surge of civil society initiatives in the aftermath of the latest economic crisis. Their functioning is largely based on a combination of voluntary and paid work and on a mixture of financial resources generated by the sale of goods and services, public financing (via contracts, tax benefits and direct subsidies) and private donations.[990]

Social enterprises are in general seen as active actors in important social areas such as social protection, social services, health, local services, education and training, culture, sport and recreational activities. Owing to their important role in the economies of many welfare states, social enterprises benefit from intense promotion at the level of representative EU institutions.[991]

Social economy enterprises developed hanks to the interplay between bottom-up (namely community-led) and top-down (externally-driven) drivers, including European funding programmes, which have been an important factor in many countries, in particular the European Social Fund.'[992] Their development is thus defined by solidarity values which encourage citizens to 'self-organise intertwined with specific public policies and public schemes.'[993] More recent studies describe social enterprises as the spine social economy.[994]

According to a very recent study commissioned by the European Commission, there are several types of social economy enterprises, depending on their concrete legal status and form of organization. Their statutory form varies from Member State to Member State. Anyway, the most common ones are set up under an institutionalized form (with a regulated, legal status).[995] But, regardless of their status and effective internal organization, they all

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great value in a public procurement equation is the fact that it opens a wide door for public commissioners "to build a supply chain that actually shares [their] essential purpose and values" as such values may stem from various public policies (F Villeneuve-Smith and J Blake, *The art of the possible in public procurement* (2016) available at <https://www.bwbllp.com/file/the-art-of-the-possible-in-public-procurement-pdf> accessed 27 November 2018.

[990] D Parvu and E Clipici, "*Social enterprises and the EU's public procurement market*", in (2016) 27 VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations 4, 1612.

[991] Ibidem.

[992] European Commission (2020) '*Social enterprises and their ecosystems in Europe. Comparative synthesis report. Executive summary*', authors: Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales and Chiara Carini, Luxembourg: Publications Office of the European Union, available at https://europa.eu/!Qq64ny, 9.

[993] Ibidem.

[994] J Defourny, L Hulga°rd and V Pestoff, (eds), '*Social enterprise and the third sector: changing European landscapes in a comparative perspective*', Routledge, 2014.

[995] European Commission (2020) '*Social enterprises and their ecosystems in Europe. Comparative synthesis report. Executive summary*', authors: Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales and Chiara Carini, Luxembourg: Publications Office of the European Union, available at https://europa.eu/!Qq64ny, 23.

respond, in principle, to a variety of scopes, depending on the concrete welfare system under which they are functioning. *Figure 1* below reveals this mapping.

Type of welfare system	**Main drivers boosting SE development**	**Examples of countries**
Poor supply of welfare services by public providers and, traditionally, gaps in welfare delivery and strong civic engagement	✓ Bottom-up experimentation by groups of citizens of new services ✓ Consolidation of SEs thanks to public policies that have regularised social service delivery	Greece, Ireland, Italy, Portugal, Spain
Extensive public supply of social services, increasingly contracted out to private providers	✓ Privatisation of social services ✓ Bottom-up dynamics	Denmark, Finland, Norway, Sweden, United Kingdom
Extensive public and non-profit welfare structures, covering the majority of the needs of the population	✓ Public support system designed to support work integration ✓ Bottom-up emergence of SEs to address new needs	Austria, Belgium, France, Germany, Netherlands
Welfare systems that have undergone drastic reforms, weak associative and cooperative tradition	✓ Public policies (start-up grants) specifically tailored to support WISEs ✓ Initiatives with philanthropic background and donors' programmes	CEE and SEE countries

Figure 1: **Drivers and trends of social enterprises** – source: European Commission (2020) '*Social enterprises and their ecosystems in Europe. Comparative synthesis report. Executive summary*', authors: Carlo Borzaga, Giulia Galera, Barbara Franchini, Stefania Chiomento, Rocío Nogales and Chiara Carini, Luxembourg: Publications Office of the European Union, 9

Many sources underscore the contribution of social economy organizations to the achievement of important goals for the community such as local economic development, creation of jobs, increase in social inclusion, sustainable economic growth *etc*.[996] The European Commission itself insists on the role of social enterprises in the European socio-economic context[997] and, to this extent, has come with several initiatives aimed at boosting their development.[998]

At a more concrete level, social enterprises are also key actors in the delivery of public contracts.[999] Thus, ascertaining the huge import of social enterprises for the EU social market economy, the new package of Directives on public procurement reserved for them a special place.[1000] The mechanism consecrated by Articles 20 and 77 represents, in sooth, the only[1001] form of positive discrimination explicitly permitted by Directive 2014/24 in an area where fundamental public interests of a social nature prevail over the economic ones which, as a matter of principle, demand free competition as a guarantee needed to secure the four freedoms enshrined in the EU Treaties and which constitute the foundation of the single market. However, given the explicitly restrictive nature of these provisions, many hastened to challenge their conformity with the Treaties and, in particular, with the specific rules that govern the internal market and competition within it, accusing the European legislature of putting unnecessary (unlawful?) pressure on the functional structure of the single market.

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[996] See D Parvu and E Clipici, "*Social enterprises and the EU's public procurement market*", in (2016) 27 VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations 4, 1618 and the literature cited therein.

[997] See https://ec.europa.eu/growth/sectors/social-economy/enterprises_en.

[998] See for ex. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions '*Europe's next leaders: the Start-up and Scale-up Initiative*', COM(2016) 733 final.

[999] For an in-depth analysis, see J Barraket and J Weissman, *'Social procurement and its implications for social enterprise: a literature review*', The Australian Centre for Philanthropy and Nonprofit Studies, Working Paper No. CPNS 48, 2009. This role has recently been acknowledged by also the European Commission – see for ex. the project 'Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises' EASME/COSME/2017/030. See also S-A Muñoz, '*Social enterprise and public sector voices on procurement*', (2009) 5 Social Enterprise Journal 1.

[1000] There are strong evidences that '*the award of public contracts, as a specific form of the partnership between the state and the structures of the civil society, contributes to the consolidation of the tertiary sector in the EU countries*.' - D Parvu and E Clipici, "*Social enterprises and the EU's public procurement market*", in (2016) 27 VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations 4, 1620 (emphasis added).

[1001] The two Articles share a common goal, aiming at the same social values. A necessary distinction must nevertheless be made between the exception regulated by Article 20 and that making the object of Article 77 as the first applies, in general, to all public procurement contracts, without distinction, whereas the latter targets merely *services* contracts, and not even all services contracts, but only to those having as their object one of the services corresponding to the CPV codes listed thereunder (*ie*, social, health and cultural services of an obvious general public interest).

Nevertheless, the possibility to reserve a contract to a specific category of bidders is not brand new to public procurement. Directive 2004/18[1002] foresaw, in its Article 19, in a similar manner, that „*Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions. The contract notice shall make reference to this provision*." Additionally, Recital (28) from the Preamble to the same Directive 2004/18 clarified that „*Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.*"

Regardless of these ambitious arguments, the 2004 rules on reserved contracts had a very limited application, mainly given the lack of courage among contracting authorities and practitioners (since it was quite a revolutionary change in the very strict way that the internal market and competition rules were applied hitherto and many were still afraid to test its resistance to the pressure exercised by the traditional internal market rules). In fact, some Member States, where this mechanism functioned acceptably and where the institution of reserved contracts gained some traction – see for example Romania's case – owed this practice not to the provisions contained in their national laws transposing the procurement Directives but to a complementary legislation concerned with, specifically, social policies, social economy and social enterprises. Such specific norms (which usually ignored the economic dimension and the pressure brought about by the need to secure free competition in the market and instead focused exclusively on the crafting and the implementation of various social policies) put actually a strong burden on contracting

[1002] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114.

authorities to go that way, which only shows that coercion is often more effective than a mere door left open just in case.[1003]

On the other hand, Directive 2004/18 comprised no provisions similar to that contained in Article 77 of Directive 2014/24. This is actually true for the entire Chapter I of Title III from Directive 24 which have set up a lighter regime for the procurement of social and other specific services (the majority of which were initially excluded as such from the application of Directive 18).

Even more noteworthy, neither Articles 20 and 77 from Directive 24, nor Article 19 from Directive 18 had any correspondence in the former Directives 93/36 and 93/37[1004] -- still tributary to the paradigm consecrated by the Treaty establishing the European Economic Community of 1957. This only underlines the dramatic transformation that took place at this level since the dawn of the European integration, and how social values became, in a piecemeal fashion, an essential part of the EU's economy, oozing from the Treaties, through the relevant EU hard and soft law, down to the legal environment of each Member State.

Actually, the cited Article 19 of Directive 2004/18 wasn't even the first choice of the Commission. In reality, the idea to make room to such a restrictive instrument in the context of public procurement appeared only later, during the debates that took place in the European Parliament, and it took a long legislative process to finally become reality in the form quoted above.

Later on, through the thorough reform of 2014, the European legislature stretched even more the scope of this derogation, extending both the sphere of entities to which a contracting authority may now reserve a public contract (by including, beside sheltered workshops, also *economic operators whose main aim is the social and professional integration* of disabled or disadvantaged persons), but also that of the persons which may be included in such schemes (*ie*, not only "handicapped persons" but also *disadvantaged* persons). In addition to all that, Directive 2014/24 has also lowered the bar with regard to the number of people which a sheltered workshop or an entity involved in the social or professional integration thereof must hire in order to qualify for the awarding of a reserved public contract (from "most of the employees" to a much functional 30 per cent).

[1003] For details, see Chapter V below.
[1004] Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199 / 1, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1993 L 199 / 54.

Scuffles and contradictory debates took place also in connection with the contents of Article 20 of the current Directive 24, especially with regard to the categories of persons targeted by this measure (*ie*, only those with disabilities versus them but also disadvantaged persons) and the concrete forms of protection, the adopted version embracing, in the end (and after a powerful lobby from some very active European social organizations[1005]), the form initially proposed by the Commission.

However, Articles 20 and 77 from Directive 24 are now ordained to respond, with more vigour (as compared with the mechanisms similar in nature yet far weaker in effect embedded in the previous set of EU laws on public procurement), to the *current* social challenges which have been haunting the European continent in the last years (such as the disturbingly high number of long-term unemployed and a poverty that has proliferated in the aftermath of the recent economic crisis, mass migration[1006] and more and more radical nationalist movements, a diversification of the forms of exploitation, by employers, of their own employees based for example on nationality grounds , *etc*). Unfortunately, due to a very diverse landscape resulted from their transposition into national legislation of the Member States[1007], the application of the two Articles is rather frail and incongruous.[1008]

In fact, the possibility to use specific public procurement mechanisms with the explicit purpose to boost the integration of certain categories of disadvantaged or otherwise

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[1005] See for example http://www.easpd.eu/en/content/reserved-contracts-public-procurement, or http://www.socialplatform.org/news/why-reserved-contracts-in-public-procurement-are-important/ , accessed 27 November 2019.

[1006] The crucial importance of migrants' integration in the actual European social economy is underscored repeatedly, sometimes with an accent on the effects of 'non-integration' – see for ex. the Opinion of the European Economic and Social Committee on '*The costs of non-immigration and non-integration'* (2019/C 110/01).

[1007] For a comprehensive discussion, see I Baciu, "*The possibility to reserve a public contract under the new European public procurement legal framework*" in (2018) European Procurement & Public Private Partnership Law Review 4, 307 *et seq*.

[1008] Not only that the transposition norms are, in some Member States (like Romania – see, again, I Baciu, "*The possibility to reserve a public contract under the new European public procurement legal framework*" in (2018) European Procurement & Public Private Partnership Law Review 4, 307 *et seq*) *not* consistent with the EU law (as required by a constant CJEU case law), but also colliding with each other – *eg*, the Belgian law allowed, even before 2014, the reservation of contracts for social enterprises. To this extent, and in order to 'solve the trade-off between social objectives and efficiency', it encouraged, and continues to encourage, social enterprises to 'team up with standard companies and compete as 'joint ventures' (…)' in order to reap both the economic and the social available rewards, 'as the social enterprise shares its 'community' understanding while the standard company brings its 'business orientation' (see The European Committee of the Regions, Commission for Economic Policy, *'Assessing the implementation of the 2014 Directives on public procurement: challenges and opportunities at regional and local level'*, a report by A Valenza, M Alessandrini, P Negrila and P Celotti, European Union, 2019, 28). To the contrary, the practice in other Member States tends to forbid this kind of partnerships as going against the 'social' core of Article 20 (which is supposedly aimed at protecting only social economy enterprises but not also usual traders) – see the Romanian case law cited in I Baciu, "*The possibility to reserve a public contract under the new European public procurement legal framework*" in (2018) European Procurement & Public Private Partnership Law Review 4.

impaired or debilitated persons into the labour market or with the other members of the community[1009] is now, due to the decisive political shift that left an unmistakable footprint in the Treaty of Lisbon, part of the larger strategy[1010] assumed at the Union's level and which purports to transform public procurement into a powerful, strategic tool for the implementation of various public policies not directly connected with this field (which, traditionally, has more to do with the efficient spending of public funds and the promotion of a free competition among traders) but aiming at enhancing the general wellbeing and, in particular, at generating social benefits and bolstering the integration of the disadvantaged. Although frail at the outset, this approach gained enough traction of late, especially based on a constant case law coming from the European Court of Justice and, later, the Court of Justice of the European Union[1011] and, more importantly, the substantive changes brought about by the Treaty of Lisbon.

3. The specific case of fundamental (social) rights

When the theme of (fundamental) human rights started to come into the limelight, the accent was firstly put, given the circumstances in which that happened, on *civil* and *political* rights.[1012] In the following stages, however, also specific economic, social and

[1009] For an extensive discussion on these aspects, see Chapters V and VI below.

[1010] *Ie*, the Europe 2020 strategy. To this very purpose, Recital (2) of the Preamble to Directive 2014/24 states in explicit terms that "*Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council (4) and Directive 2004/18/EC of the European Parliament and of the Council (5) should be revised and modernised in order to (...) enable procurers to make better use of public procurement in support of common societal goals.*" Along the same lines of action, Recital (3) goes even further and clarifies that "*When implementing this Directive, the United Nations Convention on the Rights of Persons with Disabilities should be taken into account, in particular in connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions*." (emphasis added).

[1011] See in this regard, for example, the cases C-31/87 *Beentjes* [1988] ECR - 04635, C-225/98 *Nord – Pas de Calais* [2000] ECR I-07445, C-513/99 *Concordia Bus* [2002] ECR I-07213, C-368/10 *Max Havelaar* [2012] ECLI:EU:C:2012:284 or, more recently (but of crucial import for this discussion), C-346/06 *Rüffert* [2008] ECR I-01989 and C-115/14 *Regio Post* [2015] ECLI:EU:C:2015:760.

[1012] As such, it is worth noting that the famous case where the Court recognized, for the first time, the fundamental rights of individuals as part of the general principles of the EU law (C-26-69, *Stauder*, [1969] ECR 419) dealt with a fundamental *civil* right, that to non-disclosure of personal data.

cultural rights gain a privileged status[1013], being acknowledged as fundamental too, hence worthy of a similar protection. The fact that, in many cases, violations of civil and political rights were essentially linked to violations of economic, social, and cultural rights have substantially contributed to this – see for example the case, cited in many papers, to do with the forced control of coffee prices with purpose to fund military operations, 'thus limiting farmers' chances of making an adequate living'.[1014] Consequently, while the diversity of political systems and societal structures led, in general, to the establishment of structurally and substantially different sets of fundamental values pertaining to different statal identities[1015], certain economic, social and civil rights have been attributed a *generally binding* nature, being consecrated as such in more and more international treaties.[1016] All these international documents converged to the idea that there shouldn't be any hierarchy between human rights and that economic, social, and cultural rights should not be treated as second-class values, as providing protection for all these rights is as necessary a duty as in the case of fundamental civil and political rights.[1017] In spite of this trend, or rather in the face of it, came a strong resistance of national courts to the judicial enforcement of these rights.[1018]

It appears however that, even before the Charter was integrated into the hard law of the Union, fundamental social rights were treated by the Court of Justice of the Union as common forms of mandatory requirements and (along with other public policies that are not necessarily a source of rights) tested as such. After the adoption of the Treaty of Lisbon however, the Court appears to have not been sure about the correct path and applied the proportionality test with less vigour, being sometimes tempted to reduce it to a bare balancing of interests. The opinion of AG Verica Trstenjak in C-271/08, *Commission v Germany*, is relevant in this regard. She basically stressed there that, '*In the case of a conflict between a*

[1013] With particular regard to the evolution of the protection of social rights in the EU, see R O'Gorman, *The ECHR, the EU and the weakness of social rights protection at the European level*', in (2011) 12 German Law Journal 10.
[1014] L Arbour, '*Economic and social justice for societies in transition'*, (2006) 40 International Law and Politics 1, 8, 9.
[1015] M Avbelj, '*European Court of Justice and the question of value choices. Fundamental human rights as an exception to the freedom of movement of goods'*, New York University School of Law, Jean Monnet Working Paper 06/2004, 8.
[1016] See for ex. the Convention on the Elimination of All Forms of Discrimination against Women (Article 13) or December 18, 1979 - 1249 U.N.T.S. 20378; the Convention on the Rights of the Child (Article 4) of November 20, 1989 - 1577 U.N.T.S. 43; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990 - U.N. Doc. A/Res/45/158; the Convention on the Rights of Persons with Disabilities of 13 December 2006, U.N. Doc. A/Res/61/106 etc.
[1017] In spite of this principle, the Court appears to have spotted some traces of differentiation which may force a hierarchy between human rights themselves – see for ex. case C-147/17, *Ustinia Cvas and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța*, ECLI:EU:C:2018:926, para 55, cited below.
[1018] L Arbour, '*Economic and social justice for societies in transition'*, (2006) 40 International Law and Politics 1, 11.

fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights.' – para 81 (emphasis added).[1019]

As a consequence of this evolution, when implementing EU law, Member States are bound to comply with all the constitutional rules and principles of the Union, including those seeking to endorse an adequate protection for fundamental rights. As such, in the case of, for example, non-exhaustive harmonization, Member States' discretion stops where a fundamental right is at risk, even if the protection thereof was not the primary goal of the norm the transposition of which is considered.[1020]

It is equally important to note that the standards set by the ILO (through its documents and in particular through its Conventions) lay the foundation for a significant number of policies, laws and / or collective agreements adopted, in the social field, in the Member States and at the European level respectively. In this regard, the European Commission acknowledged openly that '*The ILO standards form the background to a number of policies, laws and collective agreements in the Member States and at European level. The standards and measures of the ILO also complement the acquis in areas which are not covered or only partly covered by legislation and Community policies*.'[1021]

What is more, the International Labour Conference adopted, at its eighty-sixth Session, in Geneva, on 18 June 1998, a Declaration of Fundamental Principles and Rights at

[1019] For an in-depth discussion on these aspects, see I Lianos, '*Efficient Restrictions of Trade in the EU Law of the Internal Market. Trust, Distrust and the Nature of Economic Integration*', University College London, CLES Working Paper series 1/2010, 50 *et seq*. The author argues that it is counter-productive to treat social policy values and the fundamental freedoms as 'equivalent in terms of normative strength in the EU hierarchy of norms', as only the first are usually subjected to a proportionality test whereas vice-versa has never been tested by the Court (not even in the case of a mere balance of interests), and this would in itself imply that the second is always acknowledged as inherently overriding (see pp. 59 – 60). He also argues that, by treating fundamental rights as specific forms of mandatory requirements, the Court actually excluded the possibility for those rights to be used as a justification for also directly discriminating measures (which, again, implies that, in rapport with this particular form of mandatory requirements, fundamental freedoms take always precedence). Finally, according to Prof. Lianos, this balancing is flawed also because it fails to prompt a germane evaluation of both costs and benefits for each of the values in conflict.

[1020] E Spaventa, 'Fundamental rights in the European Union', in C Barnard and S Peers (eds), '*European Union Law'*, 2nd ed., Oxford University Press, 2017.

[1021] European Commission, '*Promoting decent work for all. The EU contribution to the implementation of the decent work agenda in the world. Communication from the Commission to the Council, the European Parliament, the European Economic and Social. Committee and the Committee of the Regions*', COM(2006) 249, Brussels, 24 May 2006, 4 (emphasis added).

Work.[1022] According to this document, *all ILO Members*, *regardless of whether they have ratified the relevant ILO Conventions or not*, are bound '*to respect, to promote and to realize (...) the principles concerning the fundamental rights*[1023] *which are the subject of those Conventions.* These Conventions are not explicitly indicated, but it may be easily inferred — from the genesis of the Declaration of Philadelphia and the ILO's own practice, that the Declaration refers to ILO Conventions Nos. 29 and 105 (on forced labour), 87 and 98 (on trade union rights and collective bargaining), 100 and 111 (on discrimination at work) and 138 together with 182 – the latter adopted in 1999 (on suppression of child labour).[1024] All these conventions are now explicitly listed in Annex X to Directive 2014/24 and the rights to which they refer were reaffirmed, by the cited Declaration, as 'Fundamental Principles and Rights at Work' so, since all Member States are also ILO members, they are, as such, applicable to each all Member States, even if not all of them have ratified the Conventions in which such fundamental principles and rights are rooted. All these fundamental principles and rights fall within the general scope of sustainable development promoted at the highest level and, since they are essential in the delivery of public contracts awarded under a public procurement procedure, must be duly observed by both the purchasers and the suppliers.[1025]

In this context, it is useful to remember that, pursuant to Article 2 TEU, respect for human rights is one of the core values of the EU and the European Council itself has declared that sustainable development (the main feature of which is the respect for fundamental human rights), 'is a key objective set out in the Treaty, for all European Community policies'.[1026] Moreover, Article 3 (3) and (5) TEU state the goal to 'work for the sustainable development of Europe' (and 'the Earth') whereas according to Recital 9 of the Preamble to TEU, the principle of sustainable development should be taken into account in order to promote economic and social progress for the people of the Union. To close the circle, the Court recently confirmed that the fundamental human rights which corresponded to the ILO Declaration on Fundamental Principles and Rights at Work (and its follow-ups)

[1022] Available at https://www.ilo.org/declaration/lang--en/index.htm. This Declaration reaffirmed the position expressed in the ILO Constitution and the previous Declaration of Philadelphia.
[1023] Namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.
[1024] See N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case'*, (2010) 16 Transfer (ETUI) 4, 2010, 484.
[1025] R Lunner, *'Human rights in public procurement: protecting them properly*?', in (2018) 3 European Procurement and Public Private Partnership Law Review.
[1026] Council of the European Union, Presidency Conclusion, Doc.10255/05 '*Declaration on Guiding Principles for Sustainable Development*' http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/85349.pdf, 28

are 'associated with the [constitutional] objective of sustainable development'[1027] and hence represent the 'social dimension thereof'.[1028]

As for the social protection of workers[1029], it has been judged as a generally acceptable justification in a significant number of cases – see for ex. C- 113/89 *Rush Portuguesa* (para 18, yet without explicit reference to the 'public interest'), the joined cases C369/96 and C-376/96 *Jean-Claude Arblade*[1030] (para 36, with explicit reference to the 'mandatory requirements of the public interest') or C-145/88 *Torfaen* (para 14).[1031] *Rush Portuguesa* is in fact the case in which the concept of 'posted workers' has emerged for the first time[1032] and which laid down at the foundation of what was to soon be the Posted Workers Directive.

Anyway, some years later, in *Schmidberger*[1033], the Court made a decisive move. Building on its previous judgements rendered in *ERT*[1034] and *Kremzow*[1035], it clarified, for the first time in explicit terms, that fundamental human rights are not only a stand-alone ground of justification, but also one of the solidest arguments to that purpose.[1036] According to the Court's own wording, '*fundamental rights form an integral part of the general*

[1027] See for ex Opinion of the Court (Full Court) of 16 May 2017 (Opinion 2/2015, ECLI:EU:C:2017:376), in particular para 149.
[1028] R Lunner, *'Human rights in public procurement: protecting them properly*?', in (2018) 3 European Procurement and Public Private Partnership Law Review, 200.
[1029] From this point of view, 'social values had and still have their formal place within the objectives of the European Union. (…) however, it is important to recall that in the field of workers' protection, the regulation of industrial relations at the national level commonly makes use of instruments guaranteeing the freedoms of association, collective bargaining and the right to strike (…). After initially being developed and promoted as international labour standards by the ILO, these 'social' fundamental rights found their way into international and European human rights documents in the 1960s and, eventually, also into European Community law. Whereas in Defrenne the principle of equal pay was already considered to be part of 'the foundations of the Community', the Court came to recognise fundamental human rights, even though not explicitly expressed in the Treaty, as general principles protected in the Community legal order. These principles included the rights of association, collective bargaining and to strike, now all inserted in the EU Charter' (A Veldman and S de Vries, 'Regulation and enforcement of economic freedoms and social rights: a thorny distribution of sovereignty', in T van den Brink, M Luchtman, and M Scholten (eds), *'Soveignty in the shared legal order of the EU'*, Utrecht University, Intersentia, 2015, 71).
[1030] Joined Cases C-369/96 and C-376/96 *Jean-Claude Arblade* [1999] ECR 1-8453, para 36.
[1031] For details, see W-H Roth, '*From Centros to Ueberseering: Free movement of companies, private international law, and Community law*', (2003) 52 The International and Comparative Law Quarterly 1, 199.
[1032] T Novitz, 'Collective bargaining and social dumping in posting and procurement. What might come from recent Court of Justice case law and the proposed reform of the Posted Workers Directive?', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 218.
[1033] Case C-112/00, *Schmidberger*, [2003] ECR I-000.
[1034] Case C-260/89 *ERT* [1991] ECR I-2925, para 41.
[1035] Case C-299/95 *Kremzow* [1997] ECR I-2629, para 14.
[1036] M Avbelj, '*European Court of Justice and the question of value choices. Fundamental human rights as an exception to the freedom of movement of goods'*, New York University School of Law, Jean Monnet Working Paper 06/2004, 58.

principles of law[1037] the observance of which the Court ensures. [To this extent], *measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community. Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods*.' (paras 73 and 74, emphasis added). What the Court appears to have done there was to consecrate the idea that what make fundamental human rights such efficient grounds of justification for national derogatory measures is the fact that, as opposed to other grounds of justification, they are a matter of concern at both the Member States' and the Union's level, their protection being a constitutional duty of both the Member States and the Union. AG Jacobs had already offered, in his Opinion, a mirrored view of this idea, asserting that the legitimacy of a national measure purported to protect a fundamental right should be confirmed only where such right is as such recognized not only in the national legal order of that Member State *but also consecrated by the EU law*.[1038] This also appears to explain the phrase 'in principle' used by the Court: *as a matter of principle,* all fundamental human rights consecrated at the national level could justify a measure which impinges on the fundamental economic freedoms, *except* where they are contrary to the objectives pursued by the Union itself or which the latter explicitly recognizes as legitimate.[1039] Additionally, it gave some hints on the fundamental difference between internal market rules and human rights which substantiates, in the opinion of the Court, the prevalence of the latter over the first. As so plastically captioned by the academia, "[t]here is a crucial difference between the basic freedoms case law and the human rights case law. The basic freedoms do not provide – with the exception of free movement of workers and their access to employment – fundamental rights and the jurisprudence of the ECJ on these issues is not one of human rights.[[1040]] In this context, the most important difference between the human rights case law and the basic

[1037] To draw this conclusion, the Court cited not only the 'constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories' (para 71), but also the 'preamble to the Single European Act and (…) Article F.2 of the Treaty on European Union' (para 72) — to which *Bosman* referred *in concreto* – see para 79).

[1038] See para 102 of AG's Opinion in *Schmidberger*.

[1039] M Avbelj, '*European Court of Justice and the question of value choices. Fundamental human rights as an exception to the freedom of movement of goods'*, New York University School of Law, Jean Monnet Working Paper 06/2004, 60.

[1040] In the same vein, see J Coppel and A O'Neill, '*The European Court of Justice: taking rights seriously?*' (1992) 29 Common Market Law Review 4, 689 to 691. The authors blamed the Court for putting the market freedoms on the same level with fundamental human rights which should, in their opinion, have been given a higher status in all cases.

freedoms case law is an often overlooked reservation the ECJ makes: *the Court applies the basic freedoms only if there is no secondary instrument*."[1041]

The enticing reasoning offered in *Schmidberger* was tested, later on, apparently successfully, in several other cases. In *Rüffert* for example, the prevalence of the social right at stake, acknowledged by the Court as fundamental, was denied precisely because it was not consecrated at the EU level but by an international instrument which, no matter how binding and reputable, had not been assumed by *all* Member States, but by a large majority thereof.

Otherwise, the conclusion cited above seems flawlessly logical, and it would have been only normal that the same recipe be applied as well in all the cases involving a fundamental *social* human right consecrated at the level of the European social model. Weirdly though, the Court was rather hesitant in duplicating it in milestone decisions like *Viking* and *Laval*, which actually questions the stability (or the very existence) of the principle of prevalence of the fundamental human rights (especially of those consecrated at the EU level) as developed by the Court in the *Schmidberger* line of cases.

In reality, the clash between the market freedoms and the fundamental human rights (a genuine 'clash of titans'[1042]) left some deep traces in the CJEU case law. In the early ages, the Court saw the market freedoms as a source of some merely basic, 'instrumental' rights which could not equate to the fundamental human rights sourced in the EU law[1043], and national measures that went against the economic rights stemming from the market freedoms used to be dismissed as such, except where they were eventually saved by a fundamental

[1041] A von Bogdandy, '*The European Union as a Human Rights Organization?*', (2000) 37 Common Market Law Review 6, 1326 (emphasis added).

[1042] S de Vries, 'The protection of fundamental rights within Europe's internal market after Lisbon — an endeavour for more harmony' in S de Vries, U Bernitz and S Weatherill (eds), '*The protection of fundamental rights in the EU after Lisbon*', Hart Publishing, 2013, 60.

[1043] A Tryfonidou, '*The impact of Union citizenship on the EU's market freedoms*', Hart Publishing, 2016, 219. From this point of view, it is interesting to observe that the EU Charter of Fundamental Rights allegedly suggests that only *some* of the fundamental freedoms are also fundamental rights – see Article 13 which concerns only persons and services and Article 45 (which corresponds to Article 21 TFEU) with regard to the EU citizenship. If the 'fundamental' character of a right is grasped as residing in an interest 'of a fundamental value' which 'does not derive from some other interest of the right-holder or of other persons' and which 'need not be explained or be justified by other values' (see J Ratz, '*The morality of freedom*', Oxford University Press, 1988, 200), then the Court's approach in all the cases involving the application of a TFEU Article with a social background (such as Articles 45 or 157 *etc*) in the sense that 'a fundamental (human) right cannot have as its primary justification the pursuit of an economic aim which is external to the right-holder's interest' (see F De Cecco (2014) '*Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law*' in (2014) German Law Journal 15, 385) seems to be the correct one. On the other hand, since *ADBHU* (C-240/83, [1985] ECR 531) and even earlier (see C-4/73, *Nold v. Comm'n*, [1974] ECR 491), *freedom of trade* was acknowledged by the Court as a fundamental right (as opposed to the free movement of goods and the principle of free competition – see para 9 of the *ADBHU* judgement) and distinct from all the Treaty provisions concerning the freedom of movement.

human right[1044]. In the post-Maastricht era, on the other hand, things got different. This was mainly due to the *personal (ie, human)* dimension attributed to market freedoms [1045], which started to be seen as a source of *fundamental economic rights for the EU citizens*.[1046] This metamorphosis[1047] pushed, as explained above, (certain[1048]) fundamental economic rights[1049] on an equal footing with (certain) fundamental human rights, which in the end effected an (inevitable?) prevalence of the first over the latter[1050] and an (inevitable?) expansion of the

[1044] See, eg, the *ERT* or *Familiapress* cases (C-260/89, *ERT* [1991] ECR I-2925 and C-368/1995, *Familiapress*, [1997] ECR I-3689).

[1045] In fact, 'the market freedoms should only be viewed as sources of *fundamental rights* when they are relied on by Union citizens and when they are read together with the citizenship provisions. This means that the rights deriving from them should be considered as fundamental and, thus, as being on an equal footing with the fundamental human rights protected under EU law, only in situations where the market freedoms are invoked by Union citizens and not—as in the cases to be discussed below—when they are relied on by legal persons. The same is the case when the market freedoms are invoked by third-country nationals[;] (…) a clash between fundamental rights does not emerge when the market freedoms are invoked by corporations or third country nationals in order to challenge the actions of Member States or (where applicable) individuals, seeking to protect the fundamental human rights of other persons.' (A Tryfonidou, '*The impact of Union citizenship on the EU's market freedoms*', Hart Publishing, 2016, 221).

[1046] As rightly described by S Weatherill, '[o]nce EU free movement law is revealed to exert such a broad impact that it is likely to affect national measures protecting EU fundamental rights, there arises a tension. *Pressure is loaded on the EU — most obviously, the Court — to take account of that fundamental rights context in assessing the justification advanced in support of trade-restrictive national measures* (…). *EU economic law becomes porous in the sense that measures that appear to conflict with the free movement rules may nevertheless be saved with reference to their role in protecting or promoting fundamental rights*.' – see S Weatherill, 'From economic rights to fundamental rights' in S de Vries, U Bernitz and S Weatherill, '*The protection of fundamental rights in the EU after Lisbon'*, Hart Publishing, 2013, 22–23 (emphasis added).

[1047] This '(…) gradual metamorphosis of the market freedoms into sources of fundamental rights for the Union citizen has meant that EU law is no longer only seen as the source of certain fundamental *human* rights — in situations falling within its scope — but is also the source of fundamental *economic* rights.' (A Tryfonidou, '*The impact of Union citizenship on the EU's market freedoms*', Hart Publishing, 2016, 220).

[1048] But not *all*: in the first cases brought before it and dealing with the clash of fundamental rights, the Court was still determined to keep fundamental *human* rights away from the rigors of the internal market – see for ex. *Schmidberger* or *Omega etc.* This however changed as economic rights started to be acknowledged a 'more fundamental' pith – see for ex. *Viking* or *Laval*.

[1049] The fundamental character of the economic rights postulated by the Treaties was acknowledged and pronounced by the Court in a long array of cases – see for ex *Schmidberger* (on goods), *Angonese* (on workers), *Laval* and *Omega* (on services), etc. See also C-265/95, *Commission v France* (Spanish Strawberries) or Case C-49/89, *Corsica Ferries France*, ECLI:EU:C:1989:649, esp. para 8, where the Court concluded that 'As the Court has decided on various occasions, *the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited*'. (emphasis added).

[1050] E Spaventa, 'Federalisation versus centralisation: tensions in fundamental rights discourse in the EU' in M Dougan and S Currie (eds), '*50 years of the European Treaties: looking back and thinking forward'*, Hart Publishing, 2009, 361. This change is perfectly captured by AG Sixt-Hackl in his Opinion in *Omega*: 'fundamental freedoms themselves can also perfectly well be materially categorised as fundamental rights — at least in certain respects: in so far as they lay down prohibitions on discrimination, for example, they are to be considered a specific means of expression of the general principle of equality before the law. In this respect, a conflict between fundamental freedoms enshrined in the Treaty and fundamental and human rights can also, at least in many cases, represent a conflict between fundamental rights' (para 50). And, as the same Verica Trstenjak commented in connection with the (in)famous judgements in *Viking* and *Laval*, although the Court began its reasoning – in *Viking* at least – by acknowledging that 'the collective actions at issue restricted the freedom of establishment of the ferry operator, [it] refrained from examining whether the EU fundamental right to take collective action was, as such, apt to justify this restriction on the freedom of establishment by the actions of the trade unions. Instead, the CJEU focused on the notion of protection of workers, which is inherent

scope of free movement rules.[1051] As many argued, under this new approach, the Court settled this 'clash of titans' by testing the force of fundamental human rights as a *sui generis* form of mandatory requirements instead of assuming them as 'self-standing justification grounds similar to the Treaty derogations'[1052], which has eventually undermined the 'a priori hierarchy' that inevitably exists between the two categories of (fundamental) rights and thus makes impossible the justification of directly discriminatory measures.[1053]

In its recent case law, however, the Court apparently decided to 'sharpen the teeth of the EU social fundamental rights'.[1054] In *Bauer et al*[1055], for example, it applied the *Mangold*[1056] formula to conclude that the fundamental rights enshrined in the Charter are 'essential principles of EU social law' and, consequently, '[are] directly effective and ha[ve] the ability to empower national courts to set aside incompatible national provisions.'[1057] It also clarified that fundamental rights such as that enunciated under Article Article 31(2) of

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in the fundamental right to take collective action and which had already been recognised in settled case law as an overriding reason in the public interest … A similar scheme of analysis was adopted by the CJEU in Laval un Partneri.' – see V Trstenjak and E Beysen, '*The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU*' (2013) 38 European Law Review 3, 312. So, at a more general level, it seems that the Court somewhat glimpsed a certain hierarchy also on a horizontal axis, *ie*, between fundamental human rights themselves. It hence preferred to give, unreservedly, priority only to those of a very 'high standing' (such as human dignity, or equality based on sex, or race, or religion etc) whereas on the prevalence of others, especially those who also have an economic streak (such as the right to strike) which brings them much closer to the fundamental freedoms, its conclusions were rather reserved – see for ex. the approaches in *Schmidberger* and *Omega* vs *Laval*. For a discussion, see T-I Harbo, '*The function of the proportionality principle in EU Law*', 2010 16 European Law Journal, esp. 176.

[1051] See for ex C-391/92, *Commission v Greece* (where the Court applied the *Keck* test to conclude that there was *no* obstruction of the cross-border trade) or C-570/07, *Blanco Pérez* (where the Court decided that the restriction, although obvious, was *justified* by some overriding social / health interests). For a more practical perspective, see UN, '*Guiding principles on human rights impact assessments of economic reforms. Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights*', A/HRC/40/57, December 2018.

[1052] A position already assumed openly by AG Cruz Villalón in *Santos Palhota*, where he advocated against using the protection of workers as a mere derogation from the internal market rules or, even worse, as 'an unwritten exception inferred from case-law' since a high level of social protection (which, *nota bene*, goes far beyond the protection of workers to cover an important number of other social objectives corresponding, as such, to as many fundamental social rights) is a fundamental principle of EU law, sourced in the very Treaties – see para 53 of his Opinion.

[1053] S de Vries, 'The protection of fundamental rights within Europe's internal market after Lisbon — an endeavour for more harmony*'* in S de Vries, U Bernitz and S Weatherill (eds), '*The protection of fundamental rights in the EU after Lisbon'*, Hart Publishing, 2013, 90.

[1054] https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/amp/

[1055] Joined Cases C-569/16 and C-570/16, *Bauer et al*, ECLI:EU:C:2018:871.

[1056] Case C-144/04, where it concluded that directives adopted for the application of a general principle of EU law deriving from the Treaties have a *direct* effect and therefore can be successfully adduced between *private* parties.

[1057] https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/amp/

the Charter 'reflect [some] essential principle[s] of EU social law from which there may be derogations only in compliance with the strict conditions laid down in (…) Charter itself.'[1058]

In public procurement in particular, human rights appear to having been entered through the back door, since the 2014 set of Directives adopted in this sector contains no direct reference to human rights,[1059] nor any definitions thereof (or at least concrete references to national mechanisms of determination), but only concrete provisions on a number of particular social and labour law issues, in general to do with the protection of the employees[1060], and the only *mandatory* norm in this area[1061] is concerned with the protection of a specific human right (more to the point, against child labour and the trafficking in human beings) seems to be Article 57(1)(f) of Directive 24. However, encouraged by the changes at the EU's primary law level and the recent shift at the CJEU case law level, the European legislature opened eventually the door to specific forms of *reverse discrimination*.[1062]

[1058] *Bauer et al*, para 84.

[1059] A Sanchez-Graells, 'Public procurement and 'core' human rights: a sketch of the European Union legal framework', in O Martin-Ortega and C Methven O'Brien, '*Public procurement and human rights: opportunities, risks and dilemmas for the State as buyer*', Edward Elgar Publishing, 2019, 94.

[1060] The specific terminological shortages supposedly derive, in particular, from the lack of a clear vocabulary and a detailed set of definitions, but also from the fact that the Charter of Fundamental Rights of the European Union is built around the idea of fundamental freedoms rather than on a clear notion of 'human rights', which make difficult the use of 'human rights' considerations in public procurement, at least beyond those explicitly provided by law, especially in the area of labour and employment relations – see O Martin-Ortega and C Methven O'Brien, '*Advancing respect for labour rights globally through public procurement*' (2017) 5 Politics and Governance 4, 69–79, or in that concerning some 'extend fundamental freedoms' particularly linked to the access to documents and a number of judicial guarantees – see A Sanchez-Graells, 'Public procurement and 'core' human rights: a sketch of the European Union legal framework', in O Martin-Ortega and C Methven O'Brien, '*Public procurement and human rights: opportunities, risks and dilemmas for the State as buyer*', Edward Elgar Publishing, 2019, 99.

[1061] This lack of coercion in the area of human (and in particular, social and labour) rights, according to some, seems to create a dangerously large and too vague room of interpretation and application, with a lot of discretion left at the hands of contracting authorities which, in the lack of any regulatory provisions or concrete policies, may easily fall prey to positive discrimination – see for more on this, A Sanchez-Graells, '*Public procurement and the EU competition rules*', 2nd ed., Hart, 2015, Chapter 5.

[1062] The term 'reverse discrimination' defines the discrimination against the majority (or usually priviledged) group and in favor of a minority (or usually disadvantaged) group. Reverse discrimination seeks in principle to redress social inequalities under which minority groups have less access to the privileges enjoyed by the majority group. Reverse discrimination is in fact an instrument intended to bring the members of a disadvantaged minority, for reasons mostly to do with 'social justice' (and, occasionally, with concrete economic reasons), on a 'fairer' position – for discussion, see for ex. V Verbist, *'Reverse Discrimination in the European Union'*, in Discriminatierecht in theorie en praktijk, Vol.4, Interstentia, 2017, F J Crosby, 'Reverse discrimination?', in F J Crosby (ed), *'Affirmative action is dead: long live affirmative action'*, Yale University Press, 2004, or E Ambrosini, 'Reverse discrimination in EU law: An internal market perspective' in L Rossi and F Casolari (eds), '*The principle of equality in EU law'*, Springer, 2017. From this point of view, the only permitted form of 'reverse discrimination' in public procurement law is the reservation of contracts for some disadvantages categories of people or businesses (the so-called 'set-asides') - which would otherwise see their possibility to access the market of public contracts heavily undermined, and which is justified by important social benefits (see S Arrowsmith, 'Application of the EC Treaty and Directives to Horizontal Policies: A Critical Review' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law New Directives and New Directions*, Cambridge University Press, 2009, Kindle ed, 7080 and 6040 *et seq*. See also R Boyle, 'Disability issues in public procurement', in S Arrowsmith and P Kunzlik (eds), *Social and*

On a much larger scale, the entire European trend has been, since Lisbon, decisively towards the inclusion of human rights considerations in all EU policies (whence the social vein in also the Europe 2020 manifest),[1063] as a response to the general international context.[1064] It hence is very clear that international commitments obliging national governments to respect human rights in all their policies are, or should necessarily be, reflected in also their public procurement. This entails the observance of several key principles, which the overlapping of the policies built around public procurement and human rights fails to make sufficiently visible[1065], especially in the context where the law provides for certain remedies aimed at redressing the abuse of human rights, by tenderers, during the awarding phase, but no similarly powerful remedies which to cure abuses occurring downstream, in the supply chain, or during the delivery of the contract.[1066] In the teeth of this scarcity of legal provisions in the public procurement Directives themselves stands the direct

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Environmental Policies in EC Procurement Law New Directives and New Directions, Cambridge University Press, 2009. This confirms the general approach adopted by the Court according to which reverse discrimination may be resisted on purely economic grounds, which cannot justify any forms of direct discrimination (as in *Du Pont du Nemours*) or indirect discrimination (as in *Commission v Italy*). This may also explain the impossibility to reserve contracts to SMEs (for an in-depth discussion, see M Trybus and M Andrecka, '*Favouring SMEs with Directive 2014/24/EU?*', in (2017) 12 European Procurement and Public Private Partnership Law Review 3, or N Hatsis, 'The legality of SME development policies under EC procurement law', in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law New Directives and New Directions*, Cambridge University Press, 2009). For an opinion in the sense that, for the purpose of determining the most economically advantageous tender, 'set-asides are not generally optimal, whatever the industrial preferences of the government are, while the optimal preferential treatments of firms implies complex non-linear rules', see P-H Morand, '*SMEs and public procurement policy*', in (2003) Review of Economic Design 8. In this context, it is interesting to point, again, to S Arrowsmith's allegations that the provisions contained in the public procurement law on set-asides would permit 'regional preferences' (*ie*, a closing of the market for local social economy) – see S Arrowsmith, 'Application of the EC Treaty and Directives to Horizontal Policies: A Critical Review' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law New Directives and New Directions* Cambridge University Press), 2009, Kindle ed, 6040, an opinion with which we rather disagree, as this would essentially mean to reverse the entire internal market construct.

[1063] O Martin-Ortega, '*Public procurement as a tool for the protection and promotion of human rights: a study of collaboration, due diligence and leverage in the electronics industry'* (2018) 3 Business and Human Rights Journal 1. Moreover, according to the European Parliament Report on the public procurement strategy package (2017/2278(INI), '*socially responsible public procurement must take into account supply chains and the risks associated with modern-day slavery, social dumping and human rights violations; [moreover], (…) efforts must be made to ensure that goods and services acquired through public procurement are not produced in a manner that violates human rights*; [therefore,] (…) the Commission [must] include substantive provisions on ethics in supply chains in its new guide on social considerations in public procurement' (para 20, emphasis added).

[1064] For details, see also the reports of the International Learning Lab on Public Procurement and Human Rights, in particular: '*Protecting human rights in the supply chain: a guide for public procurement practitioners'* (of 1 July 2017), '*Modern slavery and human rights in global supply chains: roles and responsibilities of public buyers'* (of 20 December 2016), and '*Public procurement and human rights: a survey of twenty jurisdictions*' (of 19 July 2016), all at http://www.hrprocurementlab.org/.

[1065] C Methven O'Brien and O Martin-Ortega, 'Public procurement and human rights: towards legal and policy coherence in pursuit of sustainable market economies', in O Martin-Ortega and C Methven O'Brien, '*Public procurement and human rights: opportunities, risks and dilemmas for the State as buyer*', Edward Elgar Publishing, 2019, 225.

[1066] C Methven O'Brien, '*Essential services, public procurement and human rights in Europe*' (2015) University of Groningen, Faculty of Law, Research Paper No. 22/2015, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591898.

applicability of the European Convention of Human Rights in the public procurement process, especially through the creation of a general obligation for states to protect human rights (the doctrine of positive obligations). From this standpoint, it is noteworthy that the discretion legally or jurisprudentially acknowledged for public buyers to pursue social considerations via public procurement has been traditionally and conventionally considered as an *exceptional derogation from the EU's internal market and competition rules* rather than a liberty deriving from a constitutional obligation to preserve fundamental human rights (including social and labour law privileges). In this context, it is interesting to see how the supply-chain standards have evolved. The latest comparative analysis show that there is a striking discrepancy between the standard conduct expected, in the human rights sphere, from private actors *vs* that expected from public buyers, with a clearly more relaxed regime for the latter.[1067]

Otherwise, as some studies noted,[1068] 'human rights related considerations within the procurement process are part of what is commonly referred to as "socially responsible public procurement" (SRPP) [, the aim of which] is to set an example and influence the market-place by giving companies incentives to implement socially responsible supply chain and management systems'[1069]. To this purpose, the 2014 Directives seem to be offering far more qualitative approaches and allow a much broader range of social and human rights related measures at *all* phases of the procurement process (that is, starting with the prior market consultations stage[1070] and up to the effective delivery of the contract, including any modification thereof) and with regard to all the entities involved (*ie*, the main contractors but also their subcontractors *etc*). The use of social labels is also welcomed (especially since

[1067] C Methven O'Brien and O Martin-Ortega, 'Discretion, divergence, paradox; public and private supply chain standards on human rights', in S Bogojević, X Groussot and J Hettne, '*Discretion in EU public procurement law'*, Hart Publishing, 2019, 198.

[1068] Institute for Human Rights and Business (IHRB), '*Protecting rights by purchasing right. The human rights provisions, opportunities and limitations under the 2014 EU Public Procurement Directives*', Nov 2015, at https://www.ihrb.org/pdf/occasional-papers/Occasional-Paper-3-Protecting-Rights-by-Purchasing-Right.pdf.
See also the Toolkit published by the Danish Institute for Human Rights on "*Driving change through public procurement: A toolkit on human rights for policy makers and public buyers (road-testing version)*" (December 2019) which explores the tangible possibilities that public procurement policy makers, buyers and contract managers have, under the 2014 package of Directives, to implement requirements to support human rights along the supply chain (https://www.humanrights.dk/sites/humanrights.dk/files/media/billeder/udgivelser/hrb_2019/road-testing_version_-_driving_change_through_public_procurement_a_toolkit_on_human_rights_for_policy_makers_and_public_buyers.pdf)

[1069] IHRB 2015 (n 1067), 8.

[1070] Where public buyers may tout their priorities in the social field before a wide array of potential suppliers and check the concrete potential of the market to respond to such standards – see for ex the ICLEI Landmark Project "*Verifying social responsibility in supply chains: a practical and legal guide for public procurers*" ICLEI, 2012, esp. 9.

the previous Directive 2004/18 referred only to eco-labels). A caveat is nonetheless set forth, especially with regard to the true potential of the use of such labels in the area of human rights.[1071] The new 'self-cleaning' tool is also welcomed.[1072] On the other hand, the fact that the same Directives leave a too much discretion on Member States in this area is seen as a source of major discrepancies in practice[1073] and an element which might encourage a general alignment with the 'lowest common denominator approach'[1074]. Finally, the obtrusive 'policy incoherence at the EU institutional level', in particular with regard to the 'EU's commitment to widespread dissemination and uptake of the UN Guiding Principles on Business and Human Rights'[1075] is seen as a major hindrance for the full access of human rights values into the public procurement zone.

According to a constant CJEU case law, where a piece of EU law juggles with key concepts for which it proposes no concrete definitions and in relation to which it makes no reference to the possibility that such concepts be defined by national law, the need for the uniform application of EU law and the principle of equality demand supplemental hedges which to stop eventual abuses from those who apply it.[1076] Following this line of thinking, it

[1071] 'The use of both labels and certifications is a potentially promising area of opportunity for strengthening social and human rights related procurement requirements in the EU. *However, substantial progress must be made in the expansion of adequate social and human rights labels and certifications that are in line with international standards on business and human rights. Currently, the existence of social and human rights related labels and certifications are extremely limited compared to the vast array covering environmental issues*.' (IHRB 2015, 29, emphasis added).

[1072] According to the IHRB 2015 study, this tool 'has the potential to be used by Member States to prioritise remediation for human rights impacts, and require bidders to demonstrate the improvements made to human rights risk management processes and systems based on previous impacts.' (32).

[1073] According to the cited study, 'Where those making the day-to-day purchasing decisions lack awareness of potential human rights risks, or lack the human resource, technical, financial or political capacity to do anything to prevent human rights risks from materialising, [negative] impacts can abound.' (p 8).

[1074] IHRB 2015, 6.

[1075] IHRB 2015, 6. The study retains that the only explicit reference to these Principles was made in the EC's Corporate Social Responsibility Communication of 2011 where it is stated that "The Commission also (…) expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles." (p 27).

[1076] See in this regard C-204/09, *Flachglas Torgau*, EU:C:2012:71, paragraph 37, C-247/16, *Schottelius*, EU:C:2017:638, paragraph 32, or C-147/17, *Ustinia Cvas and Others v Direcția Generală de Asistență Socială și Protecția Copilului Constanța*, ECLI:EU:C:2018:926, para 54, and the case law cited there. The last paragraph cited above thus makes it clear that *'[a]ccording to settled case-law, the need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the laws of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (…).*' – emphasis added. The judgement in C-147/17, *Ustinia Cvas,* continues: 'In that regard, it should be noted that the criterion used in the first subparagraph of Article 2(2) of Directive 89/391 to exclude certain activities from the scope of that directive and, indirectly, from that of Directive 2003/88, is based not on the fact that workers belong to one of the sectors of the public service referred to in that provision, taken as a whole, but exclusively on the specific nature of certain particular tasks performed by workers in the sectors referred to in that provision, *which justify an exception to the rule on the protection of the safety and health of workers, on account of the absolute necessity to guarantee effective protection of the community at large*' — (para 55) emphasis added.

should also be concluded that, in general, the discretion of Member States and contracting authorities is evidently limited, still without being very clearly visible the margins thereof. On the other hand, an equally constant case law of the European Court of Human Rights (the ECHR) confirmed that 'a state's responsibility [as stemming from the Charter of otherwise from an international treaty] *may arise* [also] *from a failure to regulate private industry, or from failing to fulfil the positive duty "to take reasonable and appropriate measures" to secure rights*.'[1077] These gaps could, of course, be covered by a coherent CJEU case law. This conclusion, on the other hand, may as well justify concrete (even if *indirect*) legislative interventions, *eg*, including via public procurement. A strong justification for this might be that, as a number of studies[1078] but also a substantial case law reveal, the use of human rights considerations in public procurement is, in fact, *not* undermining competition and the efficient spending of public funds but it is rather the failure to integrate such standards that does that. There is strong evidence that, by refusing to forgo the obsolete 'lowest-price' approach and by continuing to seek for low-priced offers, public buyers are in fact creating breaches through which discrimination and corruption may easily come in, in a context where human rights abuses are still widespread and it is common ground that abusive labour conditions give the unfair advantage of always being able to offer a lower price.[1079]

So, as a matter of principle, in the light of the latest amendments brought to the Directives on public procurement, the use of socially-oriented, human-rights-friendly approaches in public procurement is now not hardly tolerated but explicitly encouraged and, in certain cases, even mandatory. Contracting authorities may now *legally* base their decision to restrict competition among buyers on the protection of a certain fundamental right. The success of such a measure could, at least apparently, either rely on the official acknowledgement (*eg*, via the Charter, or the Treaties themselves, or via other binding instruments of international law recognized as such at the EU level) of the fundamentality of that right (which the Court admitted, in some cases – as cited above – to be sufficient for that

[1077] See for ex. ECHR, *Fadeyeva v the Russian Federation* [2005], case No. 55273/00, paras 89 and 92.
[1078] See for ex. International Learning Lab on Public Procurement and Human Rights studies, in particular that on '*Public procurement and human rights: A survey of twenty jurisdictions*' (2016), at https://www.hrprocurementlab.org/wp-content/uploads/2016/06/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf; or R Stumberg, A Ramasastry and M Roggensak, '*Turning a blind eye: respecting human rights in government purchasing*', International Corporate Accountability Roundtable (ICAR), 2014, at f https://www.researchgate.net/publication/272491019_Turning_a_Blind_Eye_Respecting_Human_Rights_in_Government_Purchasing.
[1079] R Stumberg and N Vander Meulen, 'Supply chain transparency in public procurement: lessons from the apparel sector', in O Martin-Ortega and C Methven O'Brien, '*Public procurement and human rights: opportunities, risks and dilemmas for the State as buyer*', Edward Elgar Publishing, 2019.

right to take precedence over the traditional fundamental liberties), or come in consideration of a just(ified) social policy (that is, under the umbrella of Articles 36, or 45, or 52 *etc* TFEU) or, finally, be based on concrete mandatory requirements (overriding reasons related to the public interest), provided of course that (at least in the last two cases) *all* the components of the proportionality test are met.[1080]

Moreover, in the clash between a market freedom and a right the fundamentality of which has been officially acknowledged, the latter should (although, as the Court decided in some cases – see above, it doesn't) always take precedence, except where the situation involves a fundamental *economic* right stemming from a market freedom. In this latter scenario, the economic right prevails only provided that it is invoked by a Union citizen, in its personal capacity and in defence of its own status.

There nevertheless are certain grey zones which, although involve an evident clash between social and economic needs, are not so easily controllable as the solution discussed above is not always functional. This is common especially in the case of mandatory considerations (and, more rarely, of certain public policies). A practical example is offered by poor communities. Poverty is one of the most stubborn problems for national (local) governments. However, the right to a decent life, including at least the access to basic services and health - and social care, is not, as such, explicitly acknowledged as a *fundamental human right* at an official level (although the right to human dignity is – see Article 2 TFEU and Article 1 CFREU, together to the right to education - Article 14 CFREU and that to engage in work – Article 15 CFREU). This probably explains the wide gap between the welfare systems existing across the EU. In spite of this, many of the elements used in the fight against poverty are currently part of the measures taken at the European level (especially in the context of the 'inclusion OMC') and, thus, fall under the European social model.[1081] To this extent, such elements could, in general, be ─ subject to a proper justification (based on a public policy exception or, fail that, on at least some concrete

[1080] Mandatory considerations which, in the earlier case law, were associated with a significantly narrower scope than that pertaining to the exceptions consecrated via Article 36 TFEU (since they were presumed to apply only to those measures which were not discriminatory but applied 'without distinction' to both domestic and imported goods) but which, in time, grew to include as well directly discriminatory measures – especially in the area of fundamental rights – see J Scott, 'Mandatory or imperative requirements in the EU and the WTO', in C Barnard and J Scott (eds), '*The law of the single European market. Unpacking the premises'*, Hart Publishing, 2002, 270.

[1081] R Macfarlane, '*Tackling poverty through public procurement*', Joseph Rowntree Foundation, April 2014, at www.jrf.org.uk. See also the European Parliament resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (2017/2125(INI)) (2019/C 129/04).

mandatory requirements) ─ used effectively in public procurement.[1082] But many lack such legitimate justification grounds, so their implementation is rather problematic. The (im)possibility to use economic arguments as grounds for preferential measures aimed at helping poor(er) local communities has been, since *Du Pont de Nemours*, a general rule in EU public procurement. The (im)possibility to help SMEs by, for example, establishing for them smaller values for the participation and/or the performance guarantees was as well censured by the European Commission.[1083] Offsetting schemes (*ie*, those by which suppliers are required to return part of the price in the local economy by investments in local social projects *etc*) appear to be accepted, yet their compatibility with the EU law still needs further assessment.[1084] Similarly, schemes which oblige bidders to hire (local!) long-term unemployed are a long tradition in Europe even if, since *Bentjees*, the need to comply with the internal market basic rules (which allegedly demand a full dispensing with the *local* feature) remained unchanged. This casts some shadows on their legality (at least inasmuch as the *local* element is determinant). And the list may go on.

It maybe is, in this context, useful to reiterate once more that, to the extent that a measure with a clear social load is *de facto* (or *de jure*) destined to save the economic life of either a specific category of local enterprises or of a part of the regional industry, that measure may – according to the Court[1085] but also an important part of the literature[1086], as

[1082] 'If the function of court-led economic constitutionalism is often to prise open the nation state and require Member States to demonstrate how national policies are to be reconciled with EU economic objectives, then *the function of OMC-driven social constitutionalism may equally be to put EU Member States to the test and to demand explanations of how exercises of domestic social sovereignty attain the social policy objectives and values of the Union while protecting fundamental rights. In this way, social solidarity in the name of combating poverty and social exclusion is a substantive jumping-off point to be articulated through practices of governance, but it is also an irreducible point in the sense that it cannot be avoided*' - K Armstrong, '*Governing social inclusion. Europeanization through policy coordination*', Oxford University Press, 2010, 262 (emphasis added).

[1083] See for example the Romanian example where the initial version of the law transposing the Directive 2014/24 (that is, Law 98/2016 and the norms adopted for its application) stated that the maximum guarantee thresholds which contracting authorities could have set for SMEs could not overpass ½ of those set for bigger tenderers. This rule has nevertheless – at the behest of the European Commission – been eventually repealed by the Romanian Government for unjustly favouring SMEs to the detriment of all other types of companies (ie, an *unlawful* form of *reverse discrimination*). More on this, in I Baciu, '*Recent legal and policy developments in the field of public procurement in Romania*', in (2017) 12 European Procurement and Public Private Partnership Law Review 1, 65 *et seq*.

[1084] For an in-depth discussion on this, see Chapter V below.

[1085] See for ex Case C–342/96, *Spain v. Commission* [1999] ECR I–2459, in particular para 41, where the Court clarified that there is state aid whenever the recipient has received an economic advantage, which it would not have obtained under 'normal market conditions'. Along this line of thinking, the European Court of First Instance has held, in several noteworthy judgements, that the fact that a Member State acts as a purchaser of goods or services would not render the application of the EU state aid rules useless - see Case T–14/96, *Bretagne Angleterre Irlande (BAI) v. Commission* [1999] II–139, paras 71 and 81 or Case T–106/95, *FFSA v. Commission* [1997] ECR II–229, para 125. In *BAI*, the Court retained, more concretely, that 'In determining whether an agreement whereby a public authority undertakes to purchase certain services from a specific

well be qualified as state aid which, according to the Treaties, is one of the gravest forms of market distortion and must be treated with all due care.[1087] From this point of view, industrial (and, in general, *economic*) measures are subject to a very strict scrutiny. There is, of course, the possibility to refer to Article 107(3) TFEU in order to take a scheme designed to protect local industry out of the state aid rules. This however does not mean that that scheme is also exempted from the internal market rules. The latter continue to apply, as the CJEU case law has made it clear starting with *Du Pont de Nemours*, and only a solid justification may ensure the viability thereof. Anyway, such an approach has, as a matter of principle, rather been associated with public services obligations,[1088] as will be discussed in the following section.

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undertaking for a number of years falls within the scope of Article 92(1) of the Treaty, it must be borne in mind that *the aim of Article 92 is to prevent trade between Member States from being affected by advantages given by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods*' (para 71, emphasis added – whence, again, the direct link between the EU internal market and competition rules). This conclusion was further clarified and nuanced in Case T–158/99, *Thermenhotel Stoiser Franz and others v. Commission* [2004] ECR II–1 or in Joined Cases T–116/01 and T–118/01, *P & O European Ferries SA and Diputación Foral de Vizcaya v. Commission ('P&O')* [2003] ECR II–2956. Thus, according to *Thermenhotel*, a public agreement concluded '*on purely economic grounds'* (see *Thermenhotel*, para 111) should not be deemed to involve state aid (which could easily lead to the conclusion that any additional, non-'purely economic' elements, such as *social* requirements involving the protection of local companies, or other 'strategic' - *ie*, protectionist, including for the sake local communities - benefits, may suggest the presence of a state aid). Moreover, in *P&O* the same Court admitted that a 'sufficiently advertised open tender procedure' (*P&O*, para 118) would rule out any idea of state aid. *Per a contrario*, if the procedure involves any discriminatory elements (as in the case of fraudulent reservation of contracts), the presumption of the lack of any state aid would, at least theoretically, be seriously undermined.

[1086] See H-J Priess and M G von Merveldt, 'The impact of the EC state aid rules on horizontal policies in public procurement' in S Arrowsmith and P Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge University Press, 2009, Kindle Edition, 8106 *et seq*. See also S Arrowsmith, 'Application of the EC Treaty and Directives to horizontal policies: a critical review' in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law New Directives and New Directions* Cambridge University Press, 2009, or A Doern, '*The interaction between EC rules on public procurement and state aid*' (2004) 13 Public Procurement Law Review 3, A Bartosch, '*The relationship between public procurement and state aid surveillance – the toughest standard applies?*' (2002) 39 Common Market Law Review 3, or P Baistrocchi, '*Can the award of a public contract be deemed to constitute state aid?*' (2003) 24 European Competition Law Review 510, 515.

[1087] See A Sanchez-Graells, '*Competition and State aid implications of 'public' minimum wage clauses in EU public procurement after the RegioPost Judgment'*, 2017, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958296.

[1088] M Kekelekis and K Neslein, 'Public procurement and State aid', in C Bovis (ed), '*Research Handbook on EU public procurement law*', Edward Elgar, 2016, esp. 480 *et seq*. See also the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4–14), esp. para 67.

4. Public service obligations and state aid. The particular case of social aid

4.1. The general context

In this section, we will touch upon one of the most sensitive aspects of the internal market and a defining element of any welfare system in the EU, situated at the interface between competition (through market liberalisation), social policy (social being their very core and definitive feature) and public procurement (as they are necessarily present in any outsourcing mechanism): public service obligations. Although public services and the delivery thereof are not of interest for this thesis, public service obligations are crucially important for a correct (and complete) understanding of how social policies may penetrate the economic dimension of the internal market. They are in fact defining a specific area thereof, where the fundamental rules that govern its functioning have been voluntarily weakened to make room for the specific values of the welfare state (and, implicitly, of the European social model).

The services of general interest (SGIs) are not a new issue on the European Agenda. Nonetheless, they came into the limelight only recently, *ie*, upon the adoption of the Treaty of Lisbon and the Protocol No.26 to it – which, together with Article 36 of the Charter of Fundamental Rights of the European Union (which has thenceforth been put on equal footing with the Treaties in terms of fundamental legal value), set out the principles that define and justify the EU approach to these services. These powerful instruments have been ordained to offer a flexible and pragmatic approach which to bring to the same level, in a functional way, the differences in needs and preferences that characterize the geographical, social and cultural diversity across the EU.

According to Article 14 TFEU, "*the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions*". This text has officialised the Union's power to intervene (by way of regulations) and created valuable momentum in this particular area but, on the other hand, made it clear that any such legal intervention by the Union must be "*without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services*" which

means that, as a matter of principle, the concrete organization, delivery and financing of such services remained in the Member States' courtyard.

Protocol 26, in turn, set – for the first time at primary law level – a number of specific benchmarks directly applicable to services of general interest. It also clarified that such benchmarks need to be applied and tested on a case-by-case basis since a "one size fits all" approach cannot secure the desired outcome.

Finally, pursuant to Article 36 („Access to services of general economic interest") of the Charter, "*The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union*."

Of course, given their merely general contents and purpose, the cited provisions soon needed to be adapted to various specific scenarios and frameworks. This actually prompted the Commission to come with a Communication which it entitled "A Quality Framework for Services of General Interest in Europe"[1089], where it clarified that "*The current economic and financial situation has highlighted more than ever the fundamental role of services of general interest (SGI) in the European Union (EU). In areas such as health care, childcare or care for the elderly, assistance to disabled persons or social housing, these services provide an essential safety net for citizens and help promote social cohesion. Services of general interest in the field of education, training and employment services play a key role in the growth and jobs agenda. (…) At the same time, the budget constraints that currently confront public administrations and the need for fiscal consolidation make it necessary to ensure that high-quality services are provided as efficiently and cost-effectively as possible. (…) Europe 2020 reconfirmed the need to develop new services, delivered both physically and on-line, that generate growth and create jobs. This can include innovative services of general interest. While the Treaty has always ensured that Member States have the flexibility to provide quality services of this type, the Treaty of Lisbon has introduced new provisions: Article 14 of the Treaty on the Functioning of the European Union (TFEU), and Protocol no 26 on services of general interest. It has also given Article 36 of the Charter of Fundamental Rights the same legal value as the Treaties. It is in this new context that the Commission has decided to bring together in a* single *quality framework the comprehensive set of actions which it is pursuing on services of general interest.*" And, since the services of general interest area were and still are suffering from

[1089] COM(2011) 900 final.

insufficient clarity and a poor terminology, the cited Communication came with some helpful definitions and clarifications.

Further on, faced with a rather abrupt shift in the effective delivery of such services (from the traditional practice in which they were provided directly by the State or the regional or local branches thereof to a modern one involving the outsourcing and the recourse to private sector) and in response to a still upsetting need for further guidance on these issues, the Commission released a "Staff Working Document - Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest"[1090], subsequently revamped[1091].

Before that, the Commission had already issued a discrete material on the implementation of the Community Lisbon programme with regard to the social services of general interest: "Implementing the Community Lisbon programme: Social services of general interest in the European Union"[1092]. In parallel, in 2007, the Commission announced a strategy[1093] to support the quality of social services across the EU. As a follow-up, the Commission has supported, via the PROGRESS programme, European initiatives to develop tools for quality definition and measurement and has supported the development, within the Social Protection Committee of a voluntary European Quality Framework for social services. Finally, for the 2015-2019 period, the Commission set out ten priority avenues for action[1094] and proposed therewithal some bold integrated policies (covering several fields from consumer protection to transport and environment, with an accent on a competitive resource-efficient economy) like circular economy, transport emissions, international cooperation on product safety or consumer protection etc.

Within the same areas of concern, the European Parliament issued the Resolution of 5 July 2011 on the future of social services of general interest[1095].

All these materials refer, in a taxonomical approach, to three generally acknowledged categories of services of general interest: economic, non-economic and

[1090] SEC (2010) 1545.
[1091] SWD(2013) 53 final/2.
[1092] COM (2006) 177 final of 26 April 2006.
[1093] "Services of general interest, including social services of general interest: a new European commitment" (COM (2007) 725 final of 20 November 2007).
[1094] Namely: on jobs, growth and investment, on the digital single market, on energy and climate, on a deeper and fairer internal market and also an economic and monetary union, on a balanced and progressive trade aimed at harnessing globalization, on justice and fundamental rights, on migration, on a stronger external action and on the democratic change. More information on this is available at: https://ec.europa.eu/commission/priorities_en
[1095] 2009/2222(INI).

social[1096]. On the other hand, the notions of 'public service' and, in particular, 'public service obligation', are not sufficiently defined and/or explained either legally or at a soft law level. In reality, the term 'public service' is quite an elusive term as, according to the CE's Communication of 2011, apart from Article 93 TFEU – which exploits it in a specific context and with a specific purpose, it is used rather ambiguously[1097]. On this account, the Commission proposed its replacement with either 'service of general interest' or 'service of general economic interest', depending on the concrete circumstances[1098].

According to the CJEU's case law[1099], Member States are expected to draft their national SGI (including SSGIs) regulations in line with a set of good administration-type principles (which the Court developed throughout decisions, such as the principle of consistent and systematic drafting, or those of transparency and non-discrimination). In the CJEU's opinion, inasmuch as these principles are respected, Member States may enjoy considerable freedom in regulating SSGI (proportionality being, surprisingly, assessed only marginally)[1100].

Public service obligation (PSO) on the other hand appears to define a burden – obligation or requirement *etc* – imposed on an organization by the government of a Member State, through law or contract, in the context of the provision (by that entity) of a service of general interest (or, in effect, a welfare service) which that organization, if it were

[1096] According to the COM (2011) 900 final, services of general interest (SGI) "are services that *public authorities of the Member States classify as being of general interest and, therefore, subject to specific public service obligations (PSO)*. Services of general economic interest (SGEI) are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. *The PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfil its mission*. Social services of general interest (SSGI) include social security schemes covering the main risks of life and a range of other essential services provided directly to the person that play a preventive and socially cohesive/inclusive role. *While some social services (such as statutory social security schemes) are not considered by the European Court as being economic activities, the jurisprudence of the Court makes clear* [see for ex Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, para 118; Case C-218/00 *Cisal and INAIL*, [2002] ECR I-691, para 37; or Case C-355/00 *Freskot* [2003] ECR I-5263 *etc*] *that the social nature of a service is not sufficient in itself to classify it as non-economic. The term social service of general interest consequently covers both economic and non-economic activities*." (emphasis added), p. 3-4.

[1097] It may thus either define a service delivered to the general public or ordained to meet a public interest, or just refer to the usual business of a public enterprise.

[1098] COM (2011) 900 final, 4.

[1099] See for ex. Case C-169/07 *Hartlauer* [2009] ECR I-1721. For more on this case, see J W van de Gronden, 'Free movement of services and the right of establishment: does EU internal market law transform the provision of SSGI?' in U Neergaard, E Szyszczak J W van de Gronden, M Krajewski (eds.), '*Social services of general interest in the EU*', T.M.C. Asser Press, 2013, 42.

[1100] *Hartlauer*. See also T-92/11 *RENV, Jørgen Andersen, v European Commission,* ECLI:EU:T:2017:14, para 56 *etc*. For an interesting discussion, see J W van de Gronden, (n 1098), 146-147 or L Nistor, '*Public services and the European Union: Healthcare, health insurance and education services*', Springer, 2011.

considering its own commercial interests, would not normally assume.[1101] These obligations have a rather complex nature.[1102] They are ostensibly sourced in Articles 14 and 106(2) TFEU (which actually reproduces the original wording of Article 90 TEEC and, later, of Article 86 TEC). According to the latter text, "*Undertakings entrusted with the operation of services of general economic interest* or having the character of a revenue-producing monopoly *shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them*." (emphasis added).

Grasped in this way, PSOs appear to accompany all forms of SGIs but health, social services, energy, postal services, transport, oil and gas are identified as the sectors where this concept is most relevant. PSOs are usually linked to services that society needs as part of its general interest but which cannot be run in normal commercial conditions due to specific circumstances (such as, for example, too high distribution costs or too high costs relating to the ensuring of a minimum level of security, regularity or quality of supplies, or the protection of the environmental, including energy efficiency, energy from renewable sources and climate protection etc. - in the case of oil and gas services, or too remote areas - in case of passenger transport *etc*).

Most PSOs are occasioned by *social* circumstances (*eg*, isolated communities which need to connect to the rest of the population, or basic services the access to which must be ensured for all citizens such as social services, health services, public transport, utilities *etc* at decent costs, and so on). Others are entailed by mere environmental policy objectives

[1101] 'In particular, since welfare services (…) must be provided throughout the whole territory, at an affordable price and at a specified quality and on a continuous basis, they present the characteristics of market failure (…). As a result, public authorities are compelled to use sometimes different protectionist and restrictive measures to ensure their provision (…). All these measures have the effect of partitioning the market or distorting competition. As a result, they may conflict with European Union law, raising the questions whether such law applies to welfare and whether it ought to (…)' – Nistor (n 1100), 2-3. See also the Note of DG Energy & Transport on Directives 2003/54/EC and 2003/55/EC on the Internal Market in electricity and natural gas (of 16.01.2004), available at http://www.rae.gr/old/europe/sub4/public_service_obligations_DGTREN.pdf., p.2.

[1102] In some authors' opinion, PSOs are in fact "a form of state aid that applies to (..) [regular public] services" – see M Hromádka, "*Definition of public service obligation potential in the new EU Member States*", (2017) 12 Transport Problems Review 1, 1, available at https://www.researchgate.net/publication/315934891_Definition_of_public_service_obligation_potential_in_the_new_EU_member_states. Also, a number of Member States have started to impose, in a number of key industrial sectors, some so-called "PSO levies". Such levies are usually imposed on final customers, in an attempt to recover the additional costs associated with the production process or the delivery of services from specified sources of generation, including sustainable, renewable and indigenous sources – see for ex. the PSO levy imposed by the Irish Government on all electricity consumers. According to the Note cited under n.1100 above, PSOs must, cumulatively: a) *be related to the supply of the service of general economic interest in question*; b) *contribute directly to satisfying this general economic interest*; and c) be imposed in such a way that they *do not affect the development of trade to an extent contrary to the interests of the Community* – p.2. This latter condition generated a reach case law, especially in those areas where the obligation was doubled by state aid.

(*eg*, energy efficiency, energy from renewable sources, circular economy *etc*). Regardless of the cause that lead to their establishment, all PSOs share a common feature: they make the delivery of the public service to which they are linked rather costly and unattractive for private providers (they are, commercially speaking, less viable). As the Commission pointed out in its Decision of 14 February 2008[1103], "Aid of a social character which is the subject of the present decision is considered (…) to be more appropriate for air services *which can be provided commercially but at a cost which is a barrier to social inclusion*. It allows support to be targeted *at those communities which are disadvantaged by high air fares* (…)"[1104]. (emphasis added).

All PSOs must be clearly defined in terms of scope and execution and all costs related to their implementation must be clearly identified as, "when Member States impose PSOs[,] they are never allowed to grant even a single euro in excess of the net extra costs of the PSO"[1105].

Nonetheless, given their nature and importance for the society and, in general, for the promotion of the "social and territorial cohesion" of the Union[1106], the provision of such services must somehow be made certain even if (or especially where), given dire economic circumstances and harsh budgetary constraints, the only viable alternative solution would be for governments to resort to the private market. To this purpose, national or local EU authorities may for example award exclusive rights to those running public services or establish a well-balanced set of rules for their operation. The European Union has already developed legislation to avoid disparities between Member States in the procedures and conditions applicable to PSOs in the delivery of SGEIs.[1107]

[1103] European Commission Decision of 14 February 2008, on State Aid, C(2008) 685, N 27/ 2008, United Kingdom, Aid of a Social Character Air Services in the Highlands and Islands of Scotland (prolongation of N 169/2006), OJ 2008 C 80/5.

[1104] Ibidem, p.11.

[1105] P Nicolaides, "*A Primer on Compensation for the Extra Costs of Public Service Obligations Taking into Account Efficiency Gains*", 13.10.2015, at http://stateaidhub.eu/blogs/stateaiduncovered/post/3849.

[1106] According to Article 14 TFEU.

[1107] Based on the provisions contained in the cited Article 107(2) TFEU, the European legislature adopted a series of secondary norms – especially in the energy and transport sectors – where it made substantial use of this concept. See for ex. Articles 2(e) and 2a et seq. from the Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 - OJ L 315, 3.12.2007, p. 1–13, or Articles 16 et seq. from Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) - OJ L 293, 31.10.2008, p. 3–20, or Article 3 et seq. from Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC - OJ L 211, 14.8.2009, p. 55–93 or finally Article 3 et seq. from Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC - OJ L 211, 14.8.2009, p. 94–136 etc.

It is worth pointing out that CE's 2011 Communication avoids using this syntagma and instead tries to introduce a discrete catchphrase, that of 'universal service obligation' (USO), which it defines as "*a type of PSO* which sets the requirements designed to ensure that certain services are made available to *all* consumers and users in a Member State, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, *at an affordable price*." (emphasis added). Moreover, as the same Communication clarifies, "The definition of specific USO are set at European level as an essential component of market liberalization of service sectors, such as electronic communications, post and transport."

In order to motivate operators to assume public service obligations, governments may be tempted to promise attractive compensations. Some of them may however fall into the definition of state aid offered by Article 107 TFEU. But, as a matter of principle, Article 106 TFEU and, for land transport, Article 93 TFEU, authorize the Commission to declare compensation for services of general economic interest (SGEIs) *compatible* with the TFEU competition rules.

According to Article 106 TFEU:

"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18[1108] and Articles 101 to 109[1109].

2. *Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.* The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States." (emphasis added)."

[1108] According to which "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."
[1109] *Ie*, those pertaining to Chapter 1 – "Rules on Competition" of Title VII – "Common rules on competition, taxation and approximation of laws".

Additionally, but limitedly for land transportation services, Article 93 TFEU (ex Article 73 TEC) clarifies that "Aids[1110] *shall be compatible with the Treaties* if they meet the needs of coordination of transport or *if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service*." (our emphasis).

4.2 Social aid granted to individual consumers under a PSO

At this point, it is important to recall that Article 107 TFEU is supposed to secure a right balance between the need to prevent distortions of competition due to public subsidies to traders and the 'legitimate policy objectives that Member States may want to pursue through those subsidies."[1111] Anyway, although only implied by Article 107, the conclusion that the state aid rules are only applicable to *economic* activities became indubitable under the relevant case law of the CJEU[1112].

On the other hand, the mere fact that a measure (taken at either the national or the local levels with purpose to help certain disadvantaged categories of people) has a social nature or purpose cannot automatically exclude it from the application of Article 107 TFEU in case it generates – or has the potential to generate - a distortion in the competition on a certain market.[1113] This social character may however stand for a strong justification before the Commission in the evaluation stage.

According to Article 107(2) a) TFEU, aid having a social character, granted to individual consumers is a type of state aid not necessarily harmful for the free competition. The restrictions set on state aid, in general, shall therefore not be applicable to this particular kind of aid, unless it has a concrete potential to generate a competitive imbalance in the market of reference. The system of vouchers used by governments to redress various social drawbacks is a good example in this regard, since their receivers – the end consumers – will use them while choosing among different goods or services provided by different companies.

The reference to the situation where state aid is granted to individual consumers in the text of Article 107 is not accidental as, occasionally, such aid may be granted in connection with, or in the context of, a public service obligation accompanying a

[1110] Especially state aid, in the meaning of Article 107 TFEU.
[1111] J Baquero Cruz, "Social services of general interest and the state aid rules", in U Neergaard, E Szyszczak J W van de Gronden, M Krajewski (eds.), '*Social services of general interest in the EU'*, T.M.C. Asser Press, 2013.
[1112] See for ex. the cases C-41/90 *Höfner* [1991] ECR I-1979, or C-218/00 *Cisal* [2002] ECR I-691, para 22, *etc.*
[1113] See CJEU, Cases C-173/73 *Italy v. Commission* [1974] ECR 709, paras 27 and 28, C-241/94 *France v. Commission* [1996] ECR I-4551, para 21 or C-342/96 *Spain v. Commission* [1999] ECR I-2459, para 23.

service of general interest. According to the relevant case law[1114], subsidies which are used to compensate PSOs set on operators entrusted with the delivery of a SGEI (which may be of a social nature), may not constitute state aid if they meet a number of criteria.[1115] Other useful indications on the application of this derogatory provision are contained in the European Commission's Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the Aviation Sector of 10 December 1994[1116]. This document actually clarifies that aid 'granted to individual consumers' must be interpreted in a functional way, so that it may refer not only to aid granted *directly* to end-users but also to aid granted to the operator engaged in the delivery of a service of general interest which entails the undertaking of a specific public service obligations (*indirect* benefit). It also insists on the condition that that aid have a *social* character (regardless of, *nota bene*, whether it concerns a specific group or – in the case of unprivileged regions, *eg*, isolated islands – the entire population of those regions). Finally, it concludes that, although Article 107(2) a) refers explicitly / exclusively to the production of *goods*, it is as well applicable to the provision of *services*.

Now, returning to Article 106(2) TFEU, it is clear that it grants Member States a generous margin of consideration in the setup and the organization of SGEIs. It practically lays, together with Articles 101 and 102 TFEU and 4(3) TEU, the basis for what the case law of the CJEU (and the literature around it) defines as the 'State Action Doctrine (SAD)' – according to which governments may, under to some limitations, encourage or buttress

[1114] CJEU, Case C-280/00 *Altmark* [2003] ECR I-7747. According to this decision, "(…) public subsidies (…) are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

- *first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined*;
- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
- *third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations*;
- fourth, *where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs* which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations." (emphasis added).

[1115] For more on this issue, see J J Baquero Cruz, "Social services of general interest and the state aid rules", in U Neergaard, E Szyszczak J W van de Gronden, M Krajewski (eds.), '*Social services of general interest in the EU'*, T.M.C. Asser Press, 2013, 296 *et seq*.

[1116] OJ 1994 C 350, p.5-11.

"private action incompatible with the competition rules"[1117]. Member States are thus allowed to decide what, or which of the services that need to be delivered to their people are of general interest, *ie*, SGIs (keeping in mind that only services of general *economic* interest fall within the scope of the internal market rules). The distinction between services of general (economic) interest and those who are not of general interest is important, as the two categories of services enjoy different legal regimes (at least inasmuch as the internal market rules are concerned). Only SGEIs enjoy the special treatment reserved for them by Article 106(2) TFEU. According to the cited norm, Member States may soothe the rigor of the rules contained in Articles 101 and 102 TFEU and deviate from their scope insofar as such a derogation would "obstruct the performance, in law or in fact, of the particular tasks assigned to them".[1118] Such derogation may consist for example in the granting of a special or otherwise exclusive right to the undertaking performing the SGEI in question.[1119]

On the other hand, each Member State has its own policies and visions when it comes to identify / define and regulate services of general interest. Public interests usually differ from Member State to Member State. This evidently leads to incongruous national regulations and eventually to distortions of competition. In such cases, the European Commission is called to intervene and ensure a certain (minimum) level of harmonization. It has done so, for example, in several areas "where safeguarding the public interests is high on everybody's agenda" (such as transport, energy, oil and gas, *etc*) and the relevant markets spread over the borders of several Member States.[1120] By the same instruments, the European Commission also created substantial latitude for the setting, by Member States, of public service obligations (PSOs) in those cases where the delivery of a service of general interest is usually hampered by various (*eg*, social or geographical) circumstances which make it

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[1117] P J Slot, "Public distortions of competition: the importance of article 106 TFEU and the State Action Doctrine", in U. Neergaard *et al* (eds), „*Social Services of General Interest in the EU*", 258 *et seq*. This doctrine appears to have been first tested by the CJEU in C-13/77 *GB-Inno-BM v. ATAB* [1977] ECR I-2115 and, further, in C-267/86 *Van Eyke v. Aspa NV* [1988] ECR 4769.

[1118] Ibidem, p.255.

[1119] According to a landmark decision of the Court of Justice of the European Union, *ie*, that rendered in case C-437/09 *AG2R* [2011] ECR I-00973:

> "68 According to well-established case-law, however, the mere creation of a dominant position *through the grant of special or exclusive rights within the meaning of Article 106(1) TFEU is not in itself incompatible with Article 102 TFEU*. A Member State will be in breach of the prohibitions laid down by those two provisions *only if the undertaking in question, merely by exercising the exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses* (…).
>
> 69 *Such an abusive practice contrary to Article 106(1) TFEU exists where, in particular, a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which that undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind* (…)" (emphasis added).

[1120] Slot (n 1117), 257.

unattractive to private sector.[1121] Such kind of obligations may therefore, in order to woo potential operators, be counterbalanced by attractive compensations. In practice, it is the setting of these compensations that raise most problems as, inasmuch as they go beyond the limits set by the CJEU in the *Altmark* case, the aid thus granted may fall foul of the state aid rules.

4.3 Relevant case-law and its contribution to a public service obligations theory

A long thread of cases – on which the CJEU was called to decide – marks the evolution of public service obligations set at either the EU or the MSs level.

For example, in T-92/11 *RENV*, the General Court established that "(56) […] Member States have broad discretion to define what they regard as a SGEI and, consequently, the definition of such services by a Member State may be questioned by the Commission only in the event of manifest error". The Commission is however "(57) […] under an obligation, […], to conduct a diligent and impartial examination [which must refer, *inter alia*, to all the relevant policy objectives], and that obligation requires, in particular, careful examination of the information with which the Member State provides the Commission". The conclusion that may be inferred from this decision is that a PSO cannot be set outside a coherent and well-substantiated public policy the objectives of which must be clearly determined. Moreover, regardless of its foundation, the scope of a PSO must necessarily be defined as explicitly and coherently as possible, as unclear terminology may lead to the misapplication of the relevant state aid rules[1122].

[1121] For example, in the case of passenger transport services, public service obligations could include: (i) a specified service or group of services such as those on low-density branch lines, commuter services, or off-peak services at night or on Sundays, regardless of demand levels; (ii) a regulated non-commercial fare structure or restriction of fare increases below those recommended by rail- way management or at a lower rate than cost increases; (iii) offering concession fares to specified groups such as students, pensioners, military personnel, civil servants, the disabled etc. - see for ex. the World Bank's "Railway Reform: Toolkit for Improving Rail Sector Performance - Chapter 8: Buying Services from Railways" available at https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/railways_toolkit/PDFs/RR%20Toolkit%20EN%20New%202017%2012%2027%20CH8.pdf, p.120.

[1122] This aspect was further nuanced by the European Commission. For ex., in its Decision No.2014/944 concerning SOGAS, the management company of the Italian Stretto airport – OJ L 367, 23/12/2014, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014D0944&from=EN, the CE concluded that public service obligations must be *entrusted by an official act* and *defined with sufficient precision*, as *imprecise definition of public service obligations makes it impossible to identify the costs which are caused by such obligations* and, hence, to grant compensation (since this makes a clear separation of eligible and non-eligible costs impossible and thus subsidisation of non-eligible costs cannot be avoided). The need for these obligations to stem from a formal, official act which to offer all the necessary details on its scope and execution was repeatedly underscored by the European Commission throughout its decisions – see for ex. decision

2015/1074 and 2015/1075 concerning Italian bus companies CSTP and Buonotourist – available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.179.01.0112.01.ENG and https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.179.01.0128.01.ENG. The Commission also clarified in its Decision 2014/944 that such a shortcoming cannot be redressed or covered by an ex-post definition of the relevant public service obligations. However, it identified some circumstances under which compensation – corresponding to such PSOs – which does not satisfy the Altmark criteria may still be compatible with the internal market. For an interesting discussion on this, see P. Nicolaides, „*Failure to Satisfy Ex Post the Altmark Criteria, but Compliance with the 2014 Aviation Guidelines*", 18.02.2015, available at: http://stateaidhub.eu/blogs/stateaiduncovered/post/1471#_ftn1. In its Decision SA.20580 on Dublin Bus and Irish Bus companies on the other hand – available at http://ec.europa.eu/competition/state_aid/cases/221137/221137_1597492_358_2.pdf, the Commission reached the conclusion that, since according to the fourth Altmark criterion which requires that the PSO provider is either competitively selected or *efficient by industry standards*, and the providers were, in that particular case, not selected based on a competitive tender, their efficiency may not be measured subjectively (but by industry standards) so that "(181) The [mere] need for financing of recipient undertakings [*ie*, not sourced in concrete and objective market circumstances] may not be taken into account in assessing whether a State measure may be regarded as compensation for discharging PSOs. Therefore, the Commission concludes that the fourth Altmark condition is not met, and, since the four conditions are cumulative, that the Altmark conditions are not fulfilled for a finding of no aid." Moreover, the Commission indicated that "(185) as a general rule, (…) the financing of infrastructure through State resources does not confer an advantage on its users provided that the infrastructure is open without discrimination to all in accordance with Union legislation, and does not favour one user in particular." Finally, in Decision SA.38788 concerning compensation for the UK Post Office Ltd [POL] in the period 2015-18 – available at http://ec.europa.eu/competition/state_aid/cases/256622/256622_1651530_118_2.pdf, the Commission set forth that "[e]ven traditional monopolists, like postal operators, have to comply with the rules on compensation for the extra costs of public service obligations" whereas "SGEI providers can be compensated in a way that induces them to become more efficient" – see P. Nicolaides, '*Services of General Economic Interest: How to Compensate and Induce more Efficiency*", 08.09.2015, available at http://stateaidhub.eu/blogs/stateaiduncovered/post/3699. As regards the damages due to losses which a provider of a SGEI (which includes a public service obligation scheme) may suffer as a consequence of a change in the public policies of a Member State, the Commission stated, in one of its most relevant decisions – *ie*, Decision No.2015/1470 available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D1470&from=EN, that compensation for such damages is not State aid where the harmed undertaking has a right to an entitlement that has general application. The Commission also clarified in that Decision that the award of aid to individuals must be assessed against the general State aid rules inasmuch as those individuals are in fact controlling the entity providing the relevant services. In this respect, the Commission resorted to the conclusions of the CJEU in the cases C-170/83, *Hydroterm*, [1984], ECR I-02999 and C-222/04 *Casa di Rispalmo di Firenze*, [2006], ECR I-00289 to decide that the claimants (two individuals) had not only complete control of their undertaking but were also involved in the day-to-day management of their companies consequently they too had to be treated as "undertakings" because they were engaged in economic activities. In this case, two brothers (Romanian natives but holding a Swedish citizenship) and their companies, which were active in the food sector, invested in Romania after Romania decided to implement a policy to attract foreign investors. The investment incentives were granted in the form of exemptions from import duties. These exemptions were later revoked for being incompatible with the EU competition rules applicable to the Romanian State after it joined the EU, in 2007. The Micula brothers claimed that they suffered damages caused by that change in the Romanian policy. In Decision 2016/2084 on the other hand (OJ L321, 19/11/2016) - https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016D2084&from=EN, the Commission has established that all the parameters needed for the calculation of a public service compensation must be determined in advance, by the document establishing that service and the relevant PSOs (and not at a later stage as, for example, by a court of justice during a dispute on the delivery of that service, even if based on an appointed expert). Moreover the Commission insisted on the need to keep separate accounts by explaining that "(58) […] when an undertaking carries out both activities which are subject to PSOs and activities which are not subject to PSOs, it is not possible to determine precisely what are the costs incurred in the discharge of PSOs *in the absence of a proper separation of account between the different activities of the provider*." (emphasis added). Finally, the Commission confirmed its position in the *Micula brothers* case by reiterating that no damages may be awarded as a substitute for incompatible State aid. However, State aid (awarded in compensation for the extra costs incurred in the delivery of a PSO) is compatible with investment aid, as the Commission clarified in C(2013) 7884 final – available at http://ec.europa.eu/competition/state_aid/cases/250416/250416_1542635_190_2.pdf.

In T-185/15 *Buonotourist v. Commission*[1123], the same General Court upheld the Commission's opinion that compensation cannot be calculated ex-post, *ie*, after the contract was awarded and during the delivery of the public service, based on the costs effectively incurred by the provider in connection with a specific public service obligation. Moreover, the Court highlighted the importance of making compensation contingent upon concrete, well-defined (and not just general, *ergo* elusive) and mandatory conditions (*id est*, PSOs) in the provision of a public service. According to the General Court, the service provider must have well-defined legal obligations in terms of area of operations, price, quality, customers, frequency, *etc*. The Court concluded that the compensation could not be regarded as *existing* aid because it was not in conformity with Regulation 1191/69, but constituted *new* aid, which had to be notified in accordance with Article 108(3) TFEU.[1124] In this regard, the Court stressed that, on the one hand, failure to comply with just a single provision of the state-aid rules must render the implemented aid measure automatically illegal (even if all the other conditions are met) and also that, on the other hand, the compatibility of the measures adopted in the past but with effects in the present must be tested not against the rules in place at the time of their establishment but against the rules in force at the moment when those effects occur. More concretely, the Court concluded that a compensation as that in the case making the object of T-185/15 is compatible with the state aid rules only provided that that aid falls within the scope of the rules in force at the time of its granting, "unless the new rules explicitly exclude [it] from their scope".[1125]

In T-79/10, *Colt Télécommunications France v Commission*[1126], which concerned the construction and operation of a high-speed broadband network in the Paris region [Hauts-de-Seine department], the General Court had already decided that a public service obligation may include in its scope both market segments or service segments that are profitable – therefore available for supply on the market, as well as unprofitable segments

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Another interesting Decision coming from the CE on this issue is Decision C(2018) 954 final - http://ec.europa.eu/competition/state_aid/cases/272645/272645_1971679_97_2.pdf - where the Commission clarified that "Compensation for public service obligations may be fixed at less than the net extra costs of the provider of the public service to induce it to become more efficient." – P Nicolaides, "*Compensation for Public Service Obligations*", 02.05.2018, at http://stateaidhub.eu/blogs/stateaiduncovered/post/9224.

[1123] ECLI:EU:T:2018:430.

[1124] For a very interesting discussion on this case, see P Nicolaides, "*The compatibility of state aid depends on the rules which are applicable at the time the aid is granted*", 07.08.2018, at http://stateaidhub.eu/blogs/stateaiduncovered/post/9290.

[1125] Ibidem.

[1126] ECLI:EU:T:2013:463.

which are therefore "undersupplied"[1127]. This case has remained so far (except for the more recent T-92/11 discussed above – where the Court merely implied it) the only one to address the problem of what a PSO may or may not include in its scope (a question with which most authorities struggle with). As a matter of principle (stemming from both the hard law and the soft law of the Union as well as of the CJEU) a PSO must primarily tackle a market failure[1128]. Nonetheless, T-79/10 clarified that profitable market segments may too be included in a PSO mechanism. It failed however to explain what kind of justification and what evidence Member States may safely rely on when they impose a PSO that spans both profitable and unprofitable commercial services or market segments.[1129]

In T-461/13[1130], *Spain v Commission* (and, again, in T-462/13[1131], *Basque Country v Commission*), the General Court decided[1132] that the mere proclamation of a concrete activity, by law, as being a service of general interest cannot lead to the conclusion that that service entails corresponding public service obligations in the lack of additional provisions which to indicate, clearly, the nature, scope and conditions under which such PSOs are to be performed. To reach this conclusion, the Court first established that, "(40) In order to settle the question whether [an] activity (…) falls within the exercise of public powers or the exercise of economic activities [which to justify the application of the EU competition rules]", a both systemic and teleological assessment is needed, with the evaluation of "its nature, its aim and the rules to which it is subject". To that purpose, the Court maintained that "(45) the question whether the activity in question was economic in nature does not depend on whether a private investor is prepared to carry it out on the same terms or on whether the activity is profitable (…) and the fact that the services are provided free of charge does not prevent an activity from being classified as an economic activity." Anyway, according to the Court, "(61) *In the absence of EU harmonised rules governing the matter, the Commission is not entitled to rule on the extent of public service tasks assigned to the public operator, such as the level of costs linked to that service, or the expediency of the political choices made in this regard by the national authorities, or the economic efficiency of*

[1127] For more on this, P Nicolaides, "*The scope of Public Services Obligations*", 07.02.2017, at http://stateaidhub.eu/blogs/stateaiduncovered/post/7909.
[1128] Ibidem.
[1129] Ibidem. It could however be presumed that concrete social considerations, especially when stemming from strong social policies (see the second paragraph of this Section 4.3 and the clarifications under n 1122 above) might offer such justification.
[1130] ECLI:EU:T:2015:891.
[1131] ECLI:EU:T:2015:902.
[1132] More on this, at http://stateaidhub.eu/blogs/stateaiduncovered/post/4355 (P. Nicolaides, "*Altmark, again!*", posted on 14.12.2015).

the public operator (…). It follows from the first indent of Article 1 of Protocol No 26 on services of general interest supplementing the EU and FEU Treaties that *the shared values of the Union in respect of SGEIs within the meaning of Article 14 TFEU include, in particular, the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising SGEIs as closely as possible to the needs of the users*." (emphasis added). Notwithstanding that, concluded the Court "(67) *the mere fact that a service is designated in national law as being of general interest does not mean that any operator providing that service is entrusted with performing clearly defined public service obligations within the meaning of the judgment in [the] Altmark [case]*." (emphasis added).

Further, in T-454/13[1133], *SNCM v Commission*, the Court recalled that "(112) *the Member State's power to define SGEIs is not unlimited and may not be exercised arbitrarily for the sole purpose of allowing a particular sector to circumvent the application of the competition rules*" (emphasis added), especially in a context where "(120) [i]t cannot be disputed that the granting of financial compensation to a particular service provider, that is, the public service concession holder, is liable to impede or render less advantageous the provision of those same services by operators not benefiting from the same compensation. The amount of the compensation allows its recipient to enjoy a decisive advantage over its competitors and, consequently, to dissuade them from offering the services concerned." To this purpose, settled the Court, the proportionality principle must necessarily apply to the relation between the scope of that public service (as clearly defined in the relevant documents setting it up) and the identified market failure.[1134]

In T-219/14[1135], *Regione autonoma della Sardegna [RAS] v European Commission*, the Court reiterated that an *ex post* setting and determining of the compensation corresponding to a specific PSO must render the State Aid granted in this form incompatible with the internal market rules. It also clarified a number of issues raised by the application of the Commission's Decision on services of general economic interest[1136] which allows Member States, under certain conditions, to grant aid to providers of SGEI without prior notification to the Commission[1137]. The Court retained in that case that "(105) (…) none of

[1133] ECLI:EU:T:2017:134.
[1134] P Nicolaides, "*The need for public services is shown by absence of private services*", 11.04.2017, at http://stateaidhub.eu/blogs/stateaiduncovered/post/8370.
[1135] ECLI:EU:T:2017:266.
[1136] Commission Decision (2012/21/EU) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.
[1137] P Nicolaides, "*Ex Post Definition of the Method of Compensation Makes State Aid Incompatible with the Internal Market*, 18.04.2017, at http://stateaidhub.eu/blogs/stateaiduncovered/post/8468.

the regional decisions […], by which the RAS mandated Saremar to operate routes to and from the mainland and specified the associated public service obligations, makes any express or even implicit provision for the payment of public service compensation corresponding to the costs incurred in fulfilling the aforementioned obligations […] those decisions were based on the postulate that the performance of the aforementioned public service obligations had to be done in accordance with market conditions and thus in a manner that safeguarded the activity's viability without recourse to public service compensation paid by the RAS." So, clarified the Court, "(106) (…) [although] under the second Altmark condition, the case-law allows the national authorities broad discretion in determining the methods for calculating the public service compensation in question (…), [h]owever, (…) the prior determination of the methods for calculating that compensation is necessary [under the CE's Decision 2012/21] in order for the second Altmark condition to be fulfilled and presupposes, by definition, that it was also decided beforehand to grant such compensation." Moreover, the Court pointed out that "(165) (…) the obligation to refer expressly to decision [2012/21] in public service mandates, laid down in Article 4(f) of that decision, pursues an objective of transparency that carries a particular importance where there is no obligation for Member States to notify public service compensation measures fulfilling the conditions of the decision in question (…). Moreover, the fact, (…) that non-compliance with that condition does not prevent the disputed compensation measure from being authorised under Article 106(2) TFEU, is irrelevant. (…) the Commission merely inferred from its examination of the disputed compensation measure in the light of the 2011 SGEI Decision that that compensation could not be deemed compliant with Article 106(2) TFEU if it did not meet the conditions of that decision and that, consequently, it could not be held to be exempt from the obligation of notification. That conclusion did not, therefore, relieve the Commission of having to conduct an examination of the compatibility of that measure in the light of that provision of the TFEU, in the light of, in particular, the 2011 SGEI Framework, which examination was, moreover, carried out in paragraphs 282 to 296 of the contested decision." In this context, the Court insisted that "(154) (…) *although the 2011 SGEI Decision does not expressly require that the public service in question serve a general economic interest presenting specific characteristics as compared with that served by other economic activities, it is, in any event, a precondition for the application of Article 106(2) TFEU arising from, inter alia, the not unlimited discretion the national authorities have in defining what constitutes public service*". (emphasis added).

5. Conclusions

In time, owing to the irreversible consolidation of what Mr. Delors called 'l'espace social' (*ie*, a *political* emanation), the European *social* model has crystallized (as a *policy* output) into a more and more coherent system, occupying a continuously growing place in the economy of the single market, up to the point where it reached the very core thereof. This expansion took place not only bottom-up, from more and more national levels (corresponding to the subsequent waves of the EU's expansion to the East and the array of social issues that came with them) to the European one ― as, in essence, the European social model draws its substance from the multitude of national welfare policies, but also top-down, from the European Union itself to the Member states (owing to a determined assault, from the Commission, via a series of innovative tools like the OMC, but also other instruments – including MoUs and a multitude of pieces of soft law - which, in time, proved their efficiency). This extraordinary evolution owed much of its impetus to the fundamental transformations that took place at the very heart of the EU (especially through the advancement of the Charter and the introduction of the idea of 'social market economy' into the EU's very constitutional matrix), which pushed *people* to the front as the real beneficiaries of the European project. In this context, concepts like 'fundamental (human) rights' and 'social economy' (with social economy enterprises as spearhead) became central to the entire integration process.

The consolidation of a unitary European social model facilitated, thanks in principal to the general obligation contained in Article 9 TFEU ― to which the Commission acquiesced fast and without any restraints ― the integration of several core social values into substantially all the corners of the internal market (including, or especially, in the public procurement area as one of the most important dimensions thereof). It is in fact in this particular area where the Commission, probably inspired by Prof. Scharpf's ideology and the success of the OMC in the hardcore social policy sphere, came with interesting combinations of hard law (framework directives) and quasi-OMC tools, hoping to turn the procurement process definitively social. In parallel, as many started to praise the advantages offered by the use of PSOs in the specific area of public services, the Commission saw this as a very good opportunity to push for an extensive use of various similar sustainable (that is, community-friendly) instruments across the entire procurement system.

But this integration process appears to have got stuck into the still unsolved constitutional conundrum. As the new Treaties failed to strike a clear balance between the fundamental economic and social values promoted under their umbrella (or at least to explain whether the latter are the first ones' equals or just acceptable exceptions therefrom), the Court tried hard to find a safe path out of this gridlock. Its case law unfortunately hovers, incongruously, between the already described 'binary conflict' and a 'fair balance' approach, hesitating in the end to open a too wide door for social values. Nonetheless, through several landmark judgements, it appears to have been promoting the idea that, in general, the essential social values promoted, or endorsed, at the EU level form a *sui generis* European social model, which it is ready (depending upon the concrete circumstances) to recognize as a safe harbour ― and source of solid justifications ― for many protectionist, or just indirectly restrictive, national measures. Thus, by acknowledging them as either *equally fundamental* and, due to their social nature, *prevalent*, or merely *acceptable exceptions* form the internal market rules, the Court paved a safe road for the promotion of a number of essential social values via public procurement.

As a result, in the social market economy that defines the Union's landscape since 2007, contracting authorities are now not only allowed, but somewhat obliged to pursue, when awarding public contracts, various social objectives ― especially in the area of fundamental (social) rights but also born under other corners of the continuously expanding (in response to the so many social crises) European social model ― in a compound of scopes gathered from several – interconnected - public policies.

At the EU level, these policies are the result of the EC's intense travail to determine the new place for public procurement in the new social but also *political* context.[1138] There are, on the other hand, a multitude of other social values which, without being captured as such by the European social model itself, are heavily promoted at various national levels. These are the most sensitive ones, as they put the heaviest pressure on the internal market. The Court found a number of them to be acceptable *exceptions* to (but never 'prevalent equals' of!) the economic freedoms. It usually did so building its reasoning on a complex (and not always straightforward) mandatory requirements test. But, until now, for

[1138] As detailed above, the Treaty rules on competition are doubled by the obligation (for both the Union – under Article 9 TFEU, and the Member States – under the principle of sincere cooperation postulated in Article 4(3) TEU) to promote social values and the core elements of the social policy provided at the primary law level throughout its actions and measures (*ie*, including in the area of competition and the functioning of the internal market which, inevitably, encompasses public procurement). To this end, see also the conclusions of the Court in *Concordia Bus*, cited above.

these latter values neither the European legislature nor the Court were able to craft a unitary, coherent theory (which to generate a solid *legal* practice). This makes the values endorsed by the European social model the most reliable ones, as they enjoy, intrinsically, a universal recognition as sources of justification for restrictive national policies and measures. On the other hand, other policies or measures, not relying on the European social model but on other values, developed only locally (nationally), are much harder to pass through the sieve of justification test (applied either in the area of public policies developed under articles 36, 45 or 52 *etc* TFEU, or in that of the mandatory requirements).

In any case, there are more and more voices who claim that, in order to exploit the opportunities permitted under the post-Lisbon legal framework, we need to get out of the safety zone which keeps us tied to the fundamental rights berth (as one of the safest justifications in the face of the rigorous rules of the internal market) and move to a more holistic approach, insisting on the much larger *sustainable development* context which is now high on the EU agenda.[1139] This, in the context where reality shows that many economies are still reluctant in promoting not only many fundamental social values, in general, but even the core human rights, in particular, and even more reluctant in using public procurement for this purpose. A very recent UN report just showed how the world's fifth largest economy (and one of the most ardent promotors of social procurement) deals with human rights,[1140] which stays as a proof that there is much to do in the social area and that the loop is still open between theory (or the principles and rules enshrined in the Treaties) and (national) practice. So, in line with the ambitious goals set through the Europe 2020 Strategy, a much more liberty should be recognized for contracting authorities at the award of public contracts.

In the following two Chapters we will insist not only on the concrete echoes which the development of the European social model has had in the area of public procurement, but also on the drawbacks, or even blockages, which the still unresolved (not even in the light of the relevant CJEU's case law) issues at the EU's constitutional level and a number of substantial inconsistencies between the European laws and policies are generating, in particular, in the European public procurement practice. We will try to show that, in spite

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[1139] See M Andrecka, '*Public-private partnerships in the EU public procurement regime*', GlobeEdit Publishing, 2014, or T Novitz, 'Labour standards and trade: need we choose between 'human rights' and 'sustainable development'?', in H Gött, '*Labour standards in international economic law'*, Springer, 2018. See also S Greer, *'"Balancing" and the European Court of Human Rights: A contribution to the Habermas-Alexy debate*', (2004) 63 Cambridge Law Journal 2, esp. 413.

[1140] https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881&LangID=E. For discussion, see R Mead, '*A scathing report on Britain's treatment of the poor'*, in The NewYorker, 22 November 2018, at https://www.newyorker.com/news/daily-comment/a-scathing-report-of-britains-treatment-of-the-poor.

of the Commission's very ambitious efforts and of the door left open by the Court, many of the current provisions which, in the new legal framework, encourage contracting authorities to 'go social' are still inefficient due to an important number of factors (which we will discuss further below).

CHAPTER V
PUBLIC PROCUREMENT IN THE NEW INTERNAL MARKET CONTEXT: FROM FINAL SCOPE TO SMART TOOL

1. Introduction

As correctly observed by some authors, the 2014 package of laws on public procurement was 'one of the showcase projects of the 'Barroso II' Commission (2009-2014) and, therefore, the most emblematic aspect of the Single Market Act I'.[1141] It was born in the context opened by the Better Regulation Agenda[1142] and burgeoned in the 'revolutionary' Smart Regulation Agenda launched in 2002 and revamped in 2010[1143] – which urged the Commission to continuously monitor and coordinate the evolution of the European acquis in the light of certain key policy elements (in principal, economic, social and environmental). But it became fully fledged in the context where the Commission came with two sets of initiatives under respectively the 'Single Market Act I' (launched in April 2011)[1144] and 'Single Market Act II' (October 2012).[1145]

[1141] E Van den Abeele, '*Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?*', ETUI Printshop, Brussels 2014, 6.
[1142] Launched in 2000 with the declared aim to 'open up policy and law-making and listen more to the people it affects' – see https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en. For a comprehensive discussion, see H Xanthaki, 'Improving quality of EU legislation: limits and opportunities?', A Renda, 'Cost-benefit analysis and EU policy: limits and opportunities*'* and J Nowag and X Groussot, 'From better regulation to better ajdjudication? Impact assessment and the Court of Justice's review', all in S Garben and I Govaere, '*The EU Better Regulation Agenda: a critical assessment'*, Hart Publishing, 2018. The idea that public procurement is an important piece of this strategy was recently confirmed at an official level, by the European Committee of the Regions, which stated, in explicit terms, that ,'effective governance of public procurement is an integral part of the quality of public administration across the EU, since it is a genuinely cross-cutting government function concerning virtually every public body from federal ministries to local state-owned utilities, making it broadly representative of the quality of government and to this end public procurement should be incorporated into the EU's better regulation agenda.' (see Opinion of the European Committee of the Regions on the 2014 public procurement package (2018/C 387/07), p 2).
[1143] Smart Regulation in the European Union, COM(2010) 543. See H Xanthaki, 'Improving quality of EU legislation: limits and opportunities?', in S Garben and I Govaere, '*The EU Better Regulation Agenda: a critical assessment'*, Hart Publishing, 2018, 36, 37. According to the cited author, the Smart Regulation Agenda involves the whole policy cycle and the life cycle of any piece of EU legislation, from conception to implementation, evaluation and revision, and requires the active implication of both the EU institutions and the Member States (shared responsibility). Last but not least, under the Smart Regulation Agenda, the stakeholders' engagement gets a crucial role in the process.
[1144] 'Single Market Act: Twelve levers to boost growth and strengthen confidence: Working together to create new growth', COM(2011) 206, 13 April 2011.
[1145] 'Single Market Act II. Together for new growth' of 3 October 2012, COM(2012) 573.

The Single Market project[1146] proved crucial for the public procurement market in three respects: firstly, because it changed the role of public authorities (including with regard to the possibilities opened now for cooperation) and the place of the State in public procurement, particularly in the context of liberalisation-privatisation of public services; secondly, because, based on the principles and lines of action brought about by this reformatory initiative, which insisted on legislative reformation and policy integration, the European Union was able to create new strong social and environmental dimensions and include concrete social and employment provisions in the EU public procurement rules; and thirdly, because of its obvious international dimension.[1147]

The negotiations around the text of the new Directives were tough.[1148] They nevertheless led to a compromise which is, in general, seen as a vital success, as it came in a very intricate context defined by an intriguing case law which was trying (hard) to explain how social criteria may serve as (a public policy, or otherwise a mandatory requirement) justification for specific restrictions from the internal market rules.[1149] Clearly, the expanding of the scope of public procurement through the latest package of Directives (which now offer strong *legal* grounds for sustainability – beyond the previous assaults launched at *political*

[1146] The social dimension of which was regarded with scepticism by some who considered that, in the policy making process, the development of market integration through the creation of the Single Market and of the Economic and Monetary Union etc. 'has generated 'spillovers' into the social field, not primarily for 'welfare' reasons, but rather to reduce the impediments to economic integration and to maximise the benefits' – see R Sykes, '*Crisis? What crisis? EU enlargement and the political economy of European Union social policy'*, in (2005) 4 Social Policy and Society Review 2, 212. In turn, Amandine Crespy argues that '[f]irst, the EU lacks the budgetary means for conducting distributive welfare policies; second, this is so because there is a consensus on the fact that welfare policies have a strong social and cultural dimension and should therefore be decided by local and national authorities which, unlike the EU, enjoy deeply historically rooted legitimacy (…). However, there has been a 'spill over' of EU policy making towards the realm of welfare (…). This well-known concept used by scholars to describe the functional dynamics of EU integration implies that economic policy and social policy are bound to remain closely intertwined. Because the EU has historically developed as an *economic* community, the EU institutions, in particular the EU Commission, were attributed strong competences for achieving the building of a common unified European market. The gradual extension of the scope of the market to areas which were formerly managed by public authorities has implied increasing encroachment of EU internal market and competition rules over national traditions pertaining to the provision of welfare services. This has concerned not only regulatory but also distributive aspects as the EU competition policy monitors public funding (i.e. state aids) of services activities in the Single Market. Politically, this has been possible not because there was an ideological consensus on the liberalization—and subsequent privatization—of welfare services but because, (…), in the 1980s and 1990s the 'market' became the overarching and multi-faceted idea used by the various political players in order to pursue actually contrasting projects of EU integration (…).' – see A Crespy, '*Welfare markets in Europe: the democratic challenge of European integration'*, Palgrave Studies in European Political Sociology, Palgrave Macmillan, 2016, Kindle Edition, 805 to 827.

[1147] E Van den Abeele, '*Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?*', ETUI Printshop, Brussels 2014, 7.

[1148] For discussion, see E Van den Abeele, '*Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?*', ETUI Printshop, Brussels 2014.

[1149] N Nic Shuibhne, M Maci, *'Proving public interest: The growing impact of evidence in free movement case law*' (2013) 50 Common Market Law Review 4.

and *policy* levels and via a sparse and hieratical line of CJEU *cases*) resulted in a questionable broadening of the discretionary powers of contracting authorities.

This discretion needs not be construed outside the internal market rules and the relevant CJEU' case law, but necessarily as a permanent source of 'diagonal conflicts'.[1150] Any derogation must be duly justified and proportional to the envisaged scope.[1151] '[C]hoosing which Government policies should be integrated will need to be carefully considered and justified, with the criteria clearly specified. Integration should be selective and targeted to achieve the best results. Integration does not mean that all such policies should be integrated, or in the same way, or to the same depth. Sometimes, integration may mean simply ensuring that public procurement decisions do not cut across other policies (*ie*, negatively); in other cases, it may mean that public procurement should be harnessed to help achieve other policy objectives (*ie*, positively).'[1152]

A too wide discretion is an evident source of asymmetric approaches and arbitrary practices which in the end might sabotage all goals set at the EU level — including, or especially, those pinned in the Europe 2020 Strategy.[1153] It is also argued that if this increased discretionary power (which often entails a shift to, or a strong preference for, domestic products or suppliers, thus colliding with the main goals of the internal market) is not limited by some *objective* parameters drawn based on the principles of transparency, equality, non-discrimination and proportionality[1154], the main objectives of the procurement process will eventually fail (not only those linked to fair competition and an unharmed

[1150] C Joerges, '*The impact of European integration on private law: reductionist perceptions, true conflicts and a new constitutional perspective'* (1997) 3 European Law Journal, 378; see also C Schmid, 'Vertical and diagonal conflicts in the Europeanisation process' in C Joerges and O Gerstenberg (eds), '*Private governance, democratic constitutionalism and supranationalism*', Office for Official Publications of the European Communities, 1998, 185–191. According to Mulder, 'Diagonal conflicts involve on the one hand economic freedoms and on the other hand collective goods closely related to national competences, such as social policies.' (J Mulder '*Unity and diversity in the European Union's internal market case law: towards unity in 'good governance*?', (2018) 34 Utrecht Journal of International and European Law 1, 16).

[1151] J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 37. See also the Interpretative Communication on the Community law applicable to public procurement and the possibility for integrating environmental considerations on public procurement, COM (2001) 274 final, (in particular p. 12).

[1152] C McCrudden, '*Buying social justice. Equality and public procurement*', (2007) 60 Current Legal Problems 1, 145.

[1153] E Manunza, 'Achieving a sustainable and just society through public procurement? On the limits of relative scoring and of the principles of equal treatment and transparency', in E Manunza, F Schotanus (eds), '*The art of public procurement: The art of public procurement, liber amicorum for Jan Telgen'*, University of Twente, 2018, 139.

[1154] Ibidem, 143. According to Manunza, social traces have always been present in public procurement as, at various levels, national or regional governments have, since forever, crafted social policies in order to protect domestic industry, to create jobs for the local workforce or to support employment in declining industries or in areas suffering from underemployment or lack of development and public procurement was often used as an instrument for the attainment of these goals (145).

freedom of movement, but also those aimed at the 'achievement of a just and sustainable society').[1155] The answer to this drawback is, allegedly, professionalization and a holistic, interdisciplinary approach[1156] (in the sense that it does not suffice to focus on the technical or procedural aspects of procurement, that is on *how* to buy in order to preserve fair competition, but much more emphasis should be put on the *substantial* aspects of it — on *what* to buy[1157] in order to respond best to the most important community challenges).

At a more general level, opening the door for sustainability (and, in particular, social policy considerations) in public procurement might also tackle specific market failures associated with the delivery of 'public goods'[1158] in the same way public service obligations (PSOs) are doing it in the area of public services (for details, see Chapter IV above).[1159]

Otherwise, the new set of Directives on public procurement must necessarily be construed in the context opened by the Europe 2020 Strategy which, in turn, must be read in the context where the fundamental changes brought about by the Treaty of Lisbon.[1160] The

[1155] Ibidem, 139.

[1156] Ibidem, 144. See also T Tartai, G Piga, "Supporting social considerations through public procurement: economic perspective", in G Piga, T Tartai (eds), "*Public Procurement Policy (The Economics of Legal Relationships)*", Routledge, N.Y., 2016, 12 or A von Bogdandy and S Schill, '*Overcoming absolute primacy: respect for national identity under the Lisbon Treaty*' in (2011) 48 Common Market Law Review 5, 1420.

[1157] C Weller and J Meissner Pritchard, *'Evolving CJEU jurisprudence: balancing sustainability considerations with the requirements of the internal market'*, in (2013) 1 European Procurement and Public Private Partnership Law Review, 56 *et seq*.

[1158] P Trepte, '*Regulating procurement: understanding the ends and means of public procurement regulation'* Oxford University Press, 2004, 9, 10. For an applied discussion on the special regime of public goods, see also E Aspey, '*Public goods, special rights and competitive markets: Right2Water and the utilities procurement regime*', in G S Ølykke and A Sanchez-Graells (eds), '*Reformation or deformation of the EU public procurement rules*', Edward Elgar, 2016.

[1159] See also C McCrudden, '*Buying social justice. Equality and public procurement'*, (2007) 60 Current Legal Problems 1, 143. Accordingly, 'the greater the emphasis placed on the importance of the efficient use of tax expenditure, the more likely that the argument will be made that if it is possible to use procurement to deliver on necessary social policies, by piggybacking on other purchases, the more efficient that will be' (ibidem). This idea got a strong support from the Court itself (see for example the *Concordia Bus* case, where the judges embraced openly the arguments adduced by the contracting authority who produced substantial evidences showing that such a measure would have helped making important budgetary savings) and was expressed at also the European Parliament level: 'the limits placed upon direct social expenditure by budgetary stringency make [procurement] an attractive area for the promotion of socially desirable outcomes' – see the Opinion of the Committee on Employment and Social Affairs on the communication from the European Commission on public procurement in the European Union (COM(98)0143—C4-0202/98, A4-0394/98).

[1160] According to the European Parliament Report on the public procurement strategy package (2017/2278(INI)), 'A. (…) the full potential of public procurement in helping to build a competitive social market economy is yet to be unlocked, and whereas over 250 000 public authorities in the Union spend around 14 % of GDP, or nearly EUR 2 000 billion, each year on the purchase of services, works and supplies; B. (…) public procurement involves the spending of a considerable amount of taxpayers' money, meaning that it should be carried out in an ethical manner, with transparency and integrity and in the most efficient way, in terms of both costs and quality delivered, in order to provide quality goods and services to citizens; C. (…) correctly implemented public procurement rules are a crucial tool in the service of a stronger single market and for the growth of EU companies and jobs in the Union and whereas the intelligent use of public procurement can be a strategic tool to achieve the EU's goals of smart, sustainable and inclusive growth, accelerating the transition to more sustainable supply chains and business models; D. (…) when it comes to the transposition of EU rules on public procurement and concessions, the full transposition and implementation of EU law is essential to make it easier

substantial shift in this constitutional paradigm is in fact a reflection of the political decision of Member States to show 'more of a social face to its citizens' — among which the dissatisfaction with regard to the implementation of the hard economic goals of the internal market had started to rampage up to reaching some alarming notes.[1161] The measures proposed under the Europe 2020 Strategy were just a natural follow-up to the 'social market economy' proposed by the new Treaties and which was expected to usher in full employment and a significant social development across Europe.

The dedicated literature identifies four[1162] main types of social procurement, as documented in the relevant policy papers: (i) procurement of social services (a very intricate issue, linked to the liberalisation of key sectors and the shattering of state monopolies, and which usually involve distinct, derogatory rules – see for ex. the PSOs which are usually associated with this type of services, as discussed above); (ii) social offsetting in the procurement of public works and services (this involves the use of schemes which to offset eventual negative impacts and provide indirect social outcomes); (iii) set-asides (an explicitly permitted form of positive discrimination); and (iv) corporate social responsibility (in the form of management of supply chains – ethical supply, the viability of which is challenged by the requirement to remain linked to the subject-matter of the contract).[1163] The first two focus on the potential of the contract while the last two, on the qualities of the tenderers.

In practical terms, public procurement may be used to fight employment *inequalities* (including by ensuring the compliance with regulations on minimum pay and equal pay), or *unemployment* (through social / labour integration and inclusion schemes), or *offset negative impacts* caused by urban development and regional imbalances (*eg*, by requiring that part of the price paid in exchange for the procured works or services to be re-

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and cheaper for small and medium-sized enterprises to bid for public contracts, with full respect for the EU's principles of transparency and competition' (Recitals A to D).

[1161] E Manunza, 'Achieving a sustainable and just society through public procurement? On the limits of relative scoring and of the principles of equal treatment and transparency', in E Manunza, F Schotanus (eds), '*The art of public procurement: The art of public procurement, liber amicorum for Jan Telgen'*, University of Twente, 2018, 144-145.

[1162] Other authors identified five *five* types of 'social linkages': (a) the use of procurement as a method of enforcing anti-discrimination law in the employment context; (b) the use of procurement to advance a wider conception of distributive justice, particularly affirmative action in employment; (c) the use of procurement as a method to help stimulate increased entrepreneurial activity by disadvantaged groups defined by ethnicity or gender; (d) the inclusion in procurement contracts of requirements to ensure fairness and equality when services are transferred from the public sector to the private sector; and (e) the use of procurement as a means of putting pressure on companies operating in other countries to conform to equality norms – see C McCrudden, '*Buying social justice: equality, government procurement, and legal change*', Oxford University Press, 2015, 18.

[1163] W Furneaux and J Barraket, '*Purchasing social good(s): a definition and typology of social procurement*' (2014) 34 Public Money and Management 4, 270, 271. See also J Barraket, R Keast and C Furneaux, '*Social procurement and new public governance*', Routledge Critical Studies in Public Management, Routledge, 2016, 55 *et seq*.

invested, by the private contractor, in various social programmes developed in the area where the contracting authority is located, hence abroad – for foreign suppliers, an arrangement not necessarily linked to the contract itself — except for the source of the money) or, finally, *raise aspirations* among young people (via training programmes, usually carried out *post-factum*, after the delivery of the contract, usually *not* for the benefit of the employers used for that purpose but, in general, for the local community catered by the contracting authority).[1164] Of these possibilities, the latter two seem the most problematic. This since they involve an indirect return of funds (part of the price paid under a public procurement contract) through investments targeted at specific, concrete social aims, which resembles the offsetting arrangements in defence procurement.[1165]

The four categories of social procurement identified in the relevant literature correspond, more or less, to the instruments included in the 2014 Directives on public procurement. What is even more interesting, the over twenty provisions containing explicit reference to the possibility (or obligation, as the case may be) to include social considerations in the procurement mechanism appear to involve at least one 'core' social (human) right[1166] consecrated at the EU's primary law level (either the Treaties, directly, or the CFREU). Unfortunately, although this supposedly reflects the approach expressed by the Court in

[1164] T Wright, '*New development: can 'social value' requirements on public authorities be used in procurement to increase women's participation in the UK construction industry?*' (2015) 35 Public Money & Management 2, 135-140. For the German practice, see also E K Sarter, D Sack and S Fuchs, '*Public procurement as social policy? An introduction to social criteria in public procurement in Germany*', Universität Bielefeld, Working Paper Series "Comparative Governance" 1/2014, available online at: www.uni-bielefeld.de/soz/powi or M Trybus, '*Study on social considerations in public procurement*', Country Report for the Federal Republic of Germany, 11 June 2018.

[1165] As the Commission repeatedly stated, "*such offset requirements are restrictive measures which go against the basic principles of the Treaty, because they discriminate against economic operators, goods and services from other Member States and impede the free movement of goods and service*". So, "*as restrictive measures infringing primary law, offset requirements can only be justified on the basis of one of the Treaty-based derogations (...)*" the use of which '*needs to be based on a case-by-case assessment which identifies the essential (...) interest at stake and evaluates the necessity of the concrete measure, taking into account the principle of proportionality and the need for a strict interpretation (...)*" - see "*Directive 2009/81/EC on the award of contracts in the fields of defence and security. Guidance Note. Offsets*", at: http://ec.europa.eu/internal_market/publicprocurement/docs/defence/guide-offsets_en.pdf (p 1, emphasis added). In fact, offsetting is prohibited in many international treaties not necessarily linked with the defence sector. A good example is Article 1006 of the North American Free Trade Agreement (NAFTA, 1994) which prohibits the use of offsets in the evaluation of bids. NAFTA 1994 defines offsets as "conditions imposed or considered by an entity prior to or in the course of its procurement process that encourage local development or improve its Party's balance of payments accounts, by means of requirements of local content, licensing of technology, investment, counter-trade or similar requirements." – for discussion, see the 'Preferential public procurement' study prepared, in 2016, by the World Bank Group for the G20 Global Platform on Inclusive Business, at https://www.inclusivebusiness.net/sites/default/files/inline-files/Preferential%20public%20procurement_for%20web_final_0.pdf, 6.

[1166] A Sanchez-Graells, 'Public procurement and 'core' human rights: a sketch of the European Union legal framework', in O Martin-Ortega and C Methven O'Brien, '*Public procurement and human rights: opportunities, risks and dilemmas for the State as buyer*', Edward Elgar Publishing, 2019.

Schmidberger, it does *not* make things simpler. In their response[1167] to the European Commission consultation on its Guidance on Socially Responsible Public Procurement,[1168] the International Learning Lab experts envisaged that, in spite of explicit political declarations at the highest level, 'human rights dimensions of socially responsible public procurement (SRPP) have not so far been [explicitly!] addressed in EU public procurement legislation, policy or guidance.'[1169]

Anyway, a notable common feature of social policy objectives, in general, is that they are so often designed to protect *local* communities and therefore encourage the penchant for *domestic* suppliers and products over those from other EU Member States (*ie*, protectionism).[1170] This is only natural considering that, as a matter of constitutional law (but also of political engagement), national Governments cannot (and would not), in principle – and with a few exceptions – be concerned with the wellbeing of the citizens of other states.[1171] Their mission will always concern, first and foremost, their own citizens. However,

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[1167] C Methven O'Brien, O Martin-Ortega and E Conlon, '*Guidance on Socially Responsible Public Procurement: Response to consultation of the European Commission by the International Learning Lab on Procurement and Human Rights*' (2018) BHRE Research Series, Policy Paper no.5, July 2018, at http://www.bhre.org/current-news/2018/7/20/guidance-on-socially-responsible-public-procurement-response-to-consultation-of-the-european-commission-by-the-international-learning-lab-on-procurement-and-human-rights.

[1168] https://ec.europa.eu/info/consultations/commission-guide-socially-responsible-public-procurement_en

[1169] The International Learning Lab Guidance points to several key shortcomings and downshifters which still hinder the proliferation of SRPP: 'The European Union (EU) public procurement Directives and EU member state procurement laws and policies *do not clearly define the human rights responsibilities of public bodies in connection with purchasing activities*; *EU procurement laws and policies appear to have a 'chilling effect' on human rights and sustainability efforts by public buyers due to fear of legal challenges based on narrow interpretations of EU procurement rules relating to competition and equal treatment*; To the extent EU Public Procurement Directives refer to *human rights concerns, these are defined restrictively with reference to ILO Core Labour Standards whereas reference should be made to all human rights acknowledged by the EU and the UNGPs*; *Monitoring of conditions in government supply chains and remedy mechanisms for victims of human rights abuses by suppliers to public buyers in the EU are lacking*; There is a *pressing need for guidance* and capacity development support for EU public buyers on techniques and tools they can lawfully deploy to avoid or reduce the incidence of human rights abuses in the delivery of government contracts; Such guidance should address how public buyers may lawfully require suppliers to undertake *human rights due diligence*, how they should *monitor their supplier's performance in addressing human rights risks in the supply chain*, and how and when they should apply *sanctions to suppliers that fail to implement the 'corporate responsibility to respect' human rights*. A *lack of EU policy coherence in relation to public procurement and human rights undermines the fulfilment of the state 'duty to protect' against business-related human rights abuses as well as efforts to promote responsible business conduct, inside the EU and beyond*. Given the scale of government spending, this presents a concrete and substantial threat to the realisation of the "decent work" agenda, the UNGPs and the Sustainable Development Goals, worldwide.' (p 2, emphasis added).

[1170] This is true from their basic forms to the most complex ones — such as those common to the Northern part of Europe and the UK, the community contracting, or the *maatschappelijn aanbesteden* as it is known in the Netherlands, the right to challenge, the social return on investment or the performance based contracting, *etc*. For more on this, see S Arrowsmith, J Linarelli and D Wallace Jr. (eds), '*Regulating public procurement. National and international perspectives*', Kluwer Law International, 2000, 238 *et seq*, or a A Semple, '*Citizen contracting – does radical decentralisation improve procurement outcomes?*', draft paper prepared for the 4th IPPA Conference, 28 June 2019, Montreal, available at https://www.procurementanalysis.eu/. See also A Ludlow, '*Social procurement: policy and practice'* in (2016) 7 European Labour Law Journal 3, 480.

[1171] '[W]hile states generally have the competence to enforce compliance with national and international social and environmental standards against companies within their jurisdictions, they lack legal tools to secure the

in spite of the obvious pressure that such policies are putting on the internal market fundamental principles and the four Treaty freedoms (a pressure which was acknowledge since as early as the 1970s, when the first European laws on public procurement had been adopted), the 2014 Directives appear (in principal due to their vague wording and many inconsistent provisions) to permit – or, at least, not to explicitly forbid – such approaches and consequently dangerously broadening the room for discretion for contracting authorities,[1172] although there is nothing to suggest that the initial constitutional paradigm that defines the EU's internal market (as drawn, piecemeal, by the Court itself) has changed.

This wider latitude has been mainly explained by the need to effectively achieve the EU 2020 Strategy goals[1173] set by the Commission, who took good advantage of the post-Lisbon changes in the Treaties themselves, amid a structural capsizing of the societal values in general. However, these goals are far from those that characterized the prime years of integration. But, as the big picture reveals, it was not only the Commission's efforts that prompted all these changes. Another key role in this process is granted to the rules encouraging citizens' initiatives in the crafting of EU policies (Article 11 TEU) and the principle of mutual sincere cooperation (between Member States – see Article 4 (3) TEU, and between the EU institutions – see Article 11(3) TEU), as introduced by the Treaty of Lisbon, occasioned a substantive input from many social actors and local authorities in the drafting of the latest package of Directives on public procurement, thus expanding even more the discretionary power of national governments and, conversely, contracting the scope of the

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same compliance on their companies' business partners abroad. On the one hand, private parties are not subject to international law and, on the other hand, the applicability of national law is geographically and personally limited. Thus, while governments in developed countries adopt various regulations to limit socially and environmentally harmful activities of subjects under their jurisdiction, they indirectly create incentives for these subjects to outsource their activities to countries with weaker laws. (…) The situation is further exacerbated as some developing countries do not fulfil their international obligations, i.e. they do not enforce international law within their territory, either because they lack the institutional capacity or because they fear an outflow of foreign investment. (…) They may even purposefully relax their social and environmental regulation in order to create competitive advantage for their domestic companies. (…) In this way a legal gap is created where private parties may escape from the legal consequences of the fact that their cross-border activities are not aligned with globally recognized social and environmental standards. (…) This regulatory gap needs to be closed if we aim for effective solutions to global challenges' — K Peterkova Mitkidis, '*Sustainability clauses in international supply chain contracts: regulation, enforceability and effects of ethical requirements'*, (2014) 1 Nordic Journal of Commercial Law, 22.

[1172] See for example COM(85) 310, White Paper: *Completing the internal market*, para 85, versus COM(2017) 572 final, *Making public procurement work in and for Europe*, para 5.

[1173] E Manunza, 'Achieving a sustainable and just society through public procurement? On the limits of relative scoring and of the principles of equal treatment and transparency', in E Manunza, F Schotanus (eds), '*The art of public procurement: The art of public procurement, liber amicorum for Jan Telgen'*, University of Twente, 2018, 146.

fundamental rules of the internal market.[1174] The lobby exercised by these actors landed on a fertile soil, as both the European Commission (through its active and determined initiatives – see Chapters II and IV above) and the Court of Justice of the Union (via its recent case law – see Chapter III above) proved ready to take the same path. This concerted effort resulted in the significant number of references contained, more than ever before, in the latest EU legal package on public procurement.[1175] These rules give a hint (but, unfortunately, not the necessary details) about how Member States and contracting authorities may use public procurement to pursue key goals set in various social policies crafted at either the EU or the national levels.[1176]

So, generally defined as the acquiring of goods and services, by governments, from private and non-profit firms, with the intention to create social value[1177] or, for the particular case of public sector purchasing, as 'the utilization of procurement strategies to support social policy objectives',[1178] social procurement is now, more than ever before (probably in the context occasioned by the significantly wider discretion assumed by public buyers under the encouraging CJEU case law), used as a policy tool in order to support *indigenous* suppliers and contractors and preserve *national* industries and the related workforce.[1179] This corresponds to the idea, widely embraced of late, that, in general, public authorities are more prone to accept sustainability via the back-door, as a better alternative to the traditional system, than through coercion.[1180]

[1174] F Pennings and E Manunza, 'The room for social policy conditions in public procurement law', in T van den Brink, M Luchtman and M Scholten (eds), '*Sovereignty in the shared legal order of the EU. Core values of regulation and enforcement'*, Intersentia Publishing Ltd., 2015, 173 *et seq*.

[1175] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p.65 (the 'Public Sector Directive 2014'), Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94. 28.3.2014, p.243 and Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p.1.

[1176] C Barnard, '*To boldly go: social clauses in public procurement*', (2017) 46 Industrial Law Journal 2, 210.

[1177] J Barraket and J Weissman, '*Social procurement and its implications for social enterprise: a literature review. Working Paper 48*' Brisbane: Australian Centre for Philanthropy and Nonprofit Studies, 2009, at https://eprints.qut.edu.au/29060/. A particular characteristic of social procurement is that it entails an *intentional* creation of social outcomes (both *directly* and *indirectly*) – see C W Furneaux and J Barraket, '*Purchasing social good(s): a definition and typology of social procurement*' (2014) 34 Public Money and Management 4.

[1178] J Barraket and J Weissman, '*Social procurement and its implications for social enterprise: a literature review'*, Working Paper 48' Brisbane: Australian Centre for Philanthropy and Nonprofit Studies, 2009, at https://eprints.qut.edu.au/29060/

[1179] C Bovis, '*Editorial'*, in (2017) 12 European Procurement & Public Private Partnership Law Review 3, 214. For recent statistics supporting this conjecture with numbers and concrete good-practice examples, see the World Bank study on 'Preferential public procurement' - prepared in 2016 by the World Bank Group for the G20 Global Platform on Inclusive Business, at https://www.inclusivebusiness.net/sites/default/files/inline-files/Preferential%20public%20procurement_for%20web_final_0.pdf

[1180] N Boeger, '*Reappraising the UK social value legislation'*, in (2017) 37 Public Money and Management 2, 117.

The relevant studies show however that, even after the adoption of the 2014 package of Directives on public procurement and a wild promotion of the idea of sustainability through public procurement (especially by the European Commission) there still is a significant gap between Member States in terms of good practice, with Northern countries on the champions' side and the Southern and Eastern countries on the laggards' side.[1181] The same studies also show that those who practiced socially responsible public procurement under the former Directives do it also under the current Directives, while those who did not, still do not (for both *systemic* and *traditional* causes). In reality, the first case registered on the dockets of the European Court of Justice dates back to the 1980's — an era when many of the actual Member States were still under a communist regime (to which they remained tributary, to a significant extent, until today)! However, the Dutch legislation at stake in that case (*ie, Beentjes*) was even older, being adopted in a period where protectionist movements were still very active and the first set of Directives on public procurement was still fresh, hardly readable and not very popular, while the socialist movements were surging – a proof that both the European Court of Justice and the European Commission (see its first guidance on the use of social considerations in public procurement) fell prey to it.

Otherwise, it is commonly accepted that the economic power of public buyers is an excellent lever for the promotion of sustainability, and that public procurement is more and more often used as an instrument of implementation of various policy goals[1182] but also to acquaint private markets with sustainability and raise awareness on the subject.[1183]

As a result, the latest package of Directives on public procurement comprises an impressive number of provisions which, either explicitly or implicitly, encourage (or even impose) the pursuing of social goals through the specific means of public procurement. It

[1181] https://aeidl.eu/docs/bsi/index.php/study-report .

[1182] According to the worldwide '*Global review of sustainable public procurement 2017*' study ran by the United Nations Environment Programme, '38 of the 41 (93 percent) responding national governments include SPP provisions in overarching or thematic policies and strategies, 32 (78 percent) include it in their procurement regulations and 27 (66 percent) have policies specifically dedicated to the promotion of SPP. Most of the national governments that do not have policies dedicated specifically to SPP explained that they are currently developing their SPP action plans. Considering the three types of policies and regulations together, all participating national governments *have* SPP provisions in their policy and/or regulatory framework.' - https://www.oneplanetnetwork.org/sites/default/files/globalreview_web_final.pdf p 10 (emphasis added).

[1183] M Amann, J Roehrich, M Eßig and C Harland, '*Driving sustainable supply chain management in the public sector: The importance of public procurement in the European Union*', in (2014) 19 Supply Chain Management 3, 361–366; S A Yawar and S Seuring, '*Management of social issues in supply chains: A literature review exploring social issues, actions and performance outcomes'* (2017) 141 Journal of Business Ethics, 633; or S Brammer and H Walker, '*Sustainable procurement in the public sector: An international comparative study*' (2011) 31 International Journal of Operations & Production Management, 452–476.

suffices to cite here Article 18(2) on mandatory social provisions[1184], Article 20 on reserved contracts[1185], Article 40 on preliminary market consultations[1186], Article 42(1) – especially the fourth and the fifth subparagraph on technical specifications and accessibility requirements[1187], Article 43 on labels[1188], Article 46 on the division of contracts into lots[1189],

[1184] The obligation to comply with the applicable labour laws already existed under Directive 2004/18 (although hidden between the lines of its recitals). This provision aims at making explicit and emphasizing the obligation to comply with applicable legislations in the fields of environmental, social and labour law. Recitals 39 and 40 confirm that the obligation of compliance with social provisions exists at all relevant stages of the procurement procedure (award, exclusion criteria, abnormally low tenders). The transposition of this provision is mandatory and, even if the obligation referred to in Article 18(2) appears to be directed at Member States, Recital 37 clarifies that this obligation concerns *contracting authorities* as well. According to Arrowsmith (and in spite of other's belief that provisions directed at ensuring compliance with pre-existing legal norms are redundant and useless – see Sanchez Graells), this kind of provisions is useful for several reasons: first, they 'provide an additional enforcement tool for securing compliance with the general law and/or punish violations, and for reducing the risk of violations of the general law during contract performance. The possibility of terminating the contract, for instance, may induce compliance with the law during the contract work more effectively than a remote threat of criminal prosecution.' Second, they are meant to keep governments away from being associated with any unlawful behaviour. Finally, they may ensure a level playing field in that particular area – see S Arrowsmith, '*Horizontal policies in public procurement: A taxonomy*', in (2010) 10 Journal of Public Procurement 2, 152. To the same end, see the Opinion of Advocate General Poiares Maduro in *La Cascina*: Joined Cases C-226/04-C-228/04, *La Cascina v Ministero della Difesa* [2006] ECR I-1347, para 24.

[1185] This provision aims to foster the contribution of procurement contracts to the social and professional integration of disabled or disadvantaged persons. Performance of such contracts may, as an alternative, occur in the context of sheltered employment programmes, although not all Member States transposed this latter possibility into their national legal framework – see for example Romania's case. Anyway, relevant in the application of this provision is not only Article 56 TFEU but also Articles 107 and 108 TFEU concerning aids granted by Member States to traders. In this regard, the legal definitions of disabled worker, disadvantaged worker and sheltered employment should abide by Articles 2(3), 2(4) and 2(100) from Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187 of 26.6.2014, p. 1–78). This is the more important as certain Member States have chosen to make the participation of sheltered workshops and social economy enterprises contingent upon the obtaining of a relevant functioning authorisation from the competent *national* authorities, which may, according to a constant case law from the CJEU, infringe Article 56 TFEU – see for ex Case C-354/13 *Fag og Arbejde* - ECLI:EU:C:2014:2463, paras 55-60. See also Joint Cases C-335/11 and C-337/11 *HK Danmark*, ECLI:EU:C:2013:222, according to which workers' obesity *is* 'disability' in the sense of the cited Directive.

[1186] Market consultations must be carried out with the strict observance of the principles of non-discrimination (in particular on nationality grounds as per Article 18 TFEU), equal treatment, proportionality and transparency, in line with the decisions rendered in Case C-324/98, *Telaustria* [2000] ECR I-10745 or C-496/99, *Commission v Italy* [2004] ECR I-3801. In addition, the relevant EU rules regarding the exchange of information between competitors (Article 101 TFEU and Commission's Communication establishing the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements) should also be observed as the facilitation of direct or indirect exchange of information between economic operators in the framework of market consultation might trigger issues from a competition law perspective.

[1187] This provision establishes a number of guidelines for the drafting of the technical specifications to be set out in the procurement documents. As a general principle, according to this text, technical specifications must be linked to the subject-matter of the contract and proportionate to its value and its objective. Beside these general prescriptions, more specific subparagraphs relate to the requirement of technical specifications taking into account accessibility criteria for persons with disabilities and design for all users. When *mandatory* accessibility requirements have been adopted by a legal act of the European Union, the technical specification must necessarily refer to them. Article 42(1) contains a novelty in terms of the *obligation* to take disability-friendly technical specifications into account, except in duly justified cases. Transposition of this provision is compulsory for Member States. As for the existing legal accessibility requirements which must be taken into account by all contracting authorities, it is worth citing here Commission Regulation (EU) N°1300/2014 of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility; 'eEurope – An information Society for All' launched by the Commission in May 2000 - Communication from the Commission 'eEurope 2002 – An

Information Society For All – Draft Action Plan prepared by the European Commission for the European Council in Feira 19–20 June 2000' of 24 May 2000, COM(2000) 330 final (the first document released by the Commission on the accessibility of ITC products for people with disabilities), soon followed by Council Resolution on 6 February 2003, 'eAccessibility' – improving the access of people with disabilities to the knowledge based society' (2003/C 39/03), the Communication from the Commission 'Towards a Barrier Free Europe for People with Disabilities' of 12 May 2000, COM(2000)284 final, Communication from the Commission 'i2010 – A European Information Society for growth and employment' of 1 June 2005, COM (2005) 229 final and Communication from the Commission 'Communication on eAccessibility' of 13 September 2005, COM (2005) 425 final, or Communication from the Commission 'European Disability Strategy 2010–2020', of 15 November 2010, COM (2010) 636 final *etc*. See also the UN Communication No. 1/2010, the Views adopted on 16 April 2013 by the Committee on the Rights of Persons with Disabilities, the Views adopted by the Committee at its ninth session (15–19 April 2013) or the Standardisation mandate M/376 to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement of products and services in the ICT domain, or the Standardization Mandate M/473 to CEN, CENELEC and ETSI to include the 'Design for all' approach in several standardization initiatives, M/473 – EN, Brussels 1 September 2010. In 2016, the Commission also adopted Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies (OJ L 327, 2.12.2016, p. 1-15). Anyway, as ascertained in the literature, 'the number of current Directives that contain *mandatory* accessibility [clauses] is very small. In considering disability clauses in Article 114 Treaty on the Functioning of the European Union (TFEU) Directives on the Internal Market, Waddington [*ie*, L Waddington, 'A disabled market: free movement of goods and services in the EU and disability accessibility', (2009) 15 European Law Journal 5, 575–598] points to a number of examples that contain accessibility requirements. These include Directives in the fields of passenger vehicles and labelling of medicinal products [in principal Directive 2004/27/EC amending Directive 2000/83/EC on the Community code relating to medicinal products for human use, (OJ 2004 L136/35), and Directive 2001/85/EC of the European Parliament and of the Council of 20 November 2001 Relating to Special Provisions for Vehicles Used for the Carriage of Passengers Comprising More than Eight Seats in Addition to the Driver's Seat, and Amending Directives 70/156/EEC and 97/27/EC (OJ 1997 L 42)]. However, Waddington (…) concludes that 'there are many examples of Article [114 TFEU] based instruments which could have potentially included disability specific clauses, but which do not'. (D Rice, *'Public procurement as a means to achieving social gains – progress and challenges in European legislation and standards for accessible information and communication technology'* (2015) 29 International Review of Law, Computers & Technology 2-3, 175). A valuable contribution to this field is offered by the World Health Organisation, which elaborated, in 2001, a comprehensive (and revamped) Classification of Functioning, Disability and Health (ICF), but with a more medical rather than social value. The same should go for also the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities of 1993 and so on. The first *legally binding* international instrument (with a clear social value) is the UN Convention on the Rights of Persons with Disabilities adopted in 2006 and which entered into force in 2008 (and which 'is currently an 'integral part of EU Law' and enjoys a quasiconstitutional status in the EU legal system, beneath the Treaties but above secondary law' (S Favalli and D Ferri, 'Defining disability in the EU non-discrimination legislation: judicial activism and legislative restraints', in (2016) 22 European Public Law 3, 11). Finally, in light of the CJEU's case law – see for ex Case C-354/13 *Fag og Arbejde* - ECLI:EU:C:2014:2463, paras 55-60; see also Joint Cases C-335/11 and C-337/11 *HK Danmark*, ECLI:EU:C:2013:222 etc, workers' obesity *is*, as already mentioned, 'disability' and, as such, falls within the scope of Directive 2000/78 (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22).

[1188] This provision (evidently inspired by CJEU's decision in Case C-368/10, *Max Havelaar*) makes it easier for contracting authorities to include social considerations into their buying decisions. They may do so in relation to either technical specifications, award criteria or to contract performance. In essence, this article means that contracting authorities may require a specific label (provided that several conditions are cumulatively met) as *means of proof* that the works, services or supplies comply with the required social characteristics. Labels and certification schemes can help by relieving contracting authorities from the task of running complex compliance verifications. The use of labels usually engages a two-step process: firstly, the contracting authority must define the characteristics that it is looking for and, secondly, it must indicate which third party verified standard it will accept as evidence that the works, services or supplies correspond to what it wants. Three main changes have occurred since the 2014/24 Directive entered into force: (a) labels may provide for environmental characteristics as before, but also (as a novelty) for social or other characteristics; (b) labels can be used in technical specifications, but also for award criteria and contract performance conditions and (c) labels may now be used in all types of public procurement, included public work contracts ― which were excluded before. References to

Article 56 on the choice of participants and the award of contracts (in particular paragraph 1, last subparagraph)[1190], Article 57 on the exclusion grounds (notably Article 57(2) and (4) letter a)[1191], Article 67 on contract award criteria[1192], Article 69 on abnormally low tenders (in

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labels requirements cannot have the effect of excluding a contract from the scope of the Directive (Art. 18) or narrowing down competition. Nor may it restrict innovation (Recital 75).

[1189] This provision encourages (or even obliges) contracting authorities to award contracts, where feasible, in the form of separate lots, in order to facilitate the participation in public procurement of civil society organisations (CSOs), social economy enterprises (SCEs) and small and medium sized enterprises (SMEs). If authorities decide not to organise the contracts into lots, they must provide the reasons for its decision (Art. 46(1)). In this context, a good instrument is offered by the European code of best practices facilitating access by SMEs to public procurement contracts. For a very interesting take on the power of SMEs to maintain supply chain diversification and reduce dependency among public buyers (two aspects which proved crucial especially in the light of the recent COVID-19 crisis), see L Cernat and O Guinea, *'On ants, dinosaurs, and how to survive a trade apocalypse'*, European Centre for International Political Economy, July 2020, at https://ecipe.org/blog/how-survive-trade-apocalypse/. Some legal uncertainty is however generated by a cross-reading of Article 46 (3) and Recital 79, according to which Member States may derogate from the rule of dividing contracts into lots if it appears that an award, to the same tenderer, of the contracts for several lots would be preferable (apparently even if the contract only allows the award of less lots). It is not clear whether Article 46 allows a tenderer to make different bids for each lot separately, on the one hand, and a different (and eventually lower) one for the case where he or she is awarded all, or several lots, on the other hand. Finally, it is not very clear whether Member States may allow contracting authorities not to publicise, under certain conditions, lots the value of which is below European thresholds, although the value of the whole contract goes over it.

[1190] The compatibility of the wording of Articles 56 and 57 with Article 18(2) has been questioned as the first two imply that contracting authorities may decide not to award a procurement contract to a tenderer which has submitted the best tender because the bid is not conform to Article 18(2), although Article 18(2) provides that Member States shall take appropriate measures to ensure that *in the performance* of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law.

[1191] Child labour and other forms of trafficking in human beings are defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council as "the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". In this context a special role is assumed by the EU's Charter of Fundamental Rights, in particular Art 24 (the rights of the child) and Art 32 (prohibition of child labour). As for the notion of "grave misconduct", this is not very clear. According to Recital 101, "It should be clarified that grave professional misconduct can render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract." Moreover, the CJEU specified, in connection with this concept, that " the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of res judicata", but also that "the failure of an economic operator to abide by its contractual obligations can, in principle, be considered as professional misconduct. Nevertheless, the concept of 'grave misconduct' must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct" (C-465/11, *Forposta SA* ECLI:EU:C:2012:801).

[1192] This Article provides for three evaluation factors (and not award criteria *per se* as, according to the new provision of Directive 24, contracting authorities have just one award criterion to rely on, namely the MEAT): price or cost, cost-effectiveness approach and the Best Price-Quality Ratio - BPQR. With the latter, a certain "weighting" is given to the different combinations of criteria chosen. If the "Best Price-Quality Ratio - BPQR" is used, social considerations can be included among the different award criteria to be weighed, together with the price or cost and other factors such as social, quality and environmental considerations. All these factors must be linked to the subject matter of the public contract in question. Contracting authorities are free to define

particular paragraphs 2 and 3)[1193], Article 70 setting the conditions for performance of contracts[1194], Article 71 on subcontracting (paragraph 1 referring to Article 18(2) in particular)[1195], or Articles 74 to 77 reserving a special regime for social services[1196].

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the subject of the contract in any way that meets their needs, as long as they do not distort the level playing field for enterprises throughout the EU. The fact that contracting authorities may now take into consideration the production process in the context of the award criteria allows them to integrate more flexibly, and on a wider scale, various social elements in the procurement process. These social considerations can include factors such as job creation, decent work, social and professional inclusion, integration of disadvantaged groups, or service accessibility (particularly for those living in remote areas) *etc*. With specific regard to the linkage to the subject matter of the contract, it appears that Article 67(3) requires a looser connection ('relates to') between the award criteria and the subject matter of the contract to be awarded than that had in mind by the CJEU (see C-448/01 *Wienstrom;* C-234/03, *Contse v Insalud* [2005] ECR I-9315; or C-368/10, *Max Havelaar* and so on).

[1193] This provision can be used as a tool to ensure compliance with labour and social laws, and standards, in the procurement process. It confirms that the control of the observance of the social and labour law provisions should be performed at all the relevant stages of the procurement procedure, including at the assessment of tenders (see Recital 40 from Directive 2014/24). An abnormally low tender may imply that binding social and labour law are not correctly applied. Where tenders appear to be abnormally low, contracting authorities shall require economic operators to give explanations. These explanations may notably refer to compliance with obligations referred to in Article 18(2), which imply ensuring compliance with social and labour law provisions. However, it seems very difficult, not to say impossible, for the contracting authority to concretely verify such compliance at the earliest stages of the procedure. It may at most verify compliance with the minimum wage rules, which is already as such a very difficult task. On the other hand, the contracting authority cannot shun such verifications, as the law obliges it to ask for further clarifications. Where these clarifications turn out to be unsatisfactory, it follows from the wording of Article 69(3) that the contracting authority is also obliged to reject the tender under scrutiny.

[1194] This article allows contracting authorities to set additional conditions for performance of contracts, if linked to their subject matter. Contract performance clauses can contribute to the achievement of social policy objectives, as they allow contracting authorities to go beyond the standards set by binding legislation. As a particularity, compliance with these conditions is verified at the *execution* stage. Pursuant to Recital 98 of Directive 2014,/ contract performance conditions concerning social aspects should be applied in accordance with Directive 96/71 (concerning the posting of workers in the framework of the provision of services) as interpreted by the CJEU. However, it remains unclear to what extent a contract performance clause may be considered as connected to the subject matter of the contract.

[1195] Article 71 imposes on competent national authorities the obligation to ensure that subcontractors comply with the obligations referred to in Article 18(2). The possibility to subcontract is seen as a great opportunity for the inclusion of SMEs, including social economy enterprises, into the public procurement market. The practice of subcontracting may however lead to abuses, particularly since it could result in using subcontractors which do not comply with social and labour legislations. In order to ensure some transparency in the subcontracting chain (see Recital 105), Article 71 provides that contracting authorities may ask or may be required by a Member State to ask the tendered to deliver additional relevant information. Article 71(3) allows Member States to provide mechanisms for direct payments to subcontractors. Compliance with the protection of workers' rights under Directive 96/71 should be ensured in supply chains too. Unfortunately, the concept of «subcontractor» is not legally defined: it seems that any convention through which the main contractor entrusts to a third operator the execution of part of its own contract, should be considered as a subcontract within the meaning of Directive 2014/24. As for the "competent national authorities acting within the scope of their responsibility and remit", it seems that not only contracting authorities, but any competent national authority, acting or not within the framework of a public procurement contract, have the obligation to ensure compliance. Moreover, according to the CJEU case law, contracting authorities are not allowed to require that a certain portion of the contract be executed by the main contractor itself – see for ex. *Wroclaw* (C-406/14, ECLI:EU:C:2016:562) where the Court ruled that such a clause is incompatible with the terms of Article 71, which does not provide for limitations in the use of subcontracting.

[1196] These provisions regulate the so-called 'light touch regime' for the award of contracts for social and/or other specific services. It appears that Articles 74 to 76 are the result of the negotiations carried out between the three EU institutions before the adoption of the Directive, where one of the main issues on the agenda was positive discrimination in favour of social services or special categories of people (unemployed, disadvantaged people, *etc*) which certain Member States and political groups (*eg*, EPP, ALDE or ECR) considered to be infringing the internal market and competition rules and therefore recommended cautiousness. As a result, the EU Parliament

So, in direct response to the Union's prime objective to promote a 'social market economy' as postulated by Article 3(3) TEU, the new package of Directives dedicated to public procurement are by far more socially oriented than the previous one. The link between the 'social market economy' (cause) and the requirements included in the text of the 2014 Directives (effect) is direct.[1197]

The 2014 Directives has, in general, transposed most of the CJEU jurisprudence and has gone a little bit (and quite riskily) beyond it. The new Directives also preserve the specific obligations for contracting authorities regarding "what" to procure as introduced by the previous set of Directives,[1198] by making direct reference to the concrete norms of the Energy Star Regulation[1199], the Clean Vehicles Directive[1200] and the Energy Performance of Buildings Directive[1201] and so on.

According to these provisions, considerations of a different nature than economic can be included in a public contract at *four* different stages of the procedure: during the definition of the subject-matter of the contract (via technical specifications); during the qualitative selection of tenderers (as exclusion/selection criteria applied in the exclusion/selection stage); during the selection of the most advantageous tender (as award criteria); or during the performance of the contract (as performance conditions but also in

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and the Council proposed three safeguards aimed at ensuring the continuity of social services across the EU (for details, see E Van den Abeele, '*Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?*', ETUI Printshop, Brussels 2014): (i) Member States remain free to provide social services themselves or to organise them in a way that does not entail the conclusion of public contracts. Recital 114 hence stresses, in its last paragraph, that this particular procurement regime does not prevent Member States or public authorities to provide or to organize such services without referring to public procurements. In this case, Recital 114 gives examples of those possibilities, such as the mere financing of services or the unlimited granting of licenses and authorisations to all economic operators. This latter case must however ensure sufficient advertising and compliance with the principles of transparency and non-discrimination. In a nutshell, '*light touch regime means flexibility but still adherence to competitive tendering and best practice*'(emphasis added) – see J Coperland, '*Report on 'application of social clauses' in Irish public procurement*' at: https://www.dublincity.ie/councilmeetings/documents/s13773/Report%2031-2017%20-%20Social%20Inclusion%20Clause%20in%20Public%20Procurement.pdf; (ii) according to the same Recital 114, when determining the procedures to be used for the award of contracts for services to the person, Member States are not allowed not to take into account Art. 14 TFEU, Protocol no 26 and rules related to administrative simplification when determining specific awarding rules; and (iii) Member States may decide that the choice of health or social service-provider is made on the basis of BPQR, taking into account quality and sustainability criteria.

[1197] C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 201.

[1198] A Semple, '*Reform of the EU procurement Directives and WTO GPA: Forward steps for sustainability?*', 2019, at https://www.academia.edu/6659397/FORWARD_STEPS_FOR_SUSTAINABILITY_REFORM_OF_THE_EU_PROCUREMENT_DIRECTIVES_AND_WTO_GPA

[1199] Regulation (EC) No. 106/2008 on a Community energy-efficiency labelling programme for office equipment (recast version) OJ L 39, 13.2.2008, pp. 1-7.

[1200] Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles OJ L 120, 15.5.2009, pp. 5 – 12.

[1201] Directive 2010/31/EU on the energy performance of buildings, OJ L 153, 18.6.2010, pp. 13 – 35.

connection with subcontractors). Allegedly, they might as well be used in the market consultation stage, but not as a procedural measure as such, but mostly as an instrument of advertising through which public buyers to tout their priorities in the social area in order to make them known to the market.

Unfortunately, next to these advantages lay several downshifters. First, the 2014 Directives remain silent with regard to the preparatory phases of procurement where the impact (in the market) is very high (*eg*, the potential of market consultations remains unexploited). The link to the subject matter of the contract is allegedly seen as another factor of constriction (as it curtails the possibility to impose general CSR obligations and involve in the general corporate behaviour of suppliers, thus generating an unequal development of public and private social policies).[1202] Also, many deplore the fact that Article 57(1)(f) from Directive 24 refers exclusively to child labour and human trafficking while ignoring other serious violations of fundamental human rights, but also that formal conviction (which the practice proves to be too rare) is a prerequisite to exclusion based on such violations. The too few *mandatory* clauses (which to impose the use of social requirements on a generalised basis and under a uniform legislative umbrella), the bad wording of many key provisions (such as Article 18(2), the application of which might be problematic, especially if read in connection with other clauses linked to it, or Article 67(1)[1203]) or the 'softness' of many obligatory rules (as, for example, that compelling public buyers to reject abnormally low tenders), together with the limitations imposed by Annex X to Directive 24 (which practically eliminates any possibility to use, in a public procurement context, other powerful tools consecrated in other international conventions such as the ILO Convention No.94 *etc*) are, too, a source of concern for many stakeholders. With particular regard to labour, the explicit reference to the Posted Workers Directive is seen as narrowing very much the possibility to use social considerations which come from other employment or human rights instruments than those

[1202] This particular condition is thought to undermine 'the procurer's intended objectives of seeking to work with responsible bidders, as well as [to] force inefficiencies in focusing bidders' time and resources to lower risk issues that are "linked", rather than higher risk issues that may not be "linked" but are nonetheless reflective of the bidders' most severe human rights risks.' - Institute for Human Rights and Business (IHRB), '*Protecting rights by purchasing right. The human rights provisions, opportunities and limitations under the 2014 EU Public Procurement Directives*', Nov 2015, 38. The cited study retains that 'company policies and systematic and ongoing processes of human rights due diligence' are 'the primary means through which companies can effectively seek to prevent, mitigate and remediate human rights impacts'.

[1203] Which allows of various interpretations, not being very certain where (or how sure) is the place of quality in the provided equation. For example, the Romanian legislature ignored the fact that Article 67 speaks of *one* single award criterion, which is the MEAT, and instead transposed it fractionally, setting four distinct criteria: the lowest price, the lowest cost, the best price-quality ratio and the best cost-quality ratio (see article 187 from Law 98/2016). It is true that the cited national law eliminated the lowest price criterion from the award of all contracts above the EU thresholds, but the fact that, at least in Romania, over 90 per cent of the contracts awarded during one year have a lower value makes the use of quality-related criteria quite negligible.

indicated in that Directive. This is doubled by the really deficient interpretation of these rules by the CJEU itself.

In addition to the *legal* drawbacks already cited, the relevant practice shows that although there is political and legislative will, the measurable *effects* of the application of these rules are still frail. Thus, '[d]espite the increasing prevalence of [horizontal] policies in public procurement, evidence of its *efficacy* and *efficiency* in achieving them remains limited. While many case studies of strategic procurement exist, there is a lack of quantitative research demonstrating its overall impact. *In areas such as social value procurement, the difficulty in measuring outcomes has been acknowledged and various approaches proposed and implemented to address this*.'[1204] Amongst the most important *practical* challenges faced by public authorities in the pursue of social goals through public procurement, the literature cites the difficulties associated with the securing of a necessary consensus on the objectives to be addressed, especially where the proposed strategic objectives are in conflict with each other; uncertainty with regard to the legality of this approach and its impact on overall costs (especially where internal controls verify with priority the efficiency of public spending, not always in the larger context imposed by the use of such external criteria)[1205]; lack of market capacity to deliver alternative goods or services; lack of know-how or instruments to verify the supply chain compliance, concerns about impacts on the time and complexity of procedures (which forced some Member States[1206] to go for excessive centralization) *etc.*[1207] These are doubled by a highly inefficient bureaucratic system — which is a reality in many

[1204] A Semple, '*Citizen contracting – does radical decentralisation improve procurement outcomes?*', draft paper prepared for the 4th IPPA Conference, 28 June 2019, Montreal, available at https://www.procurementanalysis.eu/, 2 (emphasis added).

[1205] At a rather theoretical level, see C Bovis, '*Social policy considerations and the European public procurement regime'*, (1998) 3 International Journal of Comparative Labour Law and Industrial Relations (where the author sets forth its concerns with regard to the risks associated with the adherence to social policy values in public procurement which, due to the inherent additional and/or hidden costs, would have an important potential to undermine the fundamental economic and competition-related dimensions of public markets). In the meantime, Professor Bovis changed his stance towards the potential of social public procurement, considering that such additional costs may be accepted, as they may be outweighed by important community benefits, especially where the inclusion of such considerations (which generate *immediate* costs) contribute to the social purpose and the pursuit of the objectives of the good of the community and has farther implications of the overall budgetary efficiency via *further* budget savings – see for ex. C Bovis, 'The social dimension of EU public procurement and the 'social market economy'', in D Ferri and F Cortese (eds), '*The EU social market economy and the law. Theoretical perspectives and practical challenges for the E*U', Routledge, 2018.

[1206] Like Italy or Ireland *etc*. Other Member States, such as Romania, started too a determined centralization process, in particular under a strong pressure from the European Commission, who started to exercise a close monitoring over their procurement process, not necessarily for sustainability purposes but mainly for reasons to do with the fight against corruption.

[1207] C Bovis, 'The social dimension of EU public procurement and the 'social market economy'', in D Ferri and F Cortese (eds), '*The EU social market economy and the law. Theoretical perspectives and practical challenges for the E*U', Routledge, 2018.

Member States, concrete (and in the latest years quite rife) budgetary constraints and a too low degree of professionalization.

Otherwise, given that practically all services and works agreements involve labour law issues, the new Directives on public procurement contain, unlike the previous set of Directives, an overwhelming number of explicit references to labour law (see for example the general 'mandatory social clause'[1208] contained in Article 18 of Directive 2014/24 and the other provisions which are particular applications thereof). So, although labour law and labour standards have traditionally been seen as a brake on economic efficiency and an exception to the customary economic efficiency rules[1209], at the EU level and, especially in the new context opened by Article 3 TEU, many have started to stress their positive influence on solidarity and, in particular, on citizenship, insisting on the idea that social inclusion leads to increased living standards and a stronger involvement in the community's wealth.[1210] The 'boosting of social inclusion' in the 2014 Directives on public procurement is thus explained in *this* particular context[1211] and the Commission confirmed this new approach (and its expected benefits) in explicit terms.[1212]

Apart from these aspects, Directive 24 refers specifically to the Posted Workers Directive[1213] similarly to Directive 2004/18 although, as discussed in the literature,

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[1208] A Semple, 'Living wages in public contracts: impact of the RegioPost judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 82. The author emphasises that almost all the other provisions which contain references to social aspects are optional, and sees this discretion as a deficiency and a drawback rather than as an advantage.

[1209] L Rodgers, 'The operation of labour law as the exception: the case of public procurement', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost', Hart Publishing*, 2018, 141, 143. In this context, more and more authors insist on the perils associated with the spread of 'exceptionalism' – see for ex. S Agamben, '*State of exception*', Chicago University Press, 2015.

[1210] See for ex. J Gordon and R A Lenhardt, '*Rethinking work and citizenship*' (2008) 55 UCLA Law Review, 1161.

[1211] L Rodgers, 'The operation of labour law as the exception: the case of public procurement', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost', Hart Publishing*, 2018, 142.

[1212] See the Commission's explanations in the material '*Supporting social responsibility in the economy through public procurement*' (09/02/2016), available at https://ec.europa.eu/growth/content/supporting-social-responsibility-economy-through-public-procurement-0_en.

[1213] The two Recitals, namely 37 and 98, which refer specifically to the Posted Workers Directive, are especially nonplussing the experts. Some see them in contradiction to each other and deplore the too vague wording thereof – see for ex. A Semple, 'Living wages in public contracts: impact of the RegioPost judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 86. In our opinion, there is no contradiction between the two texts, each of them touching on a specific aspect of the same problem. At least with regard to Recital 37, it appears to be citing the Posted Workers Directive in an attempt to clarify it through the prism of the previous decisions of the Court — which, in *Rüffert* and *RegioPost*, admitted that although the minimum standards set by law, regulation or collective agreements of universal application in the host state are mandatory in the case of posting, a *voluntary* provision of more favourable terms and conditions of employment may be accepted on the part of private employers (who could, for various reasons, accept to pay their staff

only a very few number of public contracts involve posting of workers while an important number of other Directives with a greater impact on public procurement, in particular those on acquired rights[1214] and on fixed pay[1215] respectively (which contain provisions overlapping with, or even contrary to, those contained in the Posted Workers Directive) have been ignored.[1216] Anyway, we consider that the concrete references to the Posted Workers Directive must be seen in the light of the free movement of workers and the freedom to provide services, which is one of the most important 'internal-market' aspects in the EU's public procurement context. The terms used in the two cited Recitals, as well as in Article 18 of the Directive 2014/24 are supposedly meant to guarantee that that Directive is *not* taking precedence over the Posted Workers Directive, although the language is somehow equivocal and fails to shed the much needed light on the line that demarcates the principles of equal treatment (v. differentiation) – inasmuch as workers are interested from that defining the home-state-control applicable to service providers.[1217]

Surprisingly (or not), all these provisions copy not only the solutions, but also the wording used by the Court in its case law. However, the Court failed to clarify the precise instruments through which derogatory measures defining the terms and conditions of employment applicable in the host state may be validly taken. According to Article 3 from Directive 96/71, posted workers shall enjoy only those terms and conditions adopted 'by *law, regulation* or *administrative provision*, and/or by *collective agreements or arbitration awards which have been declared universally applicable* within the meaning of paragraph 8' (emphasis added). However, neither the two Directives, nor the CJEU case law, define 'regulation' or 'administrative provisions'.[1218] They also fail to clarify whether the condition

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higher wages for example – see for a discussion on this C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018). Alternatively, Recital 37 may also be construed to mean that, where the terms and conditions of employment are more favourable in the state of origin, the posted workers cannot be deprived of the right to remain to benefit from those more favourable conditions, even if Article 3(1) of the Posted Workers Directive made the terms and conditions of the host state mandatory.

[1214] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20

[1215] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP OJ L 175, 10.7.1999, p. 43–48.

[1216] A Semple, 'Living wages in public contracts: impact of the RegioPost judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 73.

[1218] C Barnard, 'Fair's fair: public procurement, posting and pay', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 203.

[1218] As some authors opine, 'administrative provisions' cannot include mere procurement documents (*eg*, tender book or other documents included in the tender file), but only documents with a minimum regulatory contents adopted in a specific administrative context and under specific regulatory competences – see in this regard A

of being universally applicable applies only to collective agreements and arbitration awards or, in general, to any of the enumerated instruments. Clarifying these issues is highly important, especially for public procurement, as on the application or non-application of these instruments — to posted workers — depends the validity of the derogatory measures which they convey. Anyway, although in important cases like *Laval*, or *Rüffert*[1219], or even *Luxembourg*[1220], the Court appears to having ignored the 'social' pith of Article 3(7) of Directive 96/71, giving priority to the economic dimensions of the text by annihilating the ability of the host country to apply for posted workers a higher level of protection, it adopted a more cautious approach in *RegioPost*, where it admitted that for a measure to be applicable, it is not necessary that the law by which it has been adopted to be universally applicable[1221], being sufficient, at least in a public procurement context, to refer only to public contracts. In practice, this may lead to blockages as some governments may force an extensive interpretation of these terms while others may shun any concrete measures on fear of judicial censure. One thing remains sure: if adopted, such instruments *may* concern only public contracts.

The clear advantages of the inclusion of labour and, at a more general level, of social aspects into public procurement are heavily evidenced in literature[1222] and we will not insist on them as the main concern of this paper is not whether this is *good* (or bad) for the internal market, but whether this is truly *possible* (or, rather, to what concrete extent) in the

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Semple, 'Living wages in public contracts: impact of the RegioPost judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 76 or A Sanchez-Graells, '*Regulatory substitution between labour and public procurement law: the EU's shifting approach to enforcing labour standards in public contracts*', (2018) 24 European Public Law 2, 233. Anyway, according to the European Commission Guidance on the 'Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment' (2003), 'Administrative provisions are formal requirements for ensuring that action is taken which are not normally made using the same procedures as would be needed for new laws and which do not necessarily have the full force of law. Some provisions of 'soft law' might count under this heading. Extent of formalities in its preparation and capacity to be enforced may be used as indications to determine whether a particular provision is an 'administrative provision' in the sense of the Directive. Administrative provisions are by definition not necessarily binding, but for the Directive to apply, plans and programmes prepared or adopted under them must be required by them, as is the case with legislative or regulatory provisions.' (p 9).

[1219] See for ex *Rüffert*, para 33.

[1220] *Luxembourg*, para 24.

[1221] *RegioPost*, para 63.

[1222] See for ex. P Trepte, '*Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*' Oxford University Press 2005, C McCrudden, '*Buying social justice: equality, government procurement and legal change*' (Oxford University Press 2007, S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: new Directives and new directions'*, Cambridge University Press, 2009, M Cook and A Semple (eds), '*A practical guide to public procurement'*, Oxford University Press, 2015, L Rodgers, 'The operation of labour law as the exception: the case of public procurement', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, *etc*.

actual EU legal framework. Apart from this, there are some voices who insist on the fact that labour-law aspects are included in the new package of Directives on public procurement as an *exception* to economic rules (rather than to complete them), pointing to the fact that the improvement of employment labour conditions is a direct consequence of an increased efficiency in the spending of public funds but has no economic advantage of its own.[1223] This conjecture holds water if we ignore the social dimension of the integration process (which, after the adoption of the Lisbon treaty, got a new constitutional weight) and consider only the *economic* context in which European secondary norms on public procurement may be adopted (since public procurement is, first of all, an intrinsic part of the internal market and of the economic integration process), overstating the reduced leeway for action (in the social field) reserved for the EU institutions in the actual structure of competences available under the Treaties and under the constant political pressure coming from Member States.

Anyway, in spite of the overwhelming number of provisions that refer to this aspect, social objectives in public procurement are *not* limited to employment.[1224] Depending on the concrete political/policy context, they may as well target the protection of children, women, single-parent workers, victims of domestic violence, gay people, or of other minorities, or the integration of the disadvantaged, the efficient delivery of social services, the use of social labels as a means of proof of the social engagement for the benefit of the community *etc*.

Additionally, a number of social considerations are seen in close connection with the need to strengthen, and a *sine-qua-non* element for, market competitiveness: for instance, the fight against corruption – which is undoubtedly a social objective pursued through public contracts (legality protocols) – but which the Commission and the CJEU consider important also in relation to the transparency and equal treatment of economic operators.[1225]

Although much more as compared to the previous laws, the possible ways to use public procurement for the attainment of some broader social policy goals are however still not unlimited. Thus, beside a small number of dedicated instruments (such as reserved

[1223] See A Sanches Graells, '*Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies?*', presented at UACES 45th Annual Conference, Bilbao, Spain, September 2015 and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638466. or L Rodgers, 'The operation of labour law as the exception: the case of public procurement', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018, 153.

[1224] B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', in (2017) Rivista Trimestrale di Diritto Pubblico (4), 1129-1154.

[1225] Ibidem. See also C-425/15 *Impresa Edilux Srl*, ECLI:EU:C:2015:741, para 28.

contracts or the procurement of social services, but also the rules contained in special laws regulating the organization and provision of certain specific services – such as those concerning public-service obligations and the award of contracts laid down in the laws on energy, oil, gas, postal services *etc*) the new public procurement rules contained in the current EU legal framework have replaced the lowest price criterion with a more complex equation where the qualitative considerations (occasionally involving local values) occupy a determinant place. In addition, the new rules on exclusion criteria, selection criteria, technical specifications, award criteria and performance conditions are now mirroring the conclusions contained in the relevant CJEU's case-law. But, apart from that, the new Directives are still reluctant in offering enough clarity on how far contracting authorities may follow a derogatory path.

We on the other hand find the concerns with regard to the soft approach of the EU legislature and the fact that too many provisions to do with the integration of social aspects into public procurement are optional (while those which are mandatory have a too narrow scope)[1226] not to be entirely justified, since it is indisputable that the new Directives open now a large the door to social and labour values and policy standards while leaving Member States an (adequate?) amount of liberty to act on them. We however concede that, in spite of the frothy messages that usually accompany the new provisions, the European legislature appears to have chosen the easy path and took refuge in the safe harbours endorsed by the Court of Justice of the Union, innovating in far too few other directions (and mainly based on certain stable provisions of secondary laws adopted, at the EU level, under the European social model).[1227]

[1226] See many opinions in this sense in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law*', Cambridge University Press, 2016, or in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018 *etc*.

[1227] It may be for this reason that the EP Rapporteur warned, in its response to the Commission's proposal of 2011 for a new Directive on public procurement - COM(2011) 0896 - C7-006/2012 – 2011/0438 (COD), that the Commission failed to '*go far enough, particularly on social aspects*' and that it is essentially important 'to ensure compliance with social standards *at all stages of the public procurement procedure*' (p 150, emphasis added), and insisted on the need to make it clear at the outset that one of the central goals of this reform is the development of social sustainability. Mr. Tarabella although underscored that '*the notion of the 'lowest price' should finally be scrapped in favour of that of the 'most economically advantageous tender*' (MEAT). Given that price is also taken into account in the MEAT, *this would allow contracting authorities to make the most appropriate choices in relation to their specific needs, including the consideration of strategic societal aspects, social criteria and environmental criteria and, in particular, fair trade*.' (p 151, emphasis added). His proposals actually led to the inclusion of new paragraphs — such as Article 2(22) — and the revision of several initial ones. Unfortunately, many other key proposals (made in the context of the promoted development of social sustainability in and through public procurement) were brushed aside in the final version of the Directive. It is for example the case of the changes proposed for Recital 27 (now, 74), Article 40(3) (now, Article 42(3)(a)) Article 54(2) (now, Article 57(2)) or, finally, Article 66 (now, Article 67) *etc*. For the sake of discussion, it would be interesting to note that Mr. Tarabella proposed amending Article 66 (now Article 67) on award criteria

In this rather frail framework, where contracting authorities appear to be offered a significant leeway for discretionary actions but where the CJEU case law had already inflicted several deterrents and cautions, it is hence up to national governments to speculate, innovate and force closed doors, taking full advantage on the opportunities offered by the 2014 Directives.

2. Nothing but a reflection of the general CJEU paradigm

Public procurement is an impressively complex instrument in the hands of public buyers. It lays at the interface of several legal areas, such as the free movement of people, services and capitals, competition, public budgets, public administration, but also social, environmental and other 'strategic', 'sustainable' policies *etc*. On the other hand, it develops around a huge number of "regulatory objectives"[1228] implemented by the regulatory institutions either internationally or at a national level. A wealthy literature has identified around nine such objectives: best value for money, integrity and fighting corruption, transparency, efficiency, fairness and equal opportunity, accountability, sustainability, non-discrimination and competition.[1229] However, as a matter of principle, it is evident that not *all* of them can or may be pursued at the same time, but that their final structure depends on the

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to make it clear that: '2a. The criteria referred to in paragraph 2 may include: (a) quality, including technical merit, *aesthetic and functional characteristics, accessibility, design for all users*; (b) innovative characteristics including best available techniques; (c) environmental and sustainability criteria including life-cycle costing as defined in Article 67 and Green Public Procurement criteria; (d) *socially sustainable production process criteria, which may also involve the employment of disadvantaged individuals or members of vulnerable groups*; (…)'. Additionally, with particular regard to the calculation of the life-cycle costing, which — according to the current Article 67 — may include only considerations referring to specific *environmental* externalities but not also to *social and/or labour law costs*, it is worth mentioning that, at least in informal talks, EC's representatives admit that their intention was not to leave such costs on the outside as a rule, but this was due to the fact that, at least at the moment when the draft was made up and, further, when it was pushed through into law, there were no concrete methodologies which to allow such calculation so that they saw a reference thereto as irrelevant and useless. Nonetheless, inasmuch as such methodologies would be proposed in the future, social and labour costs may, according to the same representatives, validly be included in any life-cycle costing. For now, at least, such a possibility is reduced, to the prejudice of sustainability in general.

[1228] M A Corvaglia, „*Public procurement and labour rights towards coherence in international instruments of procurement regulation",* Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 662.

[1229] See for ex. J W Whelan and E C Pearson, '*Underlying values in government contracts*' 1961 10 Journal of Public Law 298, P Trepte, „*regulating procurement: understanding the ends and means of public procurement regulation*', Oxford University Press, 2005, 63, S Arrowsmith, J Linarelli and D Wallace, "*Regulating public procurement: national and international perspective*", Kluwer Law International, 2000, 70, S Arrowsmith, '*Public procurement. Basic concepts and the coverage of procurement rules*' (2011) Public Procurement Regulation: an Introduction, 1, M A Corvaglia, „*Public procurement and labour rights towards coherence in international instruments of procurement regulation",* Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, *etc*.

concrete contexts. And, since many of these objectives are antagonistic to each other, a trade-off is always necessary.[1230] Finally, in order to become functional, a procurement regulatory model must include objectives that are linked by certain 'instrumental principles'.[1231] These objectives may either be 'internal' or 'external', depending on the concerned aspects and the specific nature of the values they pursue. For example, those to do with the procurement process as such (*eg*, value for money, accountability, efficiency, transparency *etc*) usually fall within the first category, whereas those occasioned by the larger political context, defining the priorities set at the level of other, external policies, (such as the preservation of a fairly competitive environment or the achievement of concrete green or social outcomes), within the second.[1232] These 'external' objectives are rather oriented towards the general welfare and the attainment of larger community benefits, and not directly linked to, or characterizing, the procurement act in itself.

The trade-off between the various objectives of procurement is, basically, necessitated by the inherent conflict between economic and non-economic values and goals. To this extent, and since public procurement is intricately yet inexorably linked to the *economic* facet of the internal market, being crafted as a necessary measure aimed at the removing of some important barriers to the full functioning thereof and the securing of the fundamental freedoms on which the internal market is founded[1233], this trade-off customarily takes the shape of an *exemption* to the internal market rules postulated by the Treaties justified, upon the case, by the social nature of an otherwise equally fundamental value, or by a concrete public policy or, failing that, by a 'mandatory requirement' ─ the latter two cases necessarily involving, in the lack of sufficient harmonization[1234], a proportionality assessment.[1235] However, although the CJEU has the (exclusive!) competence to decide on

[1230] S L Schooner, D I Gordon and J L Clark, '*Public procurement systems: unpacking stakeholder aspirations and expectations*' (2008) No 1133234 GWU Law School Public Law Research Paper.
[1231] M A Corvaglia, „*Public procurement and labour rights towards coherence in international instruments of procurement regulation",* Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 662.
[1232] Ibidem, 691.
[1233] According to Recital (1) of Directive 2014/24. Recital (1) of Directive 2014/23 reiterates the same idea.
[1234] See N Boeger, 'Minimum harmonization, free movement and proportionality', in P Syrpis (ed), '*The judiciary, the legislature and the EU internal market'*, Cambridge University Press, 2012, 70 *et seq*.
[1235] For an in-depth discussion on the importance and role of proportionality, seen as 'the mainstay of the protection of human rights' and 'the dominant doctrine for judicial review in matters pertaining to human rights, among others, in the European Court of Human Rights and the European Court of Justice', see A Barak, '*How proportional is proportionality?*', Cambridge University Press, 2. See also T-I Harbo, '*The Function of the Proportionality principle in EU Law*', (2010) 16 European Law Journal 158; A Stone Sweet and J Mathews, '*Proportionality balancing and global constitutionalism*', in G Bongiovanni, G Sartor and C Valentini (eds) Reasonableness and Law, 2009, or S Ranchordás and B de Waard (eds) '*The Judge and the proportionate use of*

the conformity of a national public policy with the EU law or which national concerns qualify as mandatory requirements and which do not[1236], it clarified, throughout its case law to do with the free movement rules that, in principle, the proportionality assessment is rather a task for national courts[1237].

The combination of these objectives and the associated trade-offs depend very much on the procurement regulatory system that promotes them. In international contexts, such as that defined by the WTO, or the European Union *etc*, the focus appears to be set more on free competition (and the removal of trade barriers), non-discrimination and transparency.[1238] In domestic procurement systems on the other hand, the accent is usually placed differently, depending very much on the concrete political context in which each national government and legislature operates.

For example, competition doesn't have the same meaning and purport in international vs. national systems. Whereas at an international level, such as the EU, free competition primarily means the stifling of any forms of discrimination based on *nationality* (*ie*, ensuring that traders located in another state enjoy the same opportunities as the domestic ones), in a domestic context, free competition (that is, between the economic actors of the same state) rather means equal opportunities for all qualified operators (regardless of their nationality).[1239]

Likewise, each government is tempted to focus on those objectives that are necessary in the *domestic* political context, using public procurement as an instrument to attain them. Of course, owing to the particular political and economic arrangement that defines the European Union,[1240] and especially since the fundamental rules on which this arrangement is set allows the Commission to intervene by way of secondary legislation and

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discretion: A comparative administrative law study', Routledge research in EU law, Routledge, New York, 2015.

[1236] F W Scharpf, '*The asymmetry of European integration, or why the EU cannot be a 'social market economy*', in (2010) 8 Socio-Economic Review 2, Oxford University Press, 232.

[1237] To this end, see Joined Cases C-34/95, C-35/95 and C-36/95, *de Agostini*, para 45; Case C-438/05, *Viking*, para 80; Case C-142/05, *Mickelsson and Roos*, para 26; Joined Cases C-340/14 and C-341/14, *Trijber* EU:C:2015:641, para 75 *etc*. *Beentjes*, or *Nord Pas-de-Calais* or even *Wienstrom, etc*, are in the same vein.

[1238] S Arrowsmith, 'National and international perspectives on the regulation of public procurement: harmony or conflict?' in S Arrowsmith and A Davies (eds), '*Public procurement: Global revolution',* Kluwer Law International, 1998, 18-20.

[1239] R Caranta, 'Public Procurement and award criteria', in C Bovis (ed), '*Research handbook on EU public procurement law*', Edward Elgar, 2016.

[1240] Tones of literature has been written in an attempt to best describe and explain the nature and substance of the European Union. Most authors tried to find similarities with the federalism only to conclude that the EU is a *sui generis* structure.

other soft-law instruments with purpose to ensure a necessary degree of harmonization[1241], all Member States transposed the text of the Directives on public procurement without significant variations. However, each of them attached certain particular objectives to those already set at the EU level. A case in point is offered by the Romanian procurement system where, following the pressure put by the European Commission through the Cooperation and Verification Mechanism[1242], the emphasis is clearly on the fight against corruption rather than on other objectives. To the contrary, Nordic countries such as the Netherlands or Sweden *etc*, have decided to make plenty of room, in their domestic procurement systems, to sustainability and the pursue of green and social considerations and values.

The Court of Justice of the European Union upheld, too, the possibility that contracting authorities include, as a general principle, social and environmental considerations in procurement procedures. The most illustrative cases on this aspect are *Beentjes*[1243], *Nord Pas de Calais*[1244], *Concordia Bus*[1245], *EVN Wienstrom*[1246], *Max Havelaar*[1247], *Rüffert*[1248] and *Regio Post*[1249]. All these cases have been discussed, at large, in Chapter III above.

According to these judgements, contracting authorities *may* in fact go beyond the limits entailed by the primary objectives of public procurement and resort to the instrumental nature thereof by pursuing additional objectives (in particular social ones), provided however that they manage to justify their decision by resorting to one or more formally permitted derogations from the internal market and competition rules and principles (which have instead been constantly assumed by the same Courts as the cornerstone of the entire EU edifice). Once such a justification is found, the concrete use of social criteria in a public procurement equation is, in the light of the cited case law, possible inasmuch as they 'are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the relevant tender documents and

[1241] It is worth observing that the EU Treaties (starting with the Rome Treaty of '56 and all the ensuing ones) contain no public procurement provisions, but only the secondary EU legislation – see Christopher Bovis, EU Procurement Law (Edward Elgar 2012) 11.
[1242] Commission Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354/56).
[1243] Case 31/87 *Beentjes* [1988] ECR I- 04635.
[1244] Case C-225/98 *Commission v France* [2000] ECR I-07445.
[1245] Case C-513/99 *Concordia Bus Finland* [2002] ECR I-07213.
[1246] Case C-448/01 *Wienstrom* [2003] ECR I-14527.
[1247] Case C-368/10 *European Commission v Kingdom of the Netherlands* ECLI:EU:C:2012:284.
[1248] Case C-346/06 [2008] *Rüffert*, ECR I-01989.
[1249] Case C-115/14, *RegioPost* ECLI:EU:C:2015:760.

comply with all the fundamental principles of Community law, in particular the principle of non-discrimination'.[1250]

Such derogations may either be founded on a provision contained directly in the *primary* law of the Union or, in the silence of the Treaties, on a provision contained in the EU *secondary* legislation aimed at interpreting, explaining and facilitating the application of the general rules postulated by the Treaties.[1251] Of course that, where a justification for derogation from the general internal market and/or competition rules stems from a *national* norm, the derogatory provision contained in that norm must inevitably be further permitted (directly or at least indirectly) by EU's primary or at least secondary law[1252] - see for ex Article 106(2) TFEU.

Where the EU law itself is silent, such exceptional considerations may be justified on other grounds (substantially developed by the CJEU's case law and generically captioned as 'rules of reason') which, measured against the proportionality standards set by the same Court, may allow Member States to innovate and go beyond the usual rigorous of the EU's internal market framework.[1253] Thus, used in the internal market context, proportionality aims at two targets: first, 'within the economic constitution conception of the internal market project it has a public law objective: individuals can invoke the free movement provisions against national measures that are unnecessarily restricting the exercise of the four freedoms. Its main rationale lies, however, in its second function, *ie*, to further market integration. In this latter case the principle of proportionality is essentially a means of negative integration as it '*requires the Court to balance the Community interest against a*

[1250] *Concordia Bus*, para 69.

[1251] For various facets of this idea see S Arrowsmith and P Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions*', Cambridge University Press, 2009, C McCrudden, 'EC public procurement law and equality linkages: foundations for interpretation' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions*', Cambridge University Press, 2009, C McCrudden, 'The Rüffert Case and public procurement' in M Cremona (ed.), '*Market integration and public services within the EU*', Oxford University Press, 2011, or C Barnard, '*To boldly go: social clauses in public procurement, 2017'*, 2017 46 Industrial Law Journal 2.

[1252] S Arrowsmith and P Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: new directives and new directions'*, Cambridge: Cambridge University Press, 2009, 38.

[1253] Apparently, the rule of reason in the public procurement context appeared in close relation to the application of the MEAT criterion, the flexibility of interpretation and application of which has constantly been affirmed and encouraged by the CJEU up to the point where, in the social market economy environment postulated by the Treaty of Lisbon, the rule of reason has become 'an essential tool to convey effectively rights and obligations of EU law' – C Bovis, 'The social dimension of EU public procurement and the 'social market economy'', in D Ferri and F Cortese (eds.), '*The EU social market economy and the law. Theoretical perspectives and practical challenges for the EU*', Routledge, 2018, 170. As such, '[u]nder an ordo-liberal approach, the rule of reason seems an essential tool to convey effectively rights and obligations of Community law.' (C Bovis, 'The principles of public procurement regulation*'*, in C Bovis (ed), '*Research Handbook on EU public procurement law'*, Edward Elgar, 2016, 57).

legitimate national interest.'[1254] But the literature cites other two important additional functions: '[in] the mainly decentralized system of EC law enforcement the principle of proportionality serves as a *guideline of interpretation* (…) in the application of Community law at the national level and it also ensures the "optimization of administrative action" so that this principle *provides an 'executive model'* (…) for the legislator and the executive defining a framework within which to apply Community law at the national level.[1255]

In any case, regardless of how a contracting authority choses to include social elements into its procurement, it must lay down, in the relevant tender documents, all the necessary details, including a 'high-level definition of its project requirements to ensure that there is a clear and agreed understanding of the business goals and of what is required of contractors to be able to meet those goals.' It must also make sure that all these social objectives can be quantified and are measurable.[1256] Last but not least, the contracting authority should ensure that any such horizontal consideration has a solid, lawful background. To this purpose, and in the lack of any additional indications in the case law to do, specifically, with the possibility to use social considerations *in public procurement*, it remains to apply the *general* principles and tests developed by the Court through the case law to do with the four fundamental freedoms (as discussed in Chapter III above). It must hence *first* clarify whether the subject matter of a contract falls (or not) into the scope of the internal market rules. If it does, a *second* assessment is needed: it must establish whether the concrete situation contemplated by that contract admits exceptions to those rules. If it does, a *third* assessment, which to clarify whether the exceptional measures taken under that contract are proportionate, needs to be done. Of these three tests, the second is the most complex, especially given a not-so-predictive case law coming from the Court of Justice of the Union (as opposed to that concerning the first and the third tests respectively). Evidently, such an assessment is necessary as contracting authorities must be able to justify *any* of their decisions (including before the national and the European courts).[1257]

All this effort must, inevitably, be understood in the context of the latest dramatic social changes that involve an ageing population combined with falling birth-rates

[1254] N Hös, '*The principle of proportionality in the Viking and Laval Cases: An appropriate standard of judicial review?*', EUI Working Paper, European University Institute, 2009, 3 (emphasis added).
[1255] Ibidem, 4 (emphasis added).
[1256] R Macfarlane and M Cook, *'Achieving community benefits through contracts law, policy and practice*', The Policy Press, 2002, 26.
[1257] The obligation of the administration to give reasons for its decisions is an intrinsic part of the *fundamental* right to a good administration (Article 41 CFREU).

across all Europe[1258], industrialisation at a fast pace and a rapid surge in the use of AI in all economic field [1259], mass unemployment, especially among the young and the elder, doubled by and a lack of viable reinsertion programmes, massive immigration *etc*. Starting with 2000, the European institutions, in particular the European Council[1260], have been firm in insisting on the importance of ensuring a mutually reinforcing interaction between the EU's economic and social policies as part of the Lisbon Strategy.[1261] This led to a determined implementation of various socially-responsible strategies at both the private sector[1262] and the public sector levels[1263], and to the emergence of an evident ordo-liberal approach to public procurement

[1258] Latest statistics show that no Member State manages to overpass the 2.1 replacement birth-rate per woman – see M Hird, '*A new European social contract: rethinking our welfare state*' (2019), at: https://euro-babble.eu/2019/03/19/ein-neuer-europaischer-gesellschaftsvertrag-unseren-wohlfahrtsstaat-neu-denken/ .

[1259] As the press brilliantly stressed: 'Since the start of the industrial revolution, social challenges and inequalities have been addressed by the ever more complex and comprehensive welfare state. In the face of an increasingly automated workplace, capable of producing 24/7, workers and their unions [remain to fight] for the 8-hour day' – see M Hird, '*A new European social contract: rethinking our welfare state*' (2019), at: https://euro-babble.eu/2019/03/19/ein-neuer-europaischer-gesellschaftsvertrag-unseren-wohlfahrtsstaat-neu-denken/.

[1260] See the European Council, 'Part I Employment, Economic Reform and Social Cohesion', in 'Lisbon European Council Presidency Conclusions', Lisbon European Council meeting of 23– 24 March 2000', at: www.europarl.europa.eu/ summits/ lis1_en.htm (accessed 17 February 2020); see also the 'Council conclusions on employment and social policies: a framework for investing in quality' - COM(2001)0313, Brussels, 20 June 2001. The latest 'Strategic Agenda – 2014-2020' coming from the European Council (at https://www.consilium.europa.eu/en/eu-strategic-agenda-2019-2024/) insists, once more, on the importance of 'connecting all relevant policies and dimensions', and on the need to 'renew the basis for long-term sustainable and inclusive growth and strengthen cohesion in the EU.'

[1261] Ibidem, 278.

[1262] Through a frantic support for corporate social responsibility – for an in-depth analysis of this phenomenon, see M Andrecka, '*Corporate social responsibility and sustainability in Danish public procurement*', in (2017) 12 European Procurement & Public Private Partnership Law Review 3, 333 *et seq*. See also the European Commission, '*A renewed EU strategy 2011-14 for corporate social responsibility'*, COM(2011) 681 final (25 October 2011) which has urged enterprises "To identify, prevent and mitigate their possible adverse impacts" on human rights but also on other environmental and social concerns, pointing out that "Large enterprises and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, including through their supply chains."(p 6). For an interesting discussion on the use of CSR in public procurement see also J Barraket, R Keast and C Furneaux, '*Social procurement and new public governance*', Routledge Critical Studies in Public Management, Routledge, 2016, 70 *et seq*.

[1263] In fact, underscoring the need for coherence between the relevant policy instruments crafted in connection with responsible business, on the one hand, and public procurement, on the other hand, important international organizations such as the OECD have recently started to create bridges between the two agendas – see OECD, 'Responsible business conduct in government procurement practices' (2017), available at: https://mneguidelines.oecd.org/Responsible-business-conduct-in-government-procurement-practices.pdf . Many other instruments that concern corporate social responsibility and its role in procurement practice have been elaborated at the UN level, the EU level (Commission, Parliament or the European Council) but also the national level (Member States). For a review thereof, see C Methven O'Brien, O Martin-Ortega and E Conlon, '*Guidance on socially responsible public procurement: Response to consultation of the European Commission by the International Learning Lab on Procurement and Human Rights*' (2018) BHRE Research Series, Policy Paper no.5, July 2018, at http://www.bhre.org/current-news/2018/7/20/guidance-on-socially-responsible-public-procurement-response-to-consultation-of-the-european-commission-by-the-international-learning-lab-on-procurement-and-human-rights.

[1263] https://ec.europa.eu/info/consultations/commission-guide-socially-responsible-public-procurement_en (p 6 *et seq*).

regulation[1264] (in line with the social market economy promoted at the very primary-law level[1265]). To this extent, what seemed impossible just a few years ago may be perfectly possible in the *current* socio-economic context. But, no matter how encouraging the general parameters, there is no straight answer (not even in the case of fundamental human rights the general prevalence of which is already enjoying an unanimous recognition), each case following to be solved on a case-by-case basis.

3. How to do it? There are no easy answers…

The latest debates around the contrast between the primary and the secondary consideration in public procurement underscore its artificiality, concluding that public procurement is indeed instrumental for the pursue of other, non-economic values, set via various policies[1266], but also that such non-economic values cannot be placed on a secondary place in the general context, since public buyers act inevitably also as promoters of various policy objectives which they cannot leave behind. The literature identifies three different approaches in the instrumental use of public procurement, *ie*, (a) a strategic one, aimed at achieving certain strategic objectives of industrial economy; (b) a protective one, aimed at defending domestic or local suppliers from foreign competition; and (c) a proactive one, aimed at the pursue of larger socio-environmental goals.[1267] It is beyond any doubt that the current EU framework is, for some time, reflecting a clear 'proactive' approach.

On the other hand, the power of public procurement to shape private markets and practice has been substantially verified, and an important number of contributions confirm this conclusion.[1268] Moreover, sustainability became, at least in the latest years, a matter of ethics rather than one of pure economics. In the context opened by the Lisbon Treaty, a holistic approach which to integrate all the three elements of sustainable

[1264] C Bovis, '*Editorial'*, in (2017) 12 European Procurement & Public Private Partnership Law Review 3, 214.
[1265] C Bovis, '*The social dimension of EU public procurement and the 'social market economy''*, in D Ferri and F Cortese (eds), 'The EU social market economy and the law. Theoretical perspectives and practical challenges for the EU', London: Routledge, 2018.
[1266] See for ex. S L Schooner, '*Desiderata: Objectives for a system of government contract Law*' (2002) 11 Public Procurement Law Review 103, S Arrowsmith, '*Horizontal policies in public procurement: A taxonomy*' (2010) 10 Journal of Public Procurement 149.
[1267] P Trepte, '*Regulating procurement*', New York: Oxford University Press, 2005, 137–39; M A Corvaglia, *'Public procurement and labour rights. Towards coherence in international instruments of procurement regulation',* Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 1381.
[1268] See for ex. B Berthon, G Hanifan, K Timmermans and A Williams, '*Sustainable organizations? Start with sustainable procurement*', Accenture, 2013, as well as the literature cited therein.

development (economic, ecological and social) could help reaching the much sought balancing.[1269] More and more voices propose forgoing the traditional solution which opposed environmental and social values to economic ones and saw the first as derogations from the latter, and moving to an *integrated* solution[1270], where each of the three dimensions contributes to the completion of the other two,[1271] under the superior goal of sustainable development which have become an 'overarching long-term goal' of the Union.[1272] Based on this constitutionally consecrated requirement for integration, non-economic considerations may, at least theoretically, not be *completely* disregarded in public procurement, which further means that, at least subliminally, sustainability should be *always* present in all procurement practices. One of the most important consequences would be that public contracts could not be awarded anymore based on the lowest price criterion alone.[1273] In support of this theory comes the fact that the new Directives offer an important number of mechanisms through which environmental, social and internal market objectives can be pursued *simultaneously* (*eg*, the life-cycle cost approach, or the use of labels, or the fostering of SMEs' participation *etc*).[1274] It only remains to test their effectiveness at the national level (since it significantly depends on how these mechanisms are transposed into the internal legal framework of each Member State and further, on how the national and European courts will interpret them).[1275]

In relative terms, however, public buyers may easily manipulate the markets they operate in by for example either reserving the access to public contracts to specific

[1269] On the role of the 'social market economy' revolution in the development of European public procurement, see A Rösenkotter and T Wuersig, '*The impact of the Lisbon treaty in the field of public procurement'*, European Parliament Study, January 2010, at http://www.europarl.europa.eu/RegData/etudes/note/join/2010/429988/IPOL-IMCO_NT(2010)429988_EN.pdf.

[1270] For which pleads, in explicit terms, also Article 7 TFEU.

[1271] See A Wiesbrok and B Sjåfjell, 'Public procurement's potential for sustainability' in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law*', Cambridge University Press, 2016, 231, 234.

[1272] European Commission, '*Mainstreaming sustainable development into EU policies: 2009. Review of the European Union strategy for sustainable development'*, COM (2009) 400 final, 24 July 2009, p. 2. Some authors have nevertheless argued that sustainable development was one of the principal purports of the European integration even before Lisbon – see F Aldson, '*EU law and sustainability in focus: will the Lisbon treaty lead to "The sustainable development of Europe"?*', in (2011) 23 Environmental Law and Management, or A Wiesbrok and B Sjåfjell, 'Public procurement's potential for sustainability' in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law*', Cambridge University Press, 2016.

[1273] See A Wiesbrok, 'Socially responsible public procurement. European value or national choice?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law*', Cambridge University Press, 2016. See also J Grandia and J Meehan, '*Public procurement as a policy tool: using procurement to reach desired outcomes in society*', in (2017) 30 International Journal of Public Sector Management 4, 305.

[1274] A Gerbrandy, W Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: How 'social' is public economic law?*', in (2019) 15 Utrecht Law Review 2, 59. See also A Wiesbrok and B Sjåfjell, 'Public procurement's potential for sustainability' in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 236, 237.

[1275] A Wiesbrok and B Sjåfjell, 'Public procurement's potential for sustainability' in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 239.

categories of suppliers or just restricting the access to the same contracts to bidders who fail to comply with certain requirements, as they might be determined at various policy levels.[1276] They may decide *what* and, to a certain extent, *how* to purchase while allocating preferences to different (political?) priorities[1277] since public buyers are usually operating in a *political* context rather than apolitically.

Yet many considerations, going beyond the narrow frame of a contract (such as the requirement seeking for a specific corporate behaviour – like the CSR) *may*, in fact, restrict the market to the extent that only a limited number of suppliers may actually bid. Moreover, where such considerations are targeting the mere *compliance* with some already existing legislation, the problem may stem from the nature and scope of that legislation. Where this occurs, foreign companies are usually put in difficulty as they must not only get acquainted with the domestic social legislation but also take all the necessary steps to comply therewith. Moreover, as already settled in the CJEU case law, it may be very well possible that the national law, although promoting substantial social objectives in line with a concrete *national* (or regional) policy, is *not* (inasmuch as such objectives are not confirmed or assumed at also the EU level) conforming to the *EU legislation*[1278]. Should this be the case, the award of a public contract based on a standard, pre-set algorithm involving such considerations would be absolutely ineffective. Alternatively, in case the non-economic considerations involve *broader* political actions, that is *outside* a concrete legal framework (*eg*, based on the mere will of the contracting authority to protect the community that it represents, more like a *moral* undertaking and not a legal obligation *per se*), the legitimacy to impose such requirements becomes, in our opinion, even more questionable. The reason is simple: without a legal basis to lay on, a political decision can easily become fraught with subjectivism, hence erratic, *ie*, hard to control. The same should go for those cases where specific laws *are* in place, but the contracting authority decides to go *beyond* the mere application or enforcement of certain legal standards and set *higher* standards (*eg*, better working conditions as compared with the minimum standards set by the existing laws, or extended employment opportunities *etc*). This may for example be the situation where contracting authorities act in response to the need of filling certain regulatory gaps or just

[1276] M A Corvaglia, *'Public procurement and labour rights. Towards coherence in international instruments of procurement regulation'* (Studies in International Trade and Investment Law), Bloomsbury Publishing, 2017, Kindle Edition, 1354.
[1277] S Cicmil and D Marshall, '*Insights into collaboration at the project level: complexity, social interaction and procurement mechanisms*' (2005) 33 Building Research & Information 523.
[1278] See for example the judgements in *Bentjees* or *Ruffert* etc.

addressing new concerns not yet covered by the existing policies.[1279] Such a foray into uncharted areas may, too, be risky and, thus, may take that contract out of the safety zone. Given the actual fragmentation of the supply chains, the last two situations are likely to have a significant impact on the market, by distorting the competition and restricting the access to public contracts.

The conclusion must be the same also for the case where the contracting authority tries, via its procurement, to generate or consolidate good practice which to lead, *indirectly*, to an increase in the life of the denizens residing in that authority's realm (*eg*, via offsetting practices ─ as discussed above, *etc*).

In a nutshell, when the domestic legislation and standards are more demanding than those applicable in other countries, where many foreign bidders are headquartered, there is a high risk that the access to that market is restricted (hence the conformity with the EU law infringed). In the specific case of labour law, however, many of these challenges have been resolved through the Directive on the posting of workers. Unfortunately, an incongruous CJEU case law has rattled the solidity of the solutions proposed by the cited Directive. In the famous cases *Viking* (where it subordinated the right to strike to the freedom of establishment), *Laval* (where the right to collective bargaining was considered, although fundamental in a social perspective, ancillary to the freedom to provide services in the internal market[1280]), and *Luxembourg*[1281] (which revolved around the purport of Declaration No 10 on Article 3(10) of Directive 96/71 recorded in the minutes of the Council of the European Union with the following wording: 'The Council and the Commission stated: "the expression 'public policy provisions' should be construed as covering those mandatory rules

[1279] J Howe, 'The regulatory impact of using public procurement to promote better labour standards' in K Macdonald and S Marshall (eds), '*Fair trade, corporate accountability and beyond: experiments in globalizing justice*' (Ashgate 2007).

[1280] In *Laval*, the Court decided that the use of strike for the purpose of protecting posted workers was, even if strike was, admittedly a *fundamental* right of workers, unlawful inasmuch as that action 'was taken to push through demands for working conditions *in excess* of the minimum protection in the Posting of Workers Directive' – see J Danielsson, '*Democracy as an obstacle for free movement within the EU – is free movement of services compatible with the Swedish labour market model*?', LO-Tryckeriet, Stockholm, 2013, 19. Everybody was nonplussed by that capsize. Owing to *Laval*, and against the official interpretation given by AG Bott in *Rüffert* (see paras 82-83 of the Opinion), what until then was believed to be a floor of rights, turned to be in fact a ceiling of rights (for discussion, see C Barnard, '*Viking and Laval: An Introduction'*, 2017 Cambridge Yearbook of European Legal Studies, 10, 475). Thus, the Court re-introduced the country of origin rule which had already been rejected by the EU legislators when dealing with the Services Directive – see M Höpner and A Schäfer, '*A new phase of european integration: organised capitalisms in post-Ricardian Europe*', (2010) 33 West European Politics 2, 344. Pursuant to Laval, '*all rules that are outside or above the hard core of the Directive it is now the country of origin principle that applies. National pay agreements can thus be undermined for posted workers, and posted labour is allowed to have worse working and employment conditions than domestic labour*' - emphasis added (Danielsson, 20).

[1281] C-319/06 *Luxembourg* ECLI:EU:C:2008:350.

from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. These may include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions"), the Court adduced the Treaty-based freedom of services provision to strike down wage measures that had been considered permissible under the Posted Workers Directive.[1282] This case law renders the contents of the provisions contained in Directive 2014/24 questionable, and their applicability, debatable or at least difficult.

As opposed to the 'green considerations', the use of social considerations in public procurement has long historical backgrounds[1283], aiming at opening up the market for the unemployed (a social-economic dimension), but also at addressing specific forms of redistributive justice (by for example preventing or redressing structural imbalances located at either the level of national economy or at a more general level, and interesting discriminated groups such as minorities, or gay people etc, or fundamental human rights such as slavery, forced labour and the exploitation of children, or the poor, *etc*). If, in the early stages, and until relatively recently, public procurement has mostly been used to stimulate long-term *economic* growth (rather than creating *direct* social incentives),[1284] in the recent years, and probably due to the dramatic changes in the social evolution of Europe and the world, it became a powerful instrument in pursue of concrete social policy objectives. This evolution developed in strict correlation with the changes in the *political* approach at the EU level. In reality though, assessed globally, the many interventions in this direction were, and still are, marked by protectionism (via, for example, legislative initiatives like 'buy local' – see in this regard the US example, but also the Chinese one or that of other emerging economies like Brasilia's *etc*[1285], or via set-asides for small businesses or those coming from a less developed region and so on[1286]), that is, exactly what the EU legislation is trying

[1282] C Joerges and F Rödl, '*From the de-formalization of European politics and the formalism of European jurisprudence in dealing with the 'social deficit' of the integration project. A contribution occasioned by the judgments of the ECJ in the cases Viking and Laval* ' 2008 ZERP-Diskussionspapier 2, Bremen, Zentrum für Europäische Rechtspolitik an der Universität Bremen.
[1283] Ibidem,1578.
[1284] M Brülhart and F Trionfetti, '*Industrial specialisation and public procurement: theory and empirical evidence*' (2001) 16 Journal of Economic Integration 106.
[1285] S L Schooner and C R Yukins, 'Public procurement: focus on people, value for money and systemic integrity, not protectionism' in R Baldwin and S Evenett (eds), '*The collapse of global trade, murky protectionism, and the crisis: recommendations for the G20*', VoxEU.org Publication, 2009, 87.
[1286] S Arrowsmith, 'Application of the EC Treaty and Directives to horizontal policies: A critical review' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in ec procurement law new directives and new directions',* Cambridge University Press, 2009, 182. See also The World Bank, '*Preferential public procurement*' – a study prepared in 2016 by the World Bank Group for the G20 Global Platform on Inclusive

(following the GPA approach) to stifle.[1287] The discussion becomes even more complex when public procurement is used not necessarily to encourage the development of specific industrial sectors but, as elaborated above, to (also) protect concrete disadvantaged groups. In the first case, the discriminatory dimension appears to be more evident, and seemingly easier to stifle than in the second one, since economic reasons cannot, according to a consistent CJEU case law[1288], justify any mandatory requirements, regardless of the concrete circumstances.

Thus, if at first (probably discouraged by a quite narrow interpretation of the Treaties and the EU procurement legislation by the Court of Justice of the Union but also by a lack of support from the political factors, *ie*, the Council and the Parliament) the Commission was reluctant in encouraging the strategic use of public procurement for the pursue of fundamental social objectives, nowadays all its actions are quite to the contrary. Of course, in the lack of concrete legislative instruments and powers, the Commission has chosen the tenuous path of soft law, pushing hard to convince local governments to do what it cannot do by itself, in general using, as already discussed above, techniques similar to those developed in the social area via the OMCs. In effect, and in spite of all these efforts coming from the Commission, since the reference to the 'social market economy' made by Article 3(3) TEU 'stands in a vacuum', representing a mere political declaration, not accompanied by instruments (legal, but also administrative) necessary for European Union to enforce it and give it substance,[1289] the concrete materialization of the EU social market economy depends, in the end, on the effective capacity (and will) of *national* governments to intervene. [1290] The conflict between the economic and the social dimension of the single market is inevitably reflected in the way the secondary legislation adopted in the implementation of the general principles consecrated by the EU Treaties are crafted and applied. So, in the lack of concrete legislative powers and instruments which to allow the European legislature to intervene, the role of national governments becomes crucial. Unfortunately, this task is fraught with peril

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Business, at https://www.inclusivebusiness.net/sites/default/files/inline-files/Preferential%20public%20procurement_for%20web_final_0.pdf.

[1287] See A Calleja, '*Unleashing social justice through public procurement*, London, Routledge, 2017, 50 et seq. A case in point for this discussion is the famous C-21/88, *Du Pont de Nemours* [1990] ECR I-889.

[1288] For details, see Chapter II above.

[1289] J Joerges and F Rödl, "*Social Market Economy" as Europe's Social Model*?", European University Institute, Florence, 2004.

[1290] F Costamagna, '*The internal market and the welfare state after the Lisbon Treaty'*, 2019, at https://www.researchgate.net/publication/265362521_The_Internal_Market_and_the_Welfare_State_after_the_Lisbon_Treaty, 8.

(since the EU law offer no precise criteria for a safe delineation and borderlines are, owing the the Court's indecision, continuously moving) and very few are ready to embark on it.

Unfortunately, the too wide span of the social goals that theoretically can be pursued through public procurement makes this balancing quite difficult in the lack of an explicit legal provision which to clarify their concrete nature, purpose and method of implementation. To take just an example, according to art. 2 para 2 of the former Italian legislative Decree No. 163 of 2006 (now repealed by the Legislative Decree No. 50/2016), '*The principle of cost-effectiveness can be subject, within the limits expressly provided by the existing rules and the present Code, to the conditions, contained in the tender, involving social requirements, or concerning the safeguarding of human health etc*'. This clause left blind spaces and failed to clarify which social requirements may take precedence over the economic principle of cost-effectiveness (*eg*, all social clauses, or only those enforced by an external legal norm, including or not those pertaining to a specific policy not necessarily translated into law but merely into some declarative documents *etc*, or only those concerning the working and labour regime, and so on). Consequently, there were the national contracting authorities who remained to bear all the risks, which in the end led to a significantly reticent practice.

In this context, given the lack of concrete instruments for implementation at the EU level, the general social objectives included in the text of Article 3 TEU are seen more like a limitation of the application of internal market rules, rather than distinctive goals on the agenda of the EU institutions, especially since, given the balance of competences established by the Treaties, they are impossible to pursue through the adoption of specific EU legislative measures.[1291] Anyway, by bringing forward the 'social' element and by demoting the principle of 'undistorted competition' contained in the same Article 3 to a mere Protocol, the fathers of the Lisbon Treaty appear to have not only chosen to reserve for the social objectives a constitutional status (hence a consolidated position in rapport to the traditional internal market and competition rules), but also to endorse the *relative* character of the latter vis-à-vis other objectives of a social nature, which are now seen (at least those endorsed under the European social model) as equally fundamental.

However, the Commission's efforts are evidently backed by the explicit political message enclosed in the latest plans of action elaborated at the EU level, among

[1291] Ibidem, 9.

which the Europe 2020 and the Europe 2030 strategies[1292], but also by all the other projects among which (last but not least) the European Pillar of Social Rights *etc*, which demonstrate that, in spite of a not so auspicious arrangement of competences as consecrated by Articles 2 to 6 TEU and 3 to 6 TFEU, the interventions, at the EU level, in the social field need to be, and effectively are, substantial and determined. Of particular importance is Article 5 TFEU, which empowers the Union to 'take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies' and also to 'take initiatives to ensure coordination of Member States' social policies.'

In practice, public buyers have been using public procurement mechanisms to promote various social values and pursue a multitude of social *policy* goals ranging from basic labour rights to minimum wage standards, occupational health or safety conditions at work.[1293] On the other hand, public procurement is also used for the implementation of broader *political* features such as 'regional development, equality, the prohibition of various forms of discrimination, or the promotion of employment and the creation of formative opportunities for young employees.'[1294]

The literature has identified two distinct models of 'proactive social use of procurement': an *individual* justice model (including decent work conditions and requirements to do with the compliance with labour rights), and a *group* justice model (involving fair trade, employment opportunities and social inclusion).[1295] Along these lines, the European Commission's 'Buying Social' Guide cites the promotion of SMEs in the access of public procurement, the reference to 'ethical trade', the achievement of the voluntary objectives of 'corporate social responsibility' and the protection of human rights.

When it comes to fostering employment opportunities, the mechanisms most frequently used are focusing on the promotion of young employment, or the employment of older workers or on the social (or labour) integration of those coming from disadvantaged

[1292] On how sustainability is one of the EU's top priorities, see T Novitz and M Pieraccini, 'Agenda 2030 and the sustainable development goals: 'responsive, inclusive, participatory and representative decision-making'?', in M Pieraccini and T Novitz, '*Legal perspectives on sustainability'*, Bristol University Press, 2020.
[1293] C McCrudden, 'Social policy issues in public procurement: A legal overview' in S Arrowsmith and A Davies (eds), '*Public procurement: global revolution* ', Kluwer Law International, 1998, 219–239.
[1294] M A Corvaglia, *'Public procurement and labour rights towards coherence in international instruments of procurement regulation'*, Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 1608, or M Steiner, '*Is there a Swiss approach towards sustainable public procurement?*' (2013) 1 European Procurement and Public Private Partnership Law Review 73.
[1295] M A Corvaglia, *'Public Procurement and Labour Rights Towards Coherence in International Instruments of Procurement Regulation'*, Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 1642.

groups such as people with disabilities or minority enclaves or, more recently, immigrants *etc*, or of long-term unemployed, as well as on the ensuring of a fair gender balance.

On the other hand, the ensuring of decent working conditions of the employees involved in the delivery of public contracts usually refers to decent wages (distinctively of the reference to the basic salaries set by law), gender equality and non-discrimination, occupational health and safety and the access to social protection.

All these standards and requirements may concern not only the supplier itself, but the entire supply chain. This, on the other hand, creates difficulties in verifying the compliance not only due to issues of transparency but also because of the important human and financial resources it needs displacing. In practice, governments have created various mechanisms to tackle this challenge. The Swedish model, for example, requires that each supplier discloses its sub-contractors and sub-sub-contractors up to the last link. It then obliges public purchasers to proceed to a minute verification of each such links, up to the last one. In order not to block the awarding process, the Swedish law encourages public procurers to set these requirements as performance conditions (which permits their assessment in the latter stage, during the implementation phase), with bidders being only required to fill out a template statement by which to promise, at the qualification stage, to meet all these requirements. The main challenge is to ensure that these conditions, once verified, remain unchanged throughout the entire life of the contract and up to its last act of delivery. An important feature in this context is the creation of an official list of trusted contractors and sub-contractors. Once a company was verified and found to successfully meet the requirements, it is considered trustworthy and listed as such. Listed companies are not subject to further verification than only after a number of years or sooner – if there are concrete indications that their original situation (which made the object of verification) has changed. This appears to be encouraging the suppliers to take all the necessary measures to comply with the said requirements and collaborate with just trusted partners. In turn, sub-contractors (usually SMEs) are encouraged by the idea of being granted full access to public contracts.

The discussion on the 'conformity' and the eventually difficult applicability of various social considerations gets even more tensioned when addressing the 'horizontal direct effect' of the fundamental freedoms, *ie*, to what extent the principles and rules entailed by these freedoms are *directly* applicable to contracting authorities – especially to those which do not have legislative / regulatory powers, but which intend to impose discriminatory considerations directly through a public contract (that is, a bilateral agreement). Or, vice-versa, to what latitude may such entities to depart from the internal market rules. It is

nevertheless clear that, in this case, the rules established via the relevant tender documentation cannot be seen as having the value of a genuine law (of general application), as they are addressed only to those entities who manifest a clear intention to bid for the contract[1296] (more like conditions-precedent to signing). The debate around the effect which the free-movement principles have on entities which are not, or could not be, construed as falling within the definition of the 'State' is not new. It has occupied, since *Walrave and Koch*[1297], a generous place throughout the case law of the Court of Justice of the Union. In one of the latest decisions to do with the free movement of workers and the freedom to provide services[1298] the Court settled, probably inspired from its previous decision rendered in the second *Defrenne* case[1299], that 'the prohibition of discrimination on grounds of nationality laid down in Article 39 of the Treaty must be regarded as applying to *private persons* as well.' (para 36). This conclusion, which the Court anticipated, with certain nuances, in *Bosman*[1300] (a case to do as well with the freedom of movement of workers), was however not maintained in the case of free movement of goods[1301] (although the interpretation offered in *Dasonville*[1302] — where the Court referred, when interpreting the then Article 28 EC, specifically to 'all trading rules enacted by the Member States' - see para 5 – was further reversed in *Keck*[1303]). In deciding so, the Court adduced four main arguments.[1304] First, the Court envisaged the general wording of the relevant articles of the Treaty (which did not, at the time when the cited decisions were handed down, contain any specific indication which to lead to the conclusion that the obligation to secure the freedom of movement was placed exclusively on the *Member States*) – a 'literal' interpretation. Second,

[1296] For a discussion on contracting authorities as 'regulators', see the paragraphs below in this Chapter.
[1297] Case 36/74 *Walrave and Koch* [1974] ECR 1405. In this case, the Court concluded, using the '*effet utile*' argument, that '*abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law*.' (para 18).
[1298] Case C-281/98 *Angonese* [2000] ECR I-4139.
[1299] Case C-43/75 *Gabrielle Defrenne v Sabena* [1976] ECR 455. In that case, the Court established that '*the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down.*' (para 31).
[1300] Case C-415/93 *Bosman*. The Court concluded that '*nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health*' (para 86).
[1301] S van der Bogaert, 'Horizontality: the Court attacks?" in C Barnard and J Scott (eds) '*The law of the single European market: unpacking the premises*', Hart Publishing, 2002, 129.
[1302] C-8/74, *Dassonville*.
[1303] Joined Cases C-267&268/91 *Keck and Mithouard*. Here the Court chose to refer, as already mentioned in the above Chapters, to 'any measure which is capable of directly or indirectly, actually or potentially, hindering intra-Community trade' (para 11).
[1304] S van der Bogaert, 'Horizontality: the Court attacks?" in C Barnard and J Scott (eds) '*The law of the single European market: unpacking the premises*', Hart Publishing, 2002, 134.

the Court resorted to the '*effet utile*' artifice, insisting on the true purport of the Treaty provisions in discussion (a systemic and teleological approach). Third, it invoked the importance of ensuring a uniform application of those provisions in the context where 'working conditions in the different Member States are sometimes governed by provisions laid down by law or regulation and sometimes *by agreements or acts concluded by private persons*.'[1305] Finally, it made an interesting analogy with Article 141 TEC (on equal pay), which it had already tackled in *Defrenne*. In a nutshell, according to the CJEU, the internal market rules apply (*directly*!) in all the corners of the internal market and to all players, that is, not only to Member States (to which these rules appear to be addressed) but also to private entities *when establishing rules aimed at governing the status (including the freedom of movement) of their members*. The common element in all these cases was however that all the private entities the rulings of which had been challenged before the EU Courts had, pursuant to their statutes, concrete (even if limited) *legislative* powers – in the widest meaning thereof, *ie*, they were allowed to take measures and adopt rules (even if of limited application, namely, to their members as a distinctive category of people). The similarities with the 'bodies governed by public law' are evident, which means that, even if they are not private per se and have no 'legislative' competences, such latter entities should as well be caught in the scope of the internal market rules. In fact, according to the line of thinking imposed by the CJEU, Member States (to which the free-movement rules apply directly) are compelled not only to transpose and implement these rules as such – in their capacity as (national) legislatures, but also to take all the necessary measures to ensure that these rules are duly observed by all actors who, therefore, are to abstain from any derogatory actions (regardless of the nature and concrete competences thereof). This should further mean that derogations to these rules are possible only when following the avenues acknowledged as safe by the Treaties themselves. Or by the Court. In this light, it appears that little, or rather no room for manoeuvre, is left for contracting authorities with no legislative powers (*ie*, not 'regulators' *per se* - an aspect which we will discuss, separately, further below) which decide to pursue, through their procurement, sustainable goals without being compelled to do so by any official policy or law.

A number of other sensitive issues could, too, render the implementation of socially responsible public procurement quite problematic. Some have already been discussed above (see, for example, the CSR and the limitations around its use in public procurement).

[1305] Ibidem, 137 (emphasis added).

Many others will be discussed, extensively, in the following sections. Before that, we see it opportune to insist, once more, on the shortcomings spotted around the use of CSR-related requirements (on which we have already elaborated above), which is now wildly encouraged by the European Commission itself, based on the wider models built under the United Nations Global Compact – the world's largest CSR initiative (with almost 12,500 members) but also around the new instrument offered by ISO 20400 (which uses a rather holistic definition of sustainability, not necessarily focusing on social values). As already explained above, since, in line with the Court's conclusions in *Wienstrom* (cited also in *Max Havelaar*[1306]), contracting authorities are not allowed to require tenderers to have a certain CSR policy in place,[1307] requirements that refer to such policies — which define the general internal policies put in place by companies — cannot be easily limited to the subject matter of the contract (as the law and, before it, the CJEU case law, require). To this extent, its use is rather limited in public procurement. Public purchasers are however encouraged to promote the use of CSR not via exclusion instruments but rather through the building of a complex *scoring* structure (*eg*, in the award stage) where the companies that have a CSR policy in place are awarded a higher number of points.

As for the dichotomy price versus quality and how social value can (or cannot) be reached in a profoundly 'economic' scenario, the next sections will try to discuss the most intricate aspects. Here, we would just insist on the fact that the lowest price criterion, as the most wildly used award criterion (for details, see below), offers practically no access to social policy considerations. The relevant literature is quasi-unanimous in considering that its use as award criterion is problematic and usually generates unexpected costs over the long run. Lowest price also excludes, in general, any quality advantages and social criteria are hard (if not impossible) to use in this context, therefore they are not recommendable. Moreover, it may give an unfair advantage to financially powerful traders (since, in their general course of business, big names in various areas of the industry usually set specific 'brand tolls' on their items, reflecting in huge mark-ups which may easily compensate the much lower prices offered in public contracts for the same items, sometimes even below the basic

[1306] See para 90 of the *Max Havelaar* judgement.

[1307] Recital 97 from the Directive 2014/24 made this a general principle of public procurement, it stipulating in clear terms that '(…) the condition of a link with the subject-matter of the contract excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.' For an interesting discussion, see J Robinson Jr., *'Social public procurement: corporate responsibility without regulation*', 2013, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327999.

overheads).[1308] On the other hand, the measures brought about by the latest package of Directives concerning public procurement in the area of the fight against *abnormally low tenders* is seen as a very important instrument to tackle social dumping. It is, in this context, important to recall that, according to Article 107(3) TFEU, measures aimed at promoting the economic development of areas where the standard of living is abnormally low or where underemployment is high, and of the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation, do not fall into the scope of the first paragraph of Article 107. To this extent, a bidder who justifies his price by reference to the aid in the form of subsidies obtained, under a national social policy scheme, for hiring old long-term unemployed or single-parent unemployed (and keeping them employed for a minimum period) should not have his offer rejected due to state aid.[1309]

4. Price vs. quality or how can a socially advantageous tender be(come) the most economically advantageous tender in the current EU framework?

The idea of using public procurement as a means to attain other, external objectives, and especially social outcomes, is not new. Especially in the social area, public procurement has been used in Europe since as early as the end of the 19th century to settle the stringent, systemic problem of unemployment that characterized the first years after WWI and, later on, inspired by the US civil rights movements, to stimulate the integration of minorities and disadvantaged groups.[1310] It has thus been used to implement 'strategic, protective and proactive political economic policies through various methods and at various stages of the procurement process'.[1311]

[1308] T Vesel, 'Addressing social considerations in PP. Best practices for fighting social dumping in Slovenia' in G. Piga, T. Tartai (eds.), "*Public Procurement Policy (The Economics of Legal Relationships)",* Routledge, 2016, 39.

[1309] For a solution that confirms this approach, see https://www.achizitiipublice.gov.ro/search?q=somer&t=0&z=0.

[1310] C McCrudden, '*Buying social justice: equality, government procurement and legal change*', Oxford University Press 2007, 257, C McCrudden, '*Using public procurement to achieve social outcomes*' (2004) 28 Natural Resources Forum, 257. Daintith in turn explains how governments often use, beside legislative instruments ('imperium') also political and financial power to achieve concrete policy goals (see T Daintith, '*Regulation by contract: the new prerogative*' (1979) 32 Current Legal Problems 1, 41).

[1311] M A Corvaglia, *'Public Procurement and Labour Rights Towards Coherence in International Instruments of Procurement Regulation'*, Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 875. Along the same line, P Trepte (n 23) 152–76, C McCrudden, '*Using Public Procurement to Achieve Social Outcomes*' (2004) 28 Natural Resources Forum, 257, R Kattel and V Lember, '*Public*

Inevitably, the prime years of integration were marked by a resolute accent on economic values and the Treaties remained – at least until very recently - reluctant when it came to open the door to exceptions to the rules aimed at safeguarding the sacred liberties that they undertook to protect. Over the years though, some derogations have indeed been enacted, but only after long negotiations among the European political actors (expressing practically a political bargain) and only with the limited purpose to strike a tight balance between the need to protect these liberties and other values which, due to concrete political and social contexts, have grown to occupy a central place in the evolution of the internal market, on a par with the economic ones. Unfortunately, many of these exceptions– which have in the end fundamentally transformed the structure of the initial arrangement captured by the Treaties – have been marked by a wide degree of generality. This prompted a frantic search for additional support in the secondary legislation.

Weirdly though, even if the Treaties had evolved decisively, as shown above, so to bring the 'social' dimension of the internal market to the same level with the economic one, the secondary legislation dedicated to public procurement failed to advance at the same pace. Basically, until 2004 it contained not even a single reference to the 'social' potential of public procurement (although the Court of Justice of the Union had cracked the door open for this since 1988) while the 2004 package (*ie*, pre-Lisbon!) merely transposed the punctual solutions consecrated by the CJEU through its previous case law. Nor has the 2014 package taken sufficient advantage of the huge potential of the Lisbon chart. In fact, Directive 2014/24 gravitates, as already mentioned, around the safe harbours offered by the CJEU and offers a quite limited number of opportunities in this regard (among them being the possibility to reserve public contracts for certain social enterprises, that of using social labels, or the requirement to take into account certain accessibility criteria etc), while barely pointing out to some mandatory rules and regulations applicable 'in the fields of (…) social and labour law'[1312] (adopted, *nota bene*, in areas placed outside the ambit of public procurement and which, given their specific purpose, allow of certain punctual relaxations from the internal market and competition rules!).

A good explanation for this legislative hesitation is that, again, public procurement pertains, essentially, to the internal market (and competition) policy - which, pursuant to the principle of conferral consecrated by Articles 2 to 6 TFEU, is in the EU's full

Procurement as an Industrial Policy Tool an Option for Developing Countries?' (Working Papers in Technology Governance and Economic Dynamics, Tallin University 2010).

[1312] See Article 18 from the Public Sector Directive 2014.

competence. Consequently, the traditional competition principles had to keep their central place while the rules with a social value remained, due to their discriminatory potential, only marginal. And, in spite of the new internal market structure, the EU legislature didn't know how to strike, at least at a regulatory level, a better balance between the two sets of values. On the other hand, it is worth observing that, in the public procurement area, the regulatory process is, regardless of its precise scope[1313], essentially based on harmonization,[1314] which further implies a necessary degree of discretion in the implementation process[1315] – whence the possibility for Member States (and their contracting authorities) to innovate.

In practice, the problem became acute when, confronted with a systemic net of policy goals which they pledged to pursue, and in the silence of either the primary or the dedicated secondary legislation, contracting authorities started to resort to the opportunities offered by other instruments not related to public procurement (such as the Poster Workers Directives[1316] or the Equal Treatment and Equal Pay Directives[1317] *etc*) the main goal of which was (it still is!) to protect *national*/*local* social values placed in an open conflict with those defining the EU's internal market (and, thus, indirectly, with the rules on public procurement). As the CJEU itself has ascertained, the use of such instruments in public procurement is anomalous hence should be done with great rigor.[1318]

Anyway, the Court admitted that social policy goals are not only possible in public procurement, but also a valuable element thereof, as they bring important benefits for the communities and, in general, for the EU citizens. It is however worth noticing that social considerations that may be included in a public procurement equation fall inevitably within the category of '*quality'*-related criteria, which usually require additional efforts to define and assess (including a dedicated methodology).

[1313] The true scope of the EU public procurement law has been extensively questioned, debated and systematized, yet with rather inconsistent, if not divergent, conclusions.
[1314] Recital (1) of the Public Sector Directive 2014.
[1315] C Bovis, 'The drivers and boundaries of discretion in the award of public contracts', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law'*, Hart Publishing, 2019, 158.
[1316] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ L 18, 21.1.1997, p.1, together with Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') OJ L 159, 28.5.2014, p.11.
[1317] The last in the series being Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L 204, 26.7.2006, p.23.
[1318] For discussion, see C McCrudden, 'The Rüffert Case and public procurement' in M Cremona (ed), '*Market integration and public services within the EU'*, Oxford University Press, 2011.

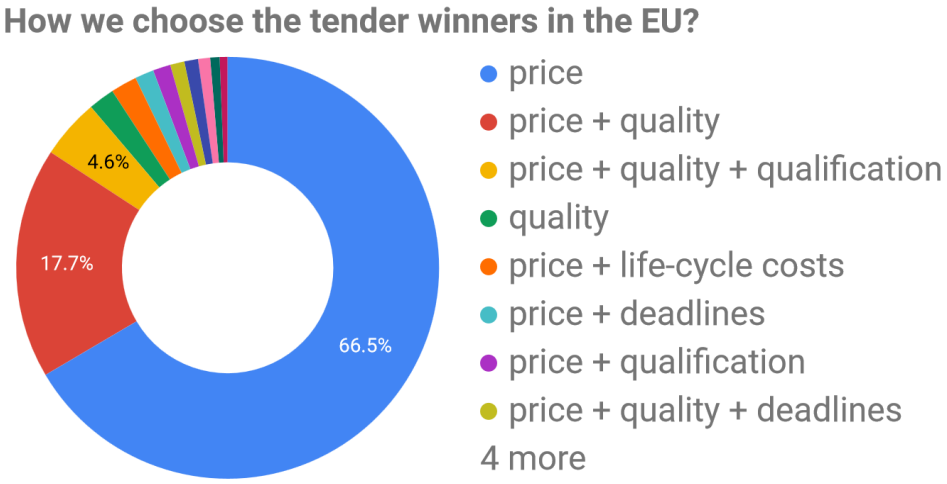
The quality of what contracting authorities want to buy is a very thorny issue in this context[1319]. Is a contracting authority free to establish the level of quality it wants the procured supplies or services to meet? In our opinion, this depends not so much on the mere will of that authority but rather on the entire economic and political context in which it operates - for example, available budgets vs. the concrete life-cycle costing, how much better, or promptly, may innovative solution respond to its needs, etc. If a hospital decides to acquire a new technology which would allow its surgeons to operate faster and more precisely, and its patients to recover faster and safer, can it go for it although it costs two or three times more than a traditional equipment and it is produced by one or just a handful of manufacturers? The answer should be yes, but only if it is scientifically (*ie, objectively*) demonstrated or demonstrable that that new technology is better from a medical point of view and the hospital has indeed access to the necessary funds. Or is a public institution allowed to ask that the travel agency from which it will acquire plane tickets for its personnel is IATA accredited, even if on the market there are many companies which do not possess such accreditation and may offer cheaper solutions? Well, in the light of the *Max Havelaar* case, the answer to this latter question should be no. Instead, that authority should stipulate that it is searching for a company that has access to competitive prices and discounts from the most important airlines and to superior flight conditions (*eg*, to suitable flight hours, good connections, shorter flights *etc*). It on the other hand should be free to stipulate that a IATA accreditation is a proof of fulfilment of such conditions, since IATA accreditation usually gives access not only to substantial discounts and more alternative solutions but also to better flight conditions or more convenient links between them, which would in the end account for more decent working conditions (social measure) and more efficiency from its employees which need to travel (economic efficiency).

It is hence unquestionable that sustainability and, in particular, social requirements, fall within the larger category of 'quality' criteria.[1320] Unfortunately, according

[1319] For the complexity of this issue, see, M Burgi and B Brandmeier, '*Quality as an interacting award criterion under current and future EU-law*', 2014 European Procurement and Public Private Partnership Law Review 1, 12 *et seq*.

[1320] According to recent studies, the priorities of the EU social policy show a clear orientation towards *quality*: a high level of workforce occupation (which entails the creation and promotion of new jobs); work quality in the form of better jobs and an improved life/work balance (which involves better employment policies, reasonable wages, and work organization that meets the needs of both companies and its employees); a high degree of social protection, suitable social services and a high level of protection of the fundamental rights; quality of industrial relationships which should be able to adapt to industrial change and to reflect the impact of know-how (new technologies and research) in the economic progress *etc*. All these are the milestones of the EU's new social policy – see P Cechin-Crista, A Mihut, G I Dobrin and S Blaj, '*The social policy of the European Union'*, (2013) 4 International Journal of Business and Social Science 10, 19.

to very recent statistics and official documents,[1321] in spite of a very determined action from the European institutions (which only intensified in the last years), quality is (still) underrated in European public procurement.[1322] Moreover, it is used less frequently as an *award* criterion but more often as either a *technical specification* or as a *qualification* standard (in the selection stage, with a correlative obligation to provide relevant certifications). This translates into a clear disinterest for innovation and stagnation at a minimum-quality level.



[1321] See for ex. https://blog.datlab.eu/can-government-pick-quality-supplier/?fbclid=IwAR0hRZ7paAtBDA3LWmgGzYtgICl_p_41ptxzaPNpM8_kjDtYSTIQ8RQQgvQ (May 2019) which concluded, based on the perusal of the relevant numbers available in the Datlab, Tender Electronic Daily, that no less than 66.5% of suppliers get chosen based on the lowest price criterion. This contradicts to a certain extent the official data retained in the documents issued by the European Commission according to which the lowest price criterion is used in approx. 55% of cases – see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, '*Making Public Procurement work in and for Europe'*, COM(2017) 572 final. Figure 2 above contains more details on this issue.

[1322] In its Opinion on the 2014 public procurement package (2018/C 387/07), the European Committee of the Regions called on the European Commission 'to swiftly finalise the draft on public procurement of innovation and the guide on socially responsible public procurement in order to facilitate the implementation of the relevant legal provisions in the Member States, in particular using 'most economically advantageous tender' as the primary award criterion; in this regard, invites the Commission to clarify that this does not mean the lowest prices'. See also the recent call of the European Parliament (addressed to the same European Commission) to do more than simply award contracts based on lowest price - European Parliament, 'Press release. Public procurement: Parliament calls for better implementation and use of quality criteria' (4 October 2018), at https://www.europarl.europa.eu/news/en/press-room/20180926IPR14423/public-procurement-call-for-better-implementation-and-use-of-quality-criteria. The Parliament deplored the excessive use of the lowest price as the primary award criterion and pointed to the need to support SMEs' participation in tenders. Moreover, several unions and employers' associations have lobbied at the Union's level for the adoption of concrete rules which to compel Member States to award contracts based on the 'economically most advantageous offer' - see for ex the EFFAT – FERCO -- EFFAT (European Federation of Food, Agriculture and Tourism Trade Unions)/ FERCO (European Federation of Contract Catering Organisations) Contribution to the Guide on socially-responsible public procurement (SRPP), 2009, at: http://www.effat.eu/files/822_d733cd3bcdb986de8dbdc5676721d82b.pdf. Finally, some studies concluded that quality-related criteria have a direct impact on the quality of the delivered services and/or products (since both the services and the production process involve key social factors) – for details, see K Jaehrling, '*The state as a 'socially responsible customer'? Public procurement between market-making and market embedding'*, in (2015) 21 European Journal of Industrial relations 2, esp. 154 *et seq*.

Figure 2*: Source:* https://blog.datlab.eu/can-government-pick-quality-supplier/?fbclid=IwAR0hRZ7paAtBDA3LWmgGzYtgICl_p_41ptxzaPNpM8_kjDtYSTIQ8RQQgvQ *(May 2019).*

The chart above reflects the situation post-2016, so after the adoption of the 2014 package.

The cited study also spotted a 'quite remarkable east-west division, where "old" EU-15 member states led by UK and France routinely use qualitative criteria[1323], whereas in former eastern block, price is used as a single criterion in over 90 % of cases'.

These conclusions are confirmed by the most recent official statistics published by the Commission in the Single Market Scoreboard (see *Figure 3*).

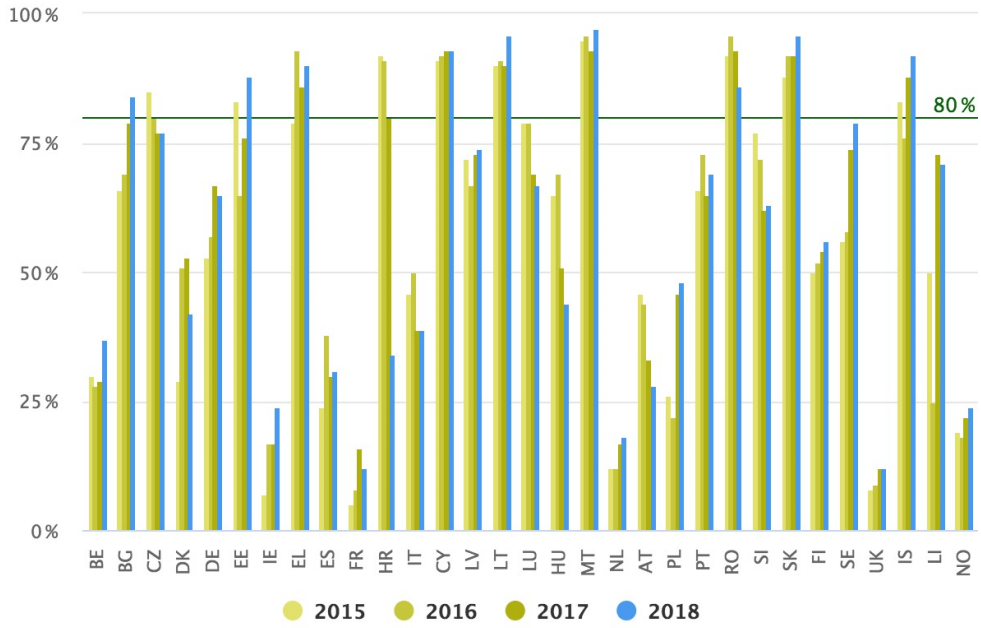


Figure 3: *Source:* https://ec.europa.eu/internal_market/scoreboard/_docs/2019/performance_per_policy_area/public_procurement_en.pdf, *p 8*

All these factors actually draw back the generalisation of SPP and, in particular, of SRPP, explaining altogether why the new Directives remained reluctant in embracing a straightforward mandatory approach in this area.[1324] In spite of these obstacles, many surveys indicate that the awareness among practitioners raised (especially after 2014), with many of them believing that both their organizations and their national governments will

[1323] But not necessarily social criteria! These are rather hard to spot even in the most advanced environments. See, for details, J Jääskeläinen and J Tukiainen, '*Anatomy of public procurement*', VATT Working Paper, VATT Institute for Economic Research, Helsinki, 2019.
[1324] A Semple, '*Mixed offerings for sustainability in a new European Union procurement directive*', (2012) 21 Public Procurement Law Review 2, 106–108.

conduct substantially more socially-oriented procurement activity in the next years.[1325] To this end, a determined political input, professionalization, a good coordination between the public and the private sectors and more incentives supplier for suppliers[1326], doubled by a better post-contract management are cited as the most suitable keys to success.[1327]

Quality also translates, quite often, or is mirrored, in standards. So, in the context where a contracting authority would ask bidders to comply with certain standards, the reliability of the assessment of compliance by that authority would very much depend, on the one hand, on whether those standards have been (or will be) set legally or not and, on the other hand, if they are, whether the authority is to apply the minimum legal standards (*ie*, set in an external law) or it decided to raise the bar and impose some severer conditions.

It is in general considered that policies which resume to seeking compliance with specific legal requirements are more likely to be conforming to the EU law. For example, the EU law authorises exclusions for specific criminal convictions. Nevertheless, it does not allow contracting authorities 'generally, to exclude firms for non-compliance with government policies *not* embodied in general regulatory legislation.'[1328] (although this assertion appears to be contradicted by the CJEU - see for ex the afore-cited case C-470/03, *AGM-COS.MET etc*).

On the other hand, while the compliance with certain legal standards may usually be measured through some formal and transparent mechanisms (*eg*, a judgement rendered by a body competent to perform such reviews, based on an official investigation ran based on some concrete procedural norms), the compliance with the standards set by contracting authorities themselves may give leeway to abuses (since such practices may leave it for the authority itself to decide if a bidder has violated or not the contractual requirements, or may even facilitate corruption). Take for example the case where a public buyer asks bidders to demonstrate that they pay their employees the *minimum* wages set in the relevant norms, versus that where the same authority asks them to pay *fair* wages, ie, at a level *beyond*

[1325] See for ex. the same United Nations Environment Programme, '*Global review of sustainable public procurement 2017*', 46 to 48.

[1326] A proper alignment of the buyer's and the seller's goals is not always apt to lead to immediate positive results. Recent surveys show that although incentives for suppliers are good, they may also constitute a driver for the maximization of short-term profit rather than optimization of a long-term relationship – see N Uenkab and J Telgen, '*Managing challenges in social care service triads – Exploring public procurement practices of Dutch municipalities'*, in (2019) 25 Journal of Purchasing and Supply Management 1, 5.

[1327] N Caldwell, H Walker, C Harland, Louise Knight et al, '*Promoting competitive markets: The role of public procurement*', in (2005) 11 Journal of Purchasing & Supply Management.

[1328] S Arrowsmith and P Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC Procurement law: New directives and new directions*', Cambridge University Press, 2009, 115.

the minimum values fixed by law. In the latter case, the setting of the bar too high has the undesired potential of narrowing the competition down to the point where only one (*eg*, the preferred bidder) or very few traders may bid. But, even where there is no preferred bidder, can the competition be sacrificed in the name of a 'superior' goal such as that of ensuring a 'fair' standard of living for the employees? Based on the substantial line of arguments adduced by the CJEU throughout its case law, the answer should be that this cannot happen in case the authority cannot justify its decision, *ie*, why it has chosen *that* minimum level of wages and not another one. Its decision must therefore be supported both politically (including social policy) *and* economically.

In particular, standards to be met by bidders which do not have a clear legal or policy support raise specific problems. The imposition of such standards (procedural hedges) is, according to some authors, likely to raise issues of legitimacy, transparency, or suitability since, in many cases, it hides askew regulatory practices (public buyers do indirectly, via public procurement, what they are not allowed, constitutionally and administratively, to do directly, *eg*, to make laws or, upon the case, to regulate and impose standards in that specific area).[1329] But this practice may also raise questions of a constitutional nature. Thus, inasmuch as the 'legitimacy' of the decision the implementation or application of which is sought via the procurement process is concerned, if the norm obliging contracting authorities or traders, in general, to behave in a certain way is imposed by an entity with legislative powers, things are pretty clear. But where it has been pushed through by an entity with no legislative powers, or at least not in that particular area of intervention (*eg*, the contracting authority itself), then the answer requires a more complex assessment. We will return to this aspect.

Otherwise, in terms of quality, it is very hard, if not impossible, to draw a clear line between possible and impossible (that is, conform, or not, with the EU law). As revealed by the most recent surveys, of those who decided to employ social elements for a greater impact and use public procurement as a policy tool[1330], only a few chose to take good advantage of the evident lack of clarity of both the legal framework[1331] and the relevant case

[1329] See T Daintith, '*Regulation by contract: the new prerogative*' (1979) 32 Current Legal Problems 1.
[1330] According to Trepte, regulatory goals in public procurement are either economic (where the accent is put on market order and economic efficiency), or political (reflecting the use or procurement as a policy instrument) or, finally, international (specific in international arrangements under international treaties *etc*), corresponding to three different models which may interplay, depending on the concrete circumstances – see P Trepte, '*Regulating procurement: understanding the ends and means of public procurement regulation*', Oxford University Press, 2004 (esp. 4 *et seq*). In the EU's specific legislative framework, there is a systematic clash between the economic and the political models, and this thesis tries to capture the gist of this conflict.
[1331] See A Semple, 'The link to the subject matter. A glass ceiling for sustainable public contracts?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 54 *et seq*.

law that interprets it, in spite of the voluntary character of such provisions[1332]. In other words, only a handful of governments and contracting authorities dare to innovate, trying to push thinks as far as possible, while the rest is still reluctant and cautious, owing in principal to the evasive language of the law and the incongruous (and so hard to grasp) decisions of the Court in this area. Unfortunately, the bulk of these examples of 'good' practice have not, with the exception of those examples falling within the patterns already validated by the CJEU, passed any official conformity tests yet, which means that so many of them still remain questionable in terms of conformity with the 'European law'.[1333] For example, in an attempt to raise the bar in hospital catering services, some local authorities (especially in the Northern countries[1334]) have started to include in their procurement practice award criteria linked to the quality, or even the *taste*, of food. This is a very intricate issue and even if one would argue that the quality of hospital food is directly linked to the general principle of decent living conditions and the dignity of human beings, others may reply that this might work with the *quality* of food but not necessarily with its *taste*, since taste is a matter of personal appreciation[1335] *etc* which exceeds the basic human rights area. Moreover, this example brings us back to the discussion on the economic versus the social dimensions of the measures taken in a procurement context. The Court has already established[1336] that a requirement asking bidders to buy local, or eventually grow vegetables which they will sell in the awarding country, is unlawful as it unreasonably places a greater burden on foreign suppliers, in general due to its clear *economic* load (its ultimate aim allegedly being the

[1332] With the exception of the accessibility requirement included in Article 42(1) of Directive 24 and the requirements stemming from other laws, *eg*, those on the standards to be met by vehicles for public transportation or green energy for office products and buildings etc. – see Annex X to Directive 2014/24.

[1333] G Bouwman et al, 'Achieving societal value through public procurement', in Manunza, F Schotanus (eds.), '*The art of public procurement: The art of public procurement, liber amicorum for Jan Telgen'*, University of Twente, 2018. See also A Wiesbrock, '*An obligation for sustainable procurement? Gauging the potential impact of Article 11 TFEU on public contracting in the EU'*, (2013) Legal Issues of Economic Integration 40.

[1334] This was a concrete example given during the High-Level Conference on Seizing Opportunities in the Public Procurement of Tomorrow organized by the European Commission and the Romanian government in Bucharest, in April 2019. The speaker, Ms Katrin Stjernfeldt Jammeh, admitted that such a criterion may easily raise questions with regard to the objectivity of the assessment, but mentioned that it however had passed the test before the *national* courts. We consider that, even if such a requirement is drafted in reference to some generally accepted and sufficiently easily measurable standards – such as those elaborated by the Hospital Caterers' Association (see the 'Hospital Catering Solutions Guide' at http://www.hospitalcaterers.org/media/1927/pf-hospital-catering-sol-guide.pdf), it may still have to pass the mandatory requirements test (of course, provided that it does not fall within one of the direct exceptions to the internal market rules, such as a legitimate public policy exception).

[1335] But not also the *tasteless* food coming from industrial-type agriculture, which raises many sensitive issues of a general interest.

[1336] See for ex Case C-249/81, *Buy Irish*, cited above. For a comparison, see also Case C-222/82, *Apple and Pear Development Council*, [1983] ECR 04083, where the Court established that the national origin of food is not permitted if this is the determinant criterion for the award of a contract whereas, if this is used in connection with other criteria that do not concern the national origin of products, its use is permissible.

boosting of local economy through an aid offered to local producers). On the other hand, when it comes to requiring suppliers to use local workforce (*eg*, for the delivery of catering services), the *social* dimension of that measure would overcome any economic aid and, hence, would be able to justify it. However, with *quality* (*fresh*) *food* things appear to be different as, given its particularities and especially the strong links with concrete standards set under a concrete European social model[1337], the possibility to 'buy locally' is assessed as strong.[1338] Also, in the recent practice of some Member States, issues related to '*animal welfare*' (in the context of procurement of foodstuff) started to crop quite often, which raises specific problems in connection with the access of foreign providers that do not meet the local standards.[1339]

Otherwise, the need to reach a necessary level of harmonization of national technical requirements has opened (since *Cassis de Dijon*?) a generous leeway for standardisation.[1340] The decisive position gained by the European standards in the internal

[1337] See for ex Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, '*Tackling the challenge of rising food prices. Directions for EU action*', COM(2008) 321 final.

[1338] For an in-depth discussion on this aspect, see B Ferk and P Ferk, 'Local preferences as non-discriminatory instrument in public procurement of fresh food', in G Piga and T Tatrai, '*Law and economics of public procurement reforms*', Routledge, 2017. The authors take advantage of the lack of any substantial case law on the ethnocentric practices in this area to identify several possible justifications for a protectionist approach, among which: public finances' hardships and job preservation, consumer protection, food security, national tradition and culture (so all having an evidently social load). Moreover, they consider that, although no clear definitions have been offered in hard or soft law, a distinction must nevertheless be made between 'food quality', 'fresh food', 'healthy food' and 'local food', insisting that fresh (*ie*, unprocessed) quality food has many advantages, including in relation to public health, the preservation of environment and public finances, which in the end correspond to as many policy objectives which might eventually pass the 'public policy' or otherwise the 'mandatory requirements' test (see for ex Recital 41 of Directive 2014/24). From this point of view, resorting to local producers may make sense especially given the disadvantages associated with the need to implement preservation measures when the food is delivered from (far) abroad. In conclusion, the authors recommend implementing a 'buy fresh quality food' as a general criterion in all public procurement of food across Europe following that, where these criteria are met predominantly by *local* providers (which, nota bene, are not necessarily *national* providers), the discriminatory effect to be accepted as such (provided, of course, that the 'local' factor is, as explained above, *not* central in the acquisition process, but rather a consequence of the application of other 'social' or environmental' criteria and, hence, determined thereby – *eg*, the area up to which the delivered food may naturally preserve the requested qualities varies on a case-by-case basis). See also G Stefani, M Tiberti, G V Lombardi, L Cei et al, *'Public food procurement: a systematic literature review*', in (2017) 8 International Journal of Food System Dynamics 4 or, for an interesting view and some concrete examples of good practice, also S Kelly and L F J Swensson, *'Leveraging institutional food procurement for linking small farmers to markets. Findings from WFP's Purchase for Progress initiative and Brazil's food procurement programmes'*, FAO Agricultural Development Economics Technical Study 1, Rome, 2017.

[1339] For discussion, see K Persson, '*Animal welfare, public procurement and the EU internal market - a recurrent dilemma in Swedish policy making?*', Graduate Thesis, Master of Laws program, University of Lund, 2016.

[1340] J Hettne, "Public procurement and European standards: fair competition or limits to discretion?", in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law'*, Hart Publishing, 2019, 122 et seq.

market[1341] as a response to the restrictive national standards[1342] has inevitably influenced also the public procurement market, contracting authorities being compelled to observe various technical standards when drafting their tender documentation. This however appears to be affecting competition by narrowing the level of discretion left to contracting authorities since, as a matter of fact, standard-setting processes are not necessarily controlled, but certainly influenced by operators with greater economic power.[1343]

Public buyers are free to set quality standards in relation to technical specifications, award criteria or contract performance conditions (see Recital 90 from Directive 24, but also Articles 26, 42 or 62 *etc*). In particular, Article 62 permits references to quality assurance standards that attest the level of accessibility for people with disabilities.

Quality standards are, alternatively, attested by labels and allowing contracting authorities to resort to labels when defining the terms of their procurement actually facilitates the intake of sustainable products, services and works.[1344] The market hosts several hundred eco- and social labels. Labels attest not only the minimum quality standards set by law but are, especially since the 1990s, also an expression of the new 'transnational governance' brought about by globalization. A huge diversity of aspects can, and are, covered by labels, and using them could help contracting authorities define better what they want from the market. Many labels include criteria from several areas of practice (*eg*, environmental *and* social). In the social area, in particular, labels could target a wide range of stakeholders (*eg*, workers themselves, but also consumers, local communities, society in general or value chain actors) and could refer to a huge number of criteria — of which some pertaining to fundamental rights such as decent living conditions, non-discrimination based on sex, or the respect of minority rights *etc*.[1345] Other important aspects which could be covered (that is,

[1341] N Aghazadeh, 'Promoting labour standards in global supply chains through consumers' choice: is social labelling effective?', in H Gött, '*Labour standards in international economic law'*, Springer, 2018, 355 *et seq.*
[1342] See for ex. C-45/87, *Commission v Ireland*, 1988] ECR 4929, 'a case that concerned public procurement but which fell outside the scope of the procurement directive applicable at the time. In this case the Court found that, 'by allowing the contract specification for tender to include a clause stipulating that certain pipes must be certified as complying with an Irish standard, Ireland failed to fulfil its obligations under what is now Article 34' (J Hettne, "Public procurement and European Standards: fair competition or limits to discretion?", in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law'*, Hart Publishing, 2019, 122).
[1343] P-T Stoll, 'International economic and social dimensions: divided or connected? in H Gött, '*Labour standards in international economic law*', Springer, 2018, 11 *et seq.*
[1344] R Caranta, 'Sustainable procurement', in M Trybus, R Caranta and G Edelstam (eds), '*EU public contract law: public procurement and beyond*', Bruylant, 2014, 172.
[1345] See N Bahlmann, '*A critical evaluation of social and eco-labels used in the textile industry: their potential impact demonstrated through environmental and social life cycle assessment'*, Harvard University, March 2018, at https://dash.harvard.edu/bitstream/handle/1/37945104/BAHLMANN-DOCUMENT-2018.pdf?sequence=1&isAllowed=y p 23.

certified) by a social label pertain to the fight against corruption, commitment to social-responsibility values, community engagement, prevention of mitigation of social conflicts, delocalization or migration etc.[1346] Social labels are, in fact, 'quality certificates' that incorporate valuable information not necessarily about the *substance* of the procured products or services, but mainly about the *conditions* in which they are either produced / provided, or traded.

It is, in this context, worth mentioning that, during the negotiations around the final text of the procurement Directives, the Committee on the Internal Market and Consumer Protection from the European Parliament collected pertinent opinions from all the relevant institutions, namely the Committee on International Trade, the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Food Safety, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development and the Committee on Legal Affairs.[1347] The report elaborated by Mr. Marc Tarabella comprises an impressive number of amendments proposed by all these institutions. Many of them were especially aiming at the strengthening of the capacity of contracting authorities to enforce social and labour law requirements via public procurement. Unfortunately, many of them remained outside the final version of the Directives. Interestingly though, during the process of reviewing the draft Directive put forward by the Commission, the Court came out with its judgement in the *Max Havelaar* case, which gave a boost to all promoters of sustainable procurement and facilitated the introduction, in the final version of the law, of a specific provision aimed at clarifying how social labels — corresponding to certain social standards — may be used in public procurement.[1348]

However, in line with Article 18(1) of Directive 2014/24, labels could not be used to unfairly restrict competition — a rather vague provision (in fact a general principle) which, in our opinion, should necessarily be read in conjunction with Article 45 of the same Directive 2014/24 (an Article which we construe to clarify the boundaries of the use of labels within which there are sufficient reasons to consider that the free movement rules remain unharmed). Nor could they be used to restrict innovation (as per Recital 75 of the same Directive). Unfortunately, this last aim risks to remain hollow formulae, as it fails to

[1346] Ibidem.
[1347] All these opinions are available at https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0007+0+DOC+XML+V0//EN.
[1348] See Recital 75 or Article 43 *etc*. from Directive 2014/24.

concretely explain how exactly innovation may suffer from the reference to a specific label, and the Court delivered thus far no edifying judgements in this regard.

Anyway, it was eventually decided that, in line with the constant case law of the Court of Justice of the Union, regardless of the circumstances attested by labels, in a public procurement context the requirement to produce a label which corresponds to criteria not linked to the subject matter of the contract (such as CSR labels) is forbidden.

The social labels with the most elusive impact in practice are *fair trade* labels.[1349] They are, in essence, linked to the conditions of trade of the procured food (which may stand as an award criterion or, ultimately, as a performance condition[1350]) rather than to the substance or the method of production of the food itself (*ie*, as technical specifications).[1351] Nonetheless, the use of fair trade labels in public procurement may supposedly have the potential effect of raising local costs and prices up, which in the end may discourage companies not covered by living-wage or fair-trade schemes.[1352]

When social labels concern the production process (of goods) or the delivery process (of services and works), social labels say more about the contractor than about the products or services themselves. To this extent, they either concern the organizational process of the producer / provider (as a component of the relevant management schemes thereof) or the implementation of the contract as such (contract performance conditions).[1353] It would therefore be useful to reiterate that, although it is clear, at least after *Max Havelaar*, that *fair*

[1349] For an interesting discussion on this, see https://fairworldproject.org/not-all-eco-social-labels-are-fair-trade/. See also A Semple, '*A practical guide to public procurement'*, Oxford University Press, 2015.

[1350] From this point of view, it is important to note that, contrary to what the Kingdom of the Netherlands had argued in C-360/10, *Max Havelaar,* that the requirement at issue applied *to the contract* at issue, that is as a condition for performance thereof within the meaning of Article 26 of Directive 2004/14 (see para 102 of the judgement), the Court retained that it was not the case, dismissing that argument not because it reached the conclusion that fair trade labels could not refer to performance conditions in general, but just based on a systemic interpretation of the tender book. It practically retained that the 'clause at issue appear[ed] in section 4 of sub-chapter 4.4 of the [relevant] specifications, entitled 'Suitability requirements/minimum levels', which correspond[ed] to the terminology used inter alia in the title and Article 44(2) of Directive 2004/18, which refer[red] to Articles 47 and 48 thereof, entitled respectively 'Economic and financial standing' and 'Technical and/or professional ability', and that alone could have misled all potential tenderers by convincing them to consider that that requirement referred only to a minimum level of professional capacity as per Articles 44(2) and 48 of Directive 2004/18. Moreover, the Court noted that 'the requirement of respect for the 'criteria of sustainable purchasing and socially responsible business' is, *per se*, not connected to any of the factors limitedly listed under Article 48 of Directive 2004/18. (see para 106 of the judgement). All these may lead to the conclusion that, as a matter of principle, fair trade labels may not be used as selection criteria but, in certain circumstances, they may legitimately be used as performance conditions (or, upon the case, as award criteria).

[1351] See also the Opinion of Advocate General Kokott of 15 December 2011 in C-360/10, *Max Havelaar*, paras 78-80.

[1352] A Semple, 'The link to the subject matter. A glass ceiling for sustainable public contracts?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 68.

[1353] R Caranta, 'Labels as enablers of sustainable public procurement', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 100.

trade labels cannot be used in connection with technical specifications, they may be very well used in other stages of the process (*eg*, as award criteria or performance conditions etc).

Technical specifications may nevertheless be defined by other types of labels such as those referring to the level of accessibility of a specific good, or to the social condition of the staff involved in the production of the goods to be delivered (or, why not, to the quality of food *etc*). These are only some of the possible examples.[1354]

5. Labour and other work-related standards in public procurement: a way to disguise discrimination or a fair path towards genuine sustainability?

Although the use (or imposition) of standards in public procurement is, in general, beneficent, many studies reveal that, in practice, compliance with *labour* standards in rather problematic, especially when relating to working age and labour conditions – mainly in the case of home-based workers or unskilled workers, particularly in developing countries.[1355] In spite of this, *labour* standards are, traditionally, the most used standards in public procurement[1356], which raises a question of conformity of all these procedures with the EU law as such.[1357] Also, according to a constant CJEU case law, labour standards cannot, as such, be used to describe the subject matter of the contract (*ie*, as technical specifications) since they are not 'intrinsic to the quality of the finished product.' However, certain 'business case' arguments – mostly prevalent in the private sector – show that 'adherence to good

[1354] This latter example goes somehow askew with the previous stance of the Commission (see for ex. the Buying Social Guide, esp. p 33). However, the rather stretched semantic of Article 42 from Directive 2014/24 *would* allow for a positive reading – see, in the same logic, M Martens and S de Margerie, *'The link to the subject-matter of the contract in green and social procurement*', (2013) 1 European Procurement and Public Private Partnership Law Review, 12. We on the other hand cannot help taking note of the fact (commented by also Martens and de Margerie) that, according to the Buying Green guide of the Commission - European Commission, 'Buying green! A handbook on environmental public procurement', 2004 (see in particular p 26), the use of worker welfare or the interests of indigenous people as technical specifications in the case of procurement of sustainable timber can hardly be acceptable.

[1355] For other relevant examples in the same direction, see http://sustainabilityskills.net.au/sustainability-skills-resources/sustainability-sectorguides/sustainability-issues-clothing/.

[1356] S Holley, G Maconachie and M Goodwin, *'Government procurement contracts and minimum labour standards enforcement: rhetoric, duplication and distraction*?', in (2015) 26 The Economic and Labour Relations Review 1.

[1357] J Howe, 'The regulatory impact of using public procurement to promote better labour standards' in K Macdonald and S Marshall (eds), '*Fair trade, corporate accountability and beyond: experiments in globalizing justice*', Ashgate, 2007.

labour practices during production processes can contribute to product quality by virtue of the commercial benefits of maintaining a stable, trained and motivated workforce.'[1358]

Social standards relating to working conditions are the most intricate in terms of evaluation and compliance, as their use is targeted at promoting a child-friendly, sweat-shop free working environment, or other labour law values (such as freedom of association and the applicability of collective agreements, working conditions, working hours and fair salaries, equality at work, equal opportunities and discrimination, inclusive policies, social security, measures to fight unemployment *etc*). Some of these conditionalities stem from the legislation referred to under Article 18(2) of the Directive 2014/24 and usually trickle down the supply chain, to the last link (producer or sub-sub-sub *etc* -contractor), but some do no.[1359]

Most of these standards seem to have appeared owing to the need to cover gaps associated with the delocalisation specific to long supply chains but also with the regulation of multinational companies in the area of social and labour *rights*. This multi-level governance fostered the appearance of many transnational *voluntary* standards, such as the UN Global Compact (an initiative aimed at encouraging businesses to adopt sustainable and socially responsible policies, but also to report on their implementation), as well as other standards issued by international organizations of a world-wide reputation such as the International Labour Organization (the labour standards of which gained a strong reputation and are in general assumed as universally points of reference. ILO standards are wildly used in public procurement, probably owing to their 'constitutional' structure, although not all ILO standards are permitted under the EU law – see for ex. the standards set via the ILO Convention No. 94 which, according to CJEU (in particular, the *Rüffert* judgement) cannot justify any derogations from the internal market rules.[1360] Other guidelines that set international standards in terms of SRPP are the United Nations Guiding Principles on

[1358] S Bell and A Usher, *'Labour standards in public procurement'*, background paper for DFID Labour Standards and Poverty Reduction Forum, 23 May 2007, at https://www.gsdrc.org/docs/open/con43.pdf . For an opinion that social considerations *may* be used to define the production process, although the link with the subject matter of the contract may raise problems in certain cases (especially when such criteria refer to child work, or the hiring of long-term unemployed etc) see also M Burgi, 'Secondary considerations in public procurement in Germany', in R Caranta and M Trybus (eds), '*The law of green and social procurement in Europe*', Djøf Publishing, 2010, 132.

[1359] See for ex S Zadek, S Lingayah, and M Forstater, '*Social labels: tools for ethical trade. Final report',* prepared for the European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, 1998, at https://hiyamaya.files.wordpress.com/2009/12/social_labels.pdf .

[1360] See C Hovary, 'The ILO's mandate and capacity: creating, proliferating and supervising labour standards for a globalized economy', in H Gött, '*Labour standards in international economic law'*, Springer, 2018, 37 *et seq*.

Business and Human Rights[1361], the United Nation Convention on the Rights of the Child[1362], or the European Convention on Human Rights[1363]. The United Nations (UN) Guiding Principles on Business and Human Rights (UNGP), published in 2011, set out the principles that govern the relationship between commercial activities and human rights, while the OECD Guidelines for Multinational Enterprises (EMNs) provide a set of government-backed recommendations on responsible business conduct to encourage the positive contributions such enterprises might have to sustainable development. However, any reference to these international standards raises questions on their enforceability at national level, since their lawful application is inevitably contingent on an adequate implementation and enforcement thereof.[1364] *En fin*, the International Organization for Standardization (the ISO) has also come with an important number of *voluntary* standards.[1365] All these standards are placed above the minimum national legal standards set by national governments and, in many cases, the EU legislature resorts to them when setting legal obligations.[1366] Other standards are set at a more focused level, by key international bodies such as the Ethical Trading Initiative (ETI) whose declared aim is to 'promote and improve the implementation of corporate codes of practice which cover supply chain working conditions'[1367]. The ETI has developed a 'Base Code' of such minimum requirements – which overlap and, in some areas, add to, the core-ILO

[1361] https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf
[1362] https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
[1363] https://www.echr.coe.int/Documents/Convention_ENG.pdf
[1364] O Martin-Ortega and O Outhwaite, '*Monitoring human rights in global supply chains. Insights and policy recommendations for civil society, global brands and academics'*, in BHRE Research Series, Policy Paper no. 3, May 2017, 5, at: http://www.bhre.org/policy-papers; See also V Ulfbeck, '*Supply chain liability of the public buyer?*'; in (2017) European Procurement and Public Private Partnership Law Review 3, 325 *et seq*.
[1365] Such as ISO 26000:2010 "Guidance on social responsibility", or, more importantly, ISO/PC 277 "Sustainable procurement". The latter international standard is intended to provide guidance to organisations integrating sustainable development as described in ISO 26000 within procurement, regardless of their activity or size.
[1366] A Hassel and N Helmerich, 'Institutional change in transnational labor governance: implementing social standards in public procurement and export credit guarantees', in Y Dahan, H Lerner and F Milman-Sivan (eds), '*Global justice and international labour rights'*, Cambridge University Press, 2016, 241. According to these authors, 'a common way to include ethical standards into the procurement process is through to sign a so-called graduated bidder declaration asking the bidder to sign a so-called graduated bidder declaration. To demonstrate that the bidder upholds social and labor rights in its supply chain, the company has three choices: firstly, it can provide the procurer with a certification, a label by a multi-stakeholder initiative or a membership in such an initiative. [Second, it can provide] the authority with an equivalent certificate, label or membership in other multi-stakeholder initiatives. Thirdly, the company can undergo an external audit by an independent auditing company to prove social and labor rights compliance in its supply chain. The bidder declaration is accompanied by a market dialogue with the bidders to ensure that they understand and improve their corporate social responsibility performance. In the case that no suitable certificate or label exists for the products the procurer wants to purchase, ILO core conventions can directly be included into the tender. Subsequently, the bidder signs a qualified self-declaration, stating that it will aim to comply with social and labor rights standards in its supply chain, agree with the public authority on targeted measures as to how to achieve its aims and report back to the public authority on its progress' (250-251).
[1367] See https://www.ethicaltrade.org/

standards. The work of both the ILO and the ETI is complemented by that done by various international organizations like the Fair Trade Federation or the Fairtrade Labelling Organization. In the area of public procurement, in particular, transnational private standards are used in the area of labour, fair trade, ethical trade in the supply chains of companies and environmental standards.[1368]

In order to gain traction, labour standards need international consecration and acknowledgement. The implementation of *ad-hoc* standards in public procurement, without strong outsourced credentials risks censure from courts (as this would equate to contracting authorities acting as regulators – an aspect on which we will elaborate further below). In spite of these problematic issues, recent studies reveal that contracting authorities use, at least in certain Member States, on a quite currently basis, tailor-made standards such as labour codes of conducts which bidders need to abide by.[1369]

Labour related considerations are, as opposed to any other social ones, particularly linked to national markets and national interests. This comes from the fact that, as a matter of principle, where cross-border elements are lacking, labour is largely a matter of local concern. Measures taken with purpose to better work conditions are targeted towards *national* labour. Consequently, any measures taken in this area are rather protective measures, as they are designed to cure *local* social imbalances or safeguard *local* jobs. Fundamental social (human) rights, or fair trade, or gender equality, or the inclusion of various disadvantaged groups *etc*, are of a far more general concern. Given their Europe-wide stretch, such objectives may safely be included in public procurement inasmuch as they do not seek to protect local markets and communities but nurture some general values proclaimed as fundamental at the very EU level.

Employment, on the other hand, is (even if the EU has certain competences in this area) the realm of each Member State and, according to Article 5 TEU, the Union may intervene via barely coordinating measures. But things change when a cross-border element emerges. The free movement of workers inside the internal market *is* a matter of EU concern. Where they seek for a job abroad, the fundamental principles and rules enshrined in the Treaties apply directly. But, when employees (that is, persons already having a job in a Member State) are *temporarily* transferred from one Member State to another (the cross-

[1368] Ibidem, 250.

[1369] See for ex A Hughes, E Morrison and K N Ruwanpura, *'Public sector procurement and ethical trade: governance and social responsibility in some hidden global supply chains'*, (2019) 24 Transactions of the Institute of British Geographers (TIBG) 2, 8. See also the DFID (UK Department for International Development) report on '*EU public procurement regulation and core labour standards*', Public World, 2007.

border element) for the delivery of specific works or services abroad (hence, they move not in search of a job in other Member State, but for the provision of certain specific duties under their pending labour contract), a different regime apply. According to Recitals 37 and 98 from Directive 2014/24, the posting of workers from other Member States comes under another sector that has already been harmonized at EU level and that is regulated by the Posted Workers Directive. This simply means that social considerations to do with the concrete working conditions of the posted workers can (in fact they *must*, according to Article 18 from Directive 2014/24) be used based not on the specific provisions contained in the legislation to do with public procurement but on that to do with the posting of workers, which appear to take precedence. However, the applicability of the Posted Workers Directive very much depends on the actual place of execution of the works or services for which the employers were hired. Of course, in case of *supply* agreements, of significant importance may also be the place where the delivered goods were manufactured.

The different approach envisaged by the new Directives on public procurement with regard to *labour conditions* might also be due to the irregular line of CJEU case law on this particular aspect which, in the end, led to greater flexibility and better conditions for workers, but also to a deeper harmonization in this area.[1370] This effect was augmented by the fact that, according to the official messages launched by the European Commission, a Member State's rate of employment and labour market flexibility lay at the core of the EU concept of *competitiveness*,[1371] which generated strong arguments for *direct* interventions and reform. Moreover, 'in view of the social costs resulting from growing inequalities (…), [the most efficient approach] could lie in reclaiming labour law's 'equalising' function through a genuine floor of rights at EU level by making optimal use of the existing means, namely the governance tools at the Union's availability [so, given its huge impact on the market, including public procurement!]'.[1372] From this point of view, it is worth remembering that the posting of workers, which is one of the most intricate matters with significant implications for the public procurement market, has already been harmonized at the EU level (under the Posted Workers Directive) and is hence falling within the scope of

[1370] B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', (2017) Rivista Trimestrale di Diritto Pubblico 4, 79 et seq.
[1371] See European Commission, '*EU Competitiveness Report 2012 – Reaping the benefits of globalization'* Brussels', SWD(2012)299 final, 19-21.
[1372] N Büttgen, '*Which mode(s) of governance for a floor of rights of worker protection?*', presented in June 2013 at the ILERA congress in Amsterdam, and available at: http://ilera-europe2013.eu/uploads/paper/attachment/294/Article_ILERA_congress_final_paper_Buttgen.pdf, 1.

several pieces of legislation which overlap and complement each other (see for example Recitals 37 and 98 from Directive 2014/24).

According to Directive 2014/24, social clauses may include requirements which: (i) apply at the place where the works are executed or services, provided and (ii) result from legislative or administrative acts (adopted at either the EU or the national level), including the international conventions listed in Annex X. This means that, in general, 'improved wage rates and other worker protection clauses can still be contemplated, but they have to be legitimated by national laws and regulations (and hence do not depend upon the discretionary decisions of the contracting authorities).'[1373] Article 18(2) is therefore (and in spite of the arguments adduced by some authors[1374]) a huge step forward. Beyond the general principle contained therein, Directive 24 contains several particular applications thereof. The most important refer to the possibility reserved for contracting authorities to reject tenderers that are proven not to comply with the applicable obligations referred to in Article 18(2).[1375] The latter may however provide evidence of 'self-cleaning'.[1376] Another application of Article 18(2) is the possibility to exclude from the procedure all tenderers who cannot justify an abnormally low price.[1377]

[1373] B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', (2017) Rivista Trimestrale di Diritto Pubblico 4, 80.

[1374] For an in-dept discussion on this Article, see A Sanchez-Graells, '*Regulatory substitution between labour and public procurement law: the EU's shifting approach to enforcing labour standards in public contracts'*, (2018) 24 European Public Law 2.

[1375] See for ex. Article 57(4) a).

[1376] An artifice newly introduced by the 2014 set of Directives with the aim to encourage the redress (especially when this has important *social* implications), before any other sanctions and help both the contracting authorities and the bidders overcome procedural blockages. According to the incipient case law of the Court — see in principle Case C-178/16, *Impresa di Costruzioni Ing. E. Mantovani SpA and Guerrato SpA v Provincia autonoma di Bolzano and Others* (*Impresa*), ECLI:EU:C:2017:1000 or C-124/17, *Vossloh Laeis GmbH v Stadtwerke München GmbH,* ECLI:EU:C:2018:85, where the Court confirmed that *integrity* is, in principle, determinant in public procurement and overcomes any concrete sanctions. In short, the Court acknowledged that it is not the *breach* that should count first but the *trustworthiness* of the bidder. To this end, an exclusion based on a conviction which is 'not yet final' *is* in line with the Directive on public procurement. On the other hand, self-cleaning' may cure even a breach that has been pronounced via an enforceable judgement. According to AG Manuel Campos Sánchez-Bordona, 'the discretion granted to the contracting authority by the national legislation [does not] necessarily [lead] to a disproportionate result. On the contrary, I think that Article 38(1)(c) of the [national law under scrutiny] respects *the necessary balance between the means used and the objective sought, which is simply to exclude from such selection procedures any tenderers that are untrustworthy, precisely because they have failed to dissociate themselves within a defined period from the earlier criminal conduct of their directors*.' (para 83 of his Opinion in C-178/16, emphasis added). This goes in line with the principle of proportionality applicable also to exclusions (which must be fit for the purpose of discouraging any circumvention of applicable laws, including social laws as per Article 18 from Directive 24, and not go beyond what is necessary to redress the harm). For discussion, see S Schoenmaekers, '*Self-cleaning and leniency: comparable objectives but different levels of success?*', in (2018) 13 European Procurement and Public Private Partnership 1.

[1377] See in this regard the judgements rendered in joint cases C-285/99 and C-286/99, *Lombardini and Mantovani*, [2001] ECR I-09233, joint cases C-147/06 and C-148/06, *SECAP* [2008] ECR I-03565 or C-599/10, *SAG ELV Slovensko and Others*, ECLI:EU:C:2012:191.

Also, according to the new Directives[1378] (which carried over the solutions already pinned by the Court in several relevant judgements[1379]), conditions related to social and, in particular, labour relations (such as wage requirements) may be imposed downstream, to the last sub-sub-contractor.

So, as clarified by a long line of CJEU decisions, contracting authorities cannot be refused the right to set award criteria that target specific social preferences, such as those containing concrete public policy goals to do, in particular, with *labour* conditions and standards.[1380] For this reason, it is in general accepted that social criteria (such as those related to working conditions and fair pay) may be used not only as technical specifications (as explained above) but also as *award* criteria.[1381] Alternatively, the Court also openly acknowledged that social and labour law matters may be used as *conditions for the performance* of a public contract[1382] and Directive 2014/24 has consequently consecrated this solution in explicit terms.[1383]

In this context, it is important to note that the Posted Workers Directive takes precedence not only in relation with the Directives on public procurement but also over the Services Directive[1384] which, as *lex specialis*, applies to also services provided under a public procurement contract. Relevant in this regard is not only Article 17 from the Services Directive, but also the accompanying clarifications offered by the Commission, which explained that it actually concerns all matters that come under the Posted Workers Directive, so not only the hard core of employment terms, but also: the definition of the term 'worker'

[1378] See in principal Article 71(1) and (6) of Directive 2014/24.
[1379] See for ex. *RegioPost*, para 84.
[1380] See *Beentjes*, *Nord-Pas-de-Calais*, *Concordia Bus* (which introduced, for the first time, a list of requirements which to be met by such criteria in order to be accepted as valid, among which the necessary link to the subject-matter of the contract, prior advertisement and limited freedom of choice for contracting authorities), *Max Havelaar* (which acknowledged for the first time the possibility to use, as award criteria, certain 'trading conditions'), *Wienstrom* (where the Court admitted that a criterion which has no direct pecuniary value may receive a considerable score in the assessment) or C-247/02, *Sintesi*, EU:C:2004:593 *etc*.
[1381] See for ex. A Semple, 'Living wages in public contracts: impact of the RegioPost judgement and the proposed revisions to the Posted Workers Directive', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost*', Hart Publishing, 2018, 88.
[1382] See, again, *Beentjes*, *Nord-Pas-de-Calais* or *Max Havelaar*. Moreover, in *RegioPost*, the Court made it clear that a bidder who refuses to comply with a condition set for the performance of that contract may be *legally* excluded from the procedure.
[1383] Article 70 from Directive 2014/24. As for Article 26 from the previous Directive 2004/18, it transpires from various sources that it is nothing but a missed opportunity, as neither the proposal coming from France and Belgium during the negotiations (to include an explicit reference to the possibility of seting labour-related conditions) nor that of the Commission (made in the sense of clarifying that such contract performance conditions may not be discriminatory) were eventually discarded – see J Hebly (ed), '*European Public Procurement: Legislative history of the 'Classic' Directive 2004/18/EC'*, Kluwer Law International, 2007.
[1384] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68.

in the law of the host country; the conditions subject to which temporary employment agencies can hire out workers; and, in so far as Member States have expanded the scope of the Posted Workers Directive to sectors other than the construction sector, also to the stipulations regarding the hard core of employment terms in generally binding stipulations in respect of these other sectors .[1385]

On the other hand, better wage rates and other protectionist clauses set in workers' support can still be contemplated, but they have to be legitimated by national laws and regulations (and hence do not depend upon the discretionary decisions of the contracting authorities).

The discussion becomes acute when the (social) rights involved are (or may be) defined as 'fundamental' rights[1386] or, even more acute, when the rights involved are fundamental *human* rights[1387], including (but not limited to) the rights entailed by the European citizenship — an area relatively new and apparently not so easy to grasp and wield.[1388] In such a case, the right balance between the economic values and objectives and the non-economic ones is much harder to strike. This is even more problematic as the Court of Justice of the European Union, through a quite substantial yet so erratic case law,[1389] has indecisively hit either one, or the other plate of the scale.

For example, the link between the right to move freely, reserved for workers or service providers under Articles 45 and 56 TFEU (which are *economic* in nature), and that

[1385] Council document 11153/04, Clarification of the services of the Commission regarding the specific interests in respect of making workers available, with special emphasis on Article 24, Brussels, 5 July 2004, pages 3-6. The consolidated version of the Luxembourg Presidency proposed that these matters be clarified in a number of additional recitals. See: Council document 5161/05, Brussels, 10 January 2005, p. 44 (recital 41b and 41c).

[1386] See for ex. A Tryfonodou, '*The impact of Union citizenship on the EU's market freedoms*', Hart Publishing, 2016 (who discusses about social rights as fundamental rights), C Kaufmann, '*Globalisation and labour rights: the conflict between core labour rights and international economic law',* Hart Publishing, 2007, G Marceau, 'Trade and labour' in D Bethlehem et al (eds), '*The Oxford Handbook of international trade law'*, Oxford University Press 2009, 539–567 or K Nadakavukaren Schefer, '*Social regulation in the WTO: Trade policy and international legal development*', Edward Elgar Publishing, 2010.

[1387] See for ex. O Martin-Ortega and C Methven O'Brien (eds) '*Public procurement and human rights*', Edward Elgar, 2019 or, at a more general level, T Cottier, '*Trade and human rights: a relationship to discover*' (2002) 5 Journal of International Economic Law 111; F M Abbott, C Breining-Kaufmann and T Cottier, '*International trade and human rights : foundations and conceptual issues'* (University of Michigan Press 2006); L Bartels, 'Trade and human rights' in D Bethlehem and others (eds), '*The Oxford Handbook of international trade law'*, 571–95 (Oxford University Press 2009); C Kaufmann et al, 'A call for a WTO ministerial decision on trade and human rights' in T Cottier and P Delimatsis (eds), '*The prospect of international trade regulation: from fragmentation to coherence*' (Cambridge University Press 2011) 323–358.

[1388] Essentially, an indispensable element of European citizenship is formed by *economic* rights (A Veldman and S de Vries, 'Regulation and enforcement of economic freedoms and social rights: a thorny distribution of sovereignty', in T van den Brink, M Luchtman, and M Scholten (eds), *'Soveignty in the shared legal order of the EU*', Utrecht University, Intersentia, 2015, 67). Alternatively, Article 34 TFEU has been defined as a 'fundamental political right', or as 'a subjective public right' – see M P Maduro, '*We the Court. The European Court of Justice and the European Economic Constitution*', Hart Publishing, Oxford 1998, 81.

[1389] For a detailed discussion on this case law, see Section 3 of Chapter IV above.

reserved for EU citizens under Article 21 TFEU (which has an evident social and, to a certain extent, political substance) remains unclear.[1390] The fact is that in substantially all cases to do with the fundamental rules concerning the *economic* freedoms postulated by the Treaties, the Court shunned any discussion on the relevance and implications of Article 21 TFEU. Some took this to mean that the Court simply implied that the free movement rights exercised under Article 21 TFEU are different from the rights exercised by, for example, workers or service providers.[1391] Nonetheless, the Court suggested, on a couple of occasions, that there might be a link between them (still without clarifying the taxonomy behind this link).[1392]

However, in *Rüffert*[1393], the Court read Directive 96/71 in the light of Article 56 TFEU (ex Article 49 EC), to conclude that the German federal legislation failed to meet the conditions laid down in the Directive regarding minimum wages in the host country which are binding on a service provider as regards payment of posted workers. The Court preferred thus to give precedence to the internal market rules even if, by doing so, it created a positive discrimination by favouring *foreign* bidders ─ as they could, based on the *Rüffert* decision, escape the scope of the federal regulation and thus pay lower wages, as opposed to the domestic one, which could not. The Court weirdly shunned any reference to Articles 2(1) TEC and 136(1) TEC then in force (which urged the Community to promote a high level of social protection and ensure that improved working conditions were in place throughout Europe) even if, in its previous case law[1394], it had firmly referred to Article 136 TEC (now Article 151 TFEU) as '*constitut[ing] an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary Community legislation in the social field*'[1395] (emphasis added).

The decision in *Rüffert* came in the particular context where the specific EU legislation concerning public procurement, *ie*, Directive 2004/18, was rather evasive with regard to the implementation of social standards via public procurement.[1396]

[1390] It thus appears that, although discrimination on grounds of nationality may occur as well 'in relation to access to employment or profession', this is construed to rather fall within the scope of Article 45 TFEU. For discussion, see the Study '*Making EU citizens' rights a reality: National courts enforcing freedom of movement and related rights'* elaborated by the European Union Agency for Fundamental Rights, Luxembourg: Publications Office of the European Union, 2018, p.18.

[1391] N Nic Shuibhne, **'***The social market economy and restriction of free movement rights: Plus c'est la même chose?*', in 2018 57 Journal of Common Market Studies 1.

[1392] See for example Case C-293/03 *My* EU:C:2004:821, para 33.

[1393] Case C-346/06, *Rüffert* ECR 2008 I-01989.

[1394] See for ex. Case C-126/86 *Zaera* [1987] ECR 3697.

[1395] *Zaera*, para 14.

[1396] This in spite of the recommendations of the Commission contained in its Interpretative Communication of 2001 - European Commission (2001) Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public

In this regard, the fact that, in *Regio Post*, the Court did not plumb the proportionality of the measure at hand (as accused by some authors[1397]) might be explained by the fact that it had not applied there the test developed in *Cassis de Dijon*, but simply checked the conformity of the national measure at stake with the laws of the Union, concluding that it is indeed conform with the Posting of Workers Directive. Proportionality is necessary, as explained by the Court in its case law only where a measure is *colliding* with the EU law and therefore, in order to be confirmed, it must be justified and proportional. Only 'mandatory requirements' which are, in the essence, harmful for the fundamental freedoms, need to pass a proportionality test. Or, at stake was not the secondary legislation of the Union (*ie*, the Posting of Workers Directive) which the Court found to be applicable and the conformity of which was assumed as such, but a national law. So, the fact that that law was assessed as conform with the Posting of Workers Directive which, in turn, was assumed to be in line with the requirements of the Treaties, brought the former, too, in line with the Treaties.

The *Rüffert* line of cases (and the norms adopted based on it) in fact requires a foray into the application of the ILO Convention No.94 (of 1949) on labour clauses in public contracts[1398] (the origins of which apparently trace back to 1891, when the British House of Commons adopted the so-called Fair Wages Resolution[1399], but which was heavily inspired by the US's Davis-Bacon Prevailing Wage Act of 1931 and the Walsh-Healey Public Contracts Act of 1936[1400]). This convention, adopted under the pressure of the British and the US Governments – which reserved huge budgets for military purposes in the context of the

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procurement, COM(2001) 566 final, 15 October 2001, Brussels – where it made it clear that '*In general, any contracting authority is free, when defining the goods or services it intends to buy, to choose to buy goods, services or works which correspond to its concerns as regards social policy, including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States*.' (emphasis added). It nevertheless appears that during the legislative process that should have led to the adoption of the new set of Directives on public procurement, the debates between the neo-liberal group and the social-democrat one forced a lame compromise where the EC's cited recommendations were honed to the end where no concrete text was adopted and the decision eventually remained in the hands of the Member States, nonetheless under the very strict review of the CJEU (see B Bercusson and N Bruun (2005) 'Labour law aspects of public procurement in the EU' in R Nielsen and S Treumer (eds) '*The new EU public procurement directives'*, Djøf Publishing, 2005, 97–116).

[1397] See for ex. P Bogdanowicz 'Article 56 TFEU and the principle of proportionality: Why, when and how should they be applied After RegioPost?', in A Sanchez-Graells (ed), "*Smart public procurement and labour standards: pushing the discussion after RegioPost*", Bloomsbury-Hart 2018.

[1398] As the provisions contained in the Landesvergabegesetz of the Land Niedersachsenat, at stake in the Rüffert case, were an accurate reflection of Article 2 from ILO Convention 94, and it is presumed that it was only the fact that Germany had not ratified the Convention that prevented the Court from referring to it.

[1399] N Bruun, A Jacobs, M Schmidt, '*ILO Convention No. 94 in the aftermath of the Ruffert Case',* (2010) 16 Transfer (ETUI) 4, 474.

[1400] For details, see Berkeley Journal of Employment and Labor Law, '*Paving the high road: labor standards and procurement policy in the Obama era*', (2010) 31 Berkeley Journal of Employment and Labor Law, 349.

impending World War II and thus gained an important say in the global economy – aimed at bringing the working conditions of those employed to deliver public contracts at the same level with the other workers activating in the same trade or industry.[1401] Unfortunately, only a few states have ratified it so far. Even the UK decided, in 1982 (under Mrs Thatcher's regime) to abolish the Fair Wages Resolution and denounce ILO Convention 94, while in the US, not far later, an increasing number of US states governed by Republicans started to abolish the relevant legislation consecrating fair wages principles. The ILO Committee of Experts on the Application of Conventions and Recommendations, which in 2008 decided to run an investigation into the concrete application of the Convention, acknowledged the fact that it had failed to raise to the expectations of the proponents and was signed by only a small number of states (apparently, not more than one third of ILO members[1402]) but, witnessing the risks still faced by workers in the context of a public contract (in principal those connected with undeclared work, or to do with the offering of the lowest price which, in so many cases, corresponds to the lowest level of wages and / or the lack of any investment in basic equipment and safety gear, etc.) but also the 'significant and growing international pressure to apply labour standards in public contracts, as well as in private contracting in public-private partnerships under a variety of names, including '*sustainable procurement*' or '*social considerations in public contracts*''[1403] (emphasis added), recommended maintaining it in force.[1404] It did so arguing that 'the Convention offers a clear, concrete and effective solution to the problem of how to ensure that public procurement is not a terrain for socially unhealthy competition and is never associated with poor working and wage conditions.'[1405] The fact is that, not being ratified by all EU Member States, it could not be made enforceable across the entire Union, to the effect that it was eventually left outside the list of treaties and conventions contained in Annex X to Directive 2014/24, the application of which is considered mandatory for all Member States.

[1401] H K Nielsen '*Public procurement and international labour standards*', (1995) 4 Public Procurement Law Review 2, 94.
[1402] N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case'*, (2010) 16 Transfer (ETUI) 4, 2010, 475.
[1403] Ibidem, 476.
[1404] See Report III (Part I B) to the 97th Session of the International Labour Conference, ILO, Geneva, 2008, pp.59–60, 99, 107–111.
[1405] N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case'*, (2010) 16 Transfer (ETUI) 4, 2010, 476.

ILO Convention No. 94 does not set *new* labour standards, but it requires that the *existing* standards in a district/industry be effectively applied.[1406] Anyway, since it has been ratified by some (even if not all) EU Member States, ILO Convention 94 remains applicable to them as such. This brings it under the remit of Article 351 TFEU – crafted in strict accordance with the principles of international law and, in particular, with Article 30(4)(b) of the Vienna Convention on the Law of Treaties.[1407] According to Article 351 TFEU, 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. *To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.*' emphasis added). To this end, where a judgement of the CJEU finds that there is an incompatibility between an international agreement (such as the ILO Convention No. 94) and the Treaties, Member States must take all appropriate measures to redress that incompatibility (either by an addendum to that agreement or by, simply, denouncing it).[1408] This was for example the case with the ILO Convention No. 89 which the ECJ found[1409] to collide, as regards the prohibition of night work, with Directive 76/207/EEC on the equal treatment of men and women[1410] and required the Member States involved to denounce it, or the ILO Convention No.96 on fee-charging employment agencies, which was

[1406] S Rühm, '*Labour Law requirements in the context of EU Public Procurement Law and ILO Convention No. 94 - Jeopardy of conflict between the EU legislation and the ILO Convention No. 94*', LLM Thesis, 2015, at http://independent.academia.edu/SilkeVorpahl.

[1407] Available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[1408] K Schmalenbach, 'Art.307 EG-Vertrag'. in C Calliess C and M Ruffert (eds) '*Kommentar zu EU-Vertrag und EG-Vertrag*' (3rd edition), Munich: Beck, 2007, cited by N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case'*, (2010) 16 Transfer (ETUI) 4, 2010 479.

[1409] See Case C-345/89 *Stoeckel* [1991] ECR I-4047; or C-158/91 *Levy* [1993] ECR I-4300.

[1410] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions *OJ L 39, 14.2.1976, p. 40–42*

denounced by Germany in 1992[1411]. The fate of ILO Convention No.94 depends thus on the reading of the *Rüffert* decision in the right constitutional context. One thing is sure: in *Rüffert*, the Court measured the compatibility of the regional law at stake with the provisions of the Treaty on the free movement of services (fundamental rules) but also with the Posted Workers Directive 96/71/EC and found it incompatible. In fact, the Landesvergabegesetz of the Land Niedersachsenat appears not only to have been found incompatible with the internal market rules, but also to have failed to pass the 'mandatory requirements' test devised in *Cassis de Dijon* as the Court, in the development of the reasoning, concluded, based on arguments similar with those used in *Viking* and *Laval*, that that law was not founded on an suitable mandatory requirement as it did not fit the scheme imposed by the Posted Workers Directive[1412] (which appears to be seen as the yardstick in this matters). Based on these considerations alone, the ILO Convention No.94 should have the same fate as the afore-cited ILO Conventions No.89 and 96. Fortunately, as opposed to the latter, Convention 94 appears to be directly connected with the 'Fundamental Principles and Rights at Work' (listed in ILO's Declaration of 1998 and, further, in Annex X to Directive 2014/24) which pertain to a series of key policies and laws adopted at the EU level and which may, in the context opened by Article 53 of the Charter of Fundamental Rights and considering their instrumentality in the promotion and pursue of key EU social policy objectives, be placed on an equal footing with the internal market rules, regardless of the ratification of not of Convention 94 by all Member States or of its compatibility with the Posted Workers Directive.[1413]

Anyway, the fact that ILO Convention No. 94 is not explicitly listed in Annex X to Directive 24 along with the eight ones — allegedly for not having been ratified by all Member States — makes it, similarly to the other ILO Conventions or international accords to which not all Member States have adhered, formally impossible to apply in public procurement procedures carried out across the EU, not even as a matter of course.[1414] At least

[1411] See for ex. R Birk, '*Münchener Handbuch zum Arbeitsrecht'*, 2nd edition, Beck, 2000, 190–468, cited by N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case'*, (2010) 16 Transfer (ETUI) 4, 2010, 480.

[1412] The Court retained that the regional legislation under review applied to just *a part* of the construction sector active in the geographical area of that agreement (*ie*, only to public contracts) and the collective agreement referred therein had not been made universally applicable, which was not in line with what the Poster Workers Directive required.

[1413] N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case'*, (2010) 16 Transfer (ETUI) 4, 2010, 484.

[1414] E Van den Abeele, '*The reform of the EU's public procurement Directives: a missed opportunity?*', ETUI Working Paper 2012.11, at https://www.etui.org/Publications2/Working-Papers/The-reform-of-the-EU-s-public-procurement-directives-a-missed-opportunity.

not under the current EU legal framework, even if such international instruments became part of 'the culture and legal order of [many] EU Member States'.[1415]

On the other hand, the Declaration of Fundamental Principles and Rights at Work encourages all Member States to promote these principles and rights and take all the necessary measures to implement them to the fullest extent. It is therefore all the more weird that other Conventions (such as Convention 94) which, without begetting a fundamental principle or right, contribute directly[1416] to the promotion and implementation of those acknowledged as such by the Declaration of 1998, are not recognized (eventually in the light or Article 53 of the Charter) as having the same *erga omnes* effect.[1417].

The cited Declaration came in response to ILO's failure to force the inclusion of a social clause into the WTO's GPA, which was due mainly to ILO's traditional approach which made it incapable of keeping up with global production processes. This change of approach took place in the context of the intensification of the profile-raising efforts by trade unions, NGOs and other militant organizations.[1418]

In practice however, recent studies confirm that the decision offered by the Court in *Rüffert* was received with reluctance as agreement and implementation of labour clauses are contingent not only upon the general EU regulatory framework, or the Eurozone fiscal policy conditions, but also (mainly) on the peculiarities of each national and sectoral employment system and the specific power resources at the hand for each local administration. Based on these criteria, the literature identified two scenarios of interaction between labour clauses and nationally embedded wage-setting systems, each presenting potential benefits but also limitations: a *compensatory* one (such as the UK system, 'where labour market regulation is weak and social dialogue limited, procurement instruments potentially have a significant compensatory role in harmonising standards between the public

[1415] As per the Annex to the cited Declaration (updated in 2010).
[1416] So, the instrumentality of which (for the envisaged purpose) is incontestable. This approach should be supported by the fact that neither the Declaration of Philadelphia, nor that of 1998, refer *in concreto* to concrete Conventions, but just to rights and principles (the regime of which is governed by a significantly bigger number of norms than those listed in Annex X of Directive 2014/24).
[1417] N Bruun, A Jacobs and M Schmidt, '*ILO Convention No. 94 in the aftermath of the Rüffert Case'*, (2010) 16 Transfer (ETUI) 4, 2010, 485.
[1418] A Hassel and N Helmerich, 'Institutional change in transnational labour governance: implementing social standards in public procurement and export credit guarantees', in Y Dahan, H Lerner and F Milman-Sivan (eds), '*Global justice and international labour rights'*, Cambridge University Press, 2016, 244.

and the private sectors') and a *complementary* one (such as in Germany and Denmark, 'where employment regulation is strong and social dialogue is relatively well coordinated').[1419]

Topical surveys also show that 'pay clauses' are in general used in public procurement *especially* owing to the ILO Convention No. 94 (which most Member States have either signed to make it an official part of their national systems or just assumed indirectly, by the adoption of similar rules, yet without officially becoming a party thereof).[1420] Interestingly, following the *Rüffert* decision, these practices were not abandoned, which led to even more legal uncertainty.[1421] Even more interestingly, the same surveys conclude that the inclusion of pay clauses in procurement legislation is rife particularly in those countries where collective agreements are *not* universally applicable, such as Germany and the UK, as well as Denmark, Norway and Sweden.[1422] 'In all these countries pay clauses in procurement create a kind of compensatory regulation for the absence of comprehensive legal extension mechanisms'. In other countries (such as Belgium, Austria, France or Spain), which are also signatories of the ILO Convention 94, such a practice is much more evident, in general 'due to a very high bargaining coverage as the result of universally applicable collective agreements'. In these latter areas, 'pay clauses in procurement have no additional advantage (…), except possibly for the fact that procurement might create a further area of control and enforcement.'[1423]

6. Between general national-policy objectives and the specific subject matter of the contract

Another thorny issue which only complicates the circumstances under which social considerations may be used in public procurement is the requirement that such

[1419] K Jaehrling, M Johnson, T P Larsen, B Refslund and D Grimshaw, '*Tackling precarious work in public supply chains: a comparison of local government procurement policies in Denmark, Germany and the UK*', in (2018) 32 Work, Employment and Society 3, 546 et seq.
[1420] T Schulten, K Alsos, P Burgess and K Pedersen (eds), '*Pay and other social clauses in European public procurement. An overview on regulation and practices with a focus on Denmark, Germany, Norway, Switzerland and the United Kingdom. Study on behalf of the European Federation of Public Service Unions (EPSU)*', WSI/Hans Böckler-Stiftung, 2012, at https://www.boeckler.de/pdf/wsi_schulten_pay_and_other_social_causes.pdf, 5-23.
[1421] K Jaehrling, '*The state as a 'socially responsible customer'? Public procurement between market-making and market embedding*', in (2015) 21 European Journal of Industrial relations 2, 153.
[1422] Ibidem, 154.
[1423] T Schulten, 'Pay and other social clauses in public procurement – a European overview', in T Schulten, K Alsos, P Burgess and K Pedersen (eds), '*Pay and other social clauses in European public procurement. An overview on regulation and practices with a focus on Denmark, Germany, Norway, Switzerland and the United Kingdom. Study on behalf of the European Federation of Public Service Unions (EPSU)*', WSI/Hans Böckler-Stiftung, 2012, at https://www.boeckler.de/pdf/wsi_schulten_pay_and_other_social_causes.pdf, 15.

considerations (as well as any or all specifications used by the contracting authority to define the conditions of procurement) be linked to the subject matter of the contract. This condition is now stipulated in Directive 2014/24, in explicit terms, in connection with substantially all stages of the procurement process[1424] (namely, in Articles 42(1) – for technical specifications, 43(1)(a) – for labels, 45(1) – for variants, 58(1) – for the selection criteria, 67(2) – for the award criteria and 70, for the clauses on contract performance). By way of exception, criteria linked to the selection of tenderers must not (at least not in *all* cases, especially when concerned with the reliability thereof – *ie*, with the fact that they abide by certain environmental and social standards) be linked to the subject-matter of the contract.[1425] The Commission's Green Paper that preceded the adoption of the 2014 set of Directives explained that the *'[r]elaxation of [the link to the subject matter of the contract] requirement might enable public authorities to go further in pursuing Europe 2020 policy objectives through public procurement*. Among others, it would allow contracting authorities to influence the behaviour of undertakings regardless of the product or service purchased, e.g. in order to encourage more environmental responsibility *or greater attention to corporate social responsibility*. However, when considering such a possibility, *the trade-offs with other policy considerations must be carefully assessed. The link with the subject-matter of the contract ensures that the purchase itself remains central to the process in which taxpayers' money is used*.[[1426]] This is an important guarantee to ensure that contracting authorities obtain the best possible offer with efficient use of public monies.'[1427] It also stressed that not linking their requirements to the subject matter of the contract would make access of small enterprises (in

[1424] As opposed to the previous set of Directives. For example, Directive 2004/18 referred to such a requirement only connection with award criteria (based on the relevant CJEU case law which was called to asses such a possibility only with regard to this limited scenario). Directive 2014/24 (and its contemporaneous sisters) has substantially expanded the scope of this rule, a fact seen by many authors as reflecting a compromise (more scope for social concerns vs more limited room for action) – see A Semple, 'The link to the subject matter. A glass ceiling for sustainable public contracts?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law*', Cambridge University Press, 2016, 65.

[1425] M Burgi, 'Secondary considerations in public procurement in Germany', in R Caranta and M Trybus (eds), '*The law of green and social procurement in Europe'*, Djøf Publishing, 2010, 135.

[1426] This caveat only confirmed the conclusions of the previous Communication on social consideration in public procurement of 2001 – COM(2001) 271 final, where the Commission clarified that the definition of the subject matter of the contract is a task reserved for contracting authorities (for more on this, see H Handler, '*Strategic public procurement: an overview'*, WWWforEurope Policy Paper No 28 (2015), at https://www.researchgate.net/publication/284725763_Strategic_Public_Procurement_An_Overview), and that the EU law contains no provisions with regard to *what* public authorities should buy, insisting therewithal that the "*subject matter of a public contract may not be defined with the objective or the result that access to the contract is limited to domestic companies to the detriment of tenderers from other Member States*' (p12, emphasis added).

[1427] Green Paper, COM(2011) 15, 39, emphasis added.

particular, SMEs) to that contract very hard if not impossible,[1428] especially in the context opened by the new Directives, a principal aim of which is to open up public procurement for small traders[1429] — who have the potential, as proved in practice, to boost the use of SPP (especially due to their niche specialization and know-how).[1430]

The literature expressed certain reserves on the efficiency of such a requirement and on the drawbacks of interpreting the cited legal provisions (and the link to which they refer) too narrowly, insisting that important measures such as those promoting employment of apprenticeship or of long-term unemployed could lose much of their potential if limited to the subject-matter of the contract.[1431] Anyway, the fact remains that the possibility to use such schemes in public procurement is now openly accepted and legally possible, and not linking it to the contract may in fact generate an anomalous practice where contracting authorities use public procurement to impose social-policy solutions also in situations where they do not have, constitutionally, the power to do so as, in general, 'social criteria do not have an immediate influence on the procured product or service, they affect the subject-matter only indirectly'.[1432]

[1428] Green Paper, COM(2011) 15, 40.

[1429] Who account for 99% of enterprises accross the European Union, provide two out of three existing jobs in the private sector and 80% of newly created jobs and contribute to more than half of the total added value created by enterprises in the Union (see S Schoenmaekers, 'The role of SMEs in promoting sustainable procurement', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 173).

[1430] S Schoenmaekers, 'The role of SMEs in promoting sustainable procurement', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016.

[1431] In fact, 'the rejection of social criteria has often been based on an argument that, as social criteria generally do not result in impacts in the use phase (i.e. a change to the function or appearance of a product, or the quality of the service) [hence a direct reference to the 'selling arrangements' line of cases opened by *Keck*, but especially to Case C-531/07, *LIBRO,* which discussed the changes in the use post-selling], they therefore cannot be considered to be linked to the subject matter of the contract.' – see C Weller and J Meissner Pritchard, *'Evolving CJEU jurisprudence: balancing sustainability considerations with the requirements of the internal market'*, in (2013) 1 European Procurement and Public Private Partnership Law Review, 57. For discussion on the applicability of the *Keck* formula in social procurement, see S Arrowsmith, 'Application of the EC Treaty and directives to horizontal policies: a critical review' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law. New directives and new directions,* Cambridge University Press, 2009, Kindle ed., esp. 5938 *et seq*, where the authors considered that 'a general policy requiring contractors for certain services contracts to apply fair working conditions across the workforce would be considered a hindrance to trade even if non-discriminatory, although a requirement included simply in an individual contract might not. (…) *[This] position may possibly differ for goods, based on the Keck jurisprudence, indicating that only certain types of non-discriminatory measures relating to supplies are hindrances to trade* (in contrast with *Alpine Investments* indicating that *all measures affecting trade in services are hindrances to trade*). *On this basis, the above requirement for a contractor to apply fair working conditions across the workforce would be a hindrance to trade in a services contract, but not in a supply contract, although the impact on trade is greater in the latter case*.' (emphasis added). See also A Semple, 'The link to the subject matter. A glass ceiling for sustainable public contracts?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 68.

[1432] M Burgi, 'Secondary considerations in public procurement in Germany', in R Caranta and M Trybus (eds), '*The law of green and social procurement in Europe*', Djøf Publishing, 2010, 130.

On the other hand, linking all criteria to the subject matter of procurement does not take that contract out of the scope of the internal market rules, but the contracting authority must still provide justification for any measures which hinder in any way the cross-border trade and discriminate based on the nationality of the bidders since, as confirmed by the Court,[1433] prohibition of discrimination on grounds of nationality is a particular expression of the principle of equal treatment that circumscribe the application of Articles 49 and 56 TFEU to the specific field of public procurement, and prevents contracting authorities from excluding bidders for non-compliance with an obligation which does not expressly arise from the relevant tender documents or from a specific piece of national legislation, but from 'an [isolated] *interpretation* of that law and those documents'.[1434]

Specific issues arise when the measures or standards used by contracting authorities to define the subject matter of the contract they are about to award are in fact an expression of a concrete *local* (or national) policy as, constitutionally speaking, public policies are in principle meant to be applied and implemented *intra muros* (as an expression of the *territorial* competence of governments). The CJEU case law was concretely decisive in this regard. Thus, according to *Commission v Ireland* and the ensuing line of similar judgements, in a public procurement context governed by the EU law (which involves, before anything, free trade and the freedom of movement of businesses and employees), such measures would inevitably have to be addressed not only to domestic companies but also to foreign ones (otherwise, by limiting their application to only domestic players or, even worse, by simply excluding foreign companies from the equation, there would be generated unpermitted problems of discrimination, unfair competition and inequality).

It is however important to remember that, after a wobbling practice, it was the CJEU which concluded first (and the EU legislator agreed[1435]) that it is mandatory for public buyers to ensure that all the relevant requirements and criteria involved in a procurement process are directly or indirectly connected to that contract or the subject matter thereof. This

[1433] Case C-260/17 *Anodiki Services*, ECLI:EU:C:2018:864, para 36.
[1434] Case C-309/18 *Lavorgna Srl v Comune di Montelanico, Comune do Supino, Comune di Sgurgola, Comune do Trivigliano*, ECLI:EU:C:2019:350, para 20 (emphasis added). The Court also retained that 'By contrast, those same principles do not, as a rule, preclude an economic operator from being excluded from a procedure for the award of a public contract because it has failed to comply with an obligation that is expressly imposed — on pain of the operator's being excluded — by the documents relating to that procedure or provisions of national law in force. (…) The foregoing applies all the more since, according to the settled case-law of the Court, where obligations were clearly imposed in the documents relating to the public procurement procedure — on pain of the operator's being excluded — the contracting authority cannot accept any rectification whatsoever of failures to comply with those obligations (see, by analogy, judgments of 6 November 2014, Cartiera dell'Adda, C-42/13, EU:C:2014:2345, paragraphs 46 and 48; of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 49; and of 10 November 2016, Ciclat, C-199/15, EU:C:2016:853, paragraph 30).' (paras 21, 22).
[1435] See for ex. Recitals 75, 92, 97, 104 or Articles 42, 43, 45, 67, 70 from Directive 2014/24.

condition was first served in *Concordia Bus*[1436] (and further reiterated in *Wienstrom*[1437] *et seq*) where the Court decided that '[w]hile Article 36(1)(a) of Directive 92/50 leaves it to the contracting authority to choose the criteria on which it proposes to base the award of the contract, that choice may, however, relate only to criteria aimed at identifying the economically most advantageous tender (…). *Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.*' – emphasis added (para 59). This particular provision was read as a confirmation of the conclusion that, regardless of the capacity in which the contracting authority is acting when awarding a public contract, it is in principle not public procurement the place to set policies and impose legal standards (or rules).[1438]

Anyway, according to the current legal framework, not only direct linkages are preferred. Conditions or standards which are barely *indirectly* linked to the subject matter of the contract may be also accepted. This may, for example, include use of various life-cycle consting methodologies.[1439] In fact, by offering a significantly larger latitude for contracting authorities to define the subject matter of the contract and also to establish links therewith, the new Directive 24 has in fact extended their freedom in this area (as opposed to the previous norms).[1440]

But, when such conditions are too demanding and go beyond the common practice or standards, the competition itself has to suffer, hence the overall costs of procurement, as there are slight chances that suppliers would be interested in making, fastly, the requested changes (either because it would be too costly for them to implement the required measures – for ex. better working conditions, or just because it would involve a lot of bureaucracy and red tape) and, without competition, prices tend to go high. This holds true even if they decide to do it only temporarily, *ie*, for the duration of that contract, or only partially, *ie*, with limited regard to the employees involved in the delivery of the contract.[1441]

[1436] C-513/99 *Concordia Bus Finland*, esp, para 59.
[1437] C-448/01, *Wienstrom*.
[1438] See A Semple, 'The link to the subject matter. A glass ceiling for sustainable public contracts?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 12 *et seq*.
[1439] For a discussion on the applicability of the LCC in this area, see our comments under n 1228 above and n 1562 below.
[1440] M Martens and S de Margerie, *'The link to the subject-matter of the contract in green and social procurement*', (2013) 1 European Procurement and Public Private Partnership Law Review, 17.
[1441] The example offered by the Dutch laws that oblige contracting authorities to hire long-term unemployed for the execution of public work contracts may be relevant in this regard. They remained basically unchanged since before *Beentjes* (a case concerned particularly with this specific issue) in spite of the fact that, in time, the relevant practice went astray (generating the so-called 'crowding out' effect). Thus, providers now prefer, in

The discriminatory effect of such measures is even more evident in those cases which are meant to generate a coherent and substantial *local* practice which to benefit *domestic* (or local) denizens or trade. This would, consequently, raise serious questions about the compliance of the subject matter of the contract and of all the conditionalities crafted around it with the EU law (and, in particular, the internal market rules).

7. Contracting authorities as 'regulators': the imposition of social goals with no legal or policy background

In basically all its judgements on public procurement, the Court confirmed that sustainable considerations (in particular green and social elements) *may* be included in the equation of awarding a public contract, but only to the extent this does not hinder competition in the internal market.[1442] The fact that many such external factors do have a real potential to restrict or at least denature competition (as explicitly assessed by the Court itself in most of these judgements – see *Beentjes*, or *RegioPost*, *etc*) made scholars[1443] question the real scope of such a requirement.[1444] The answer apparently lies in the *Beentjes* judgement[1445], where

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order to save their budgets but still comply with this requirement, to dismiss their basic staff for, limitedly, the duration of the contract, following to bring them back (while sacking the temporarily hired unemployed) after the contract has been fully delivered. This practically annihilates the very purpose of those laws (*ie*, the reintegration of long-term unemployed), as those who were unemployed before end up in the same situation after the work has been done. See also our comments under n 1551 below.

[1442] See for ex *Beentjes*, *Nord-Pas-de-Calais*, *Concordia Bus*, *Rüffert*, *RegioPost etc*. This conclusion was consecrated as a general principle of EU public procurement in Article 18(1) from Directive 2014/24. It is nevertheless worth remembering that, since the 1970', the directives on public procurement have been quite reticent on the extent of their impact on horizontal policies. And, although they *did* contained sparse provisions preserving certain existing preferential policies (see Chapter II above), the applicability of these provisions was always considered to be contingent upon their compatibility with the EC Treaty (see for ex. Article 29(a) from Directive 71/305). CJEU's decision in C-21/88, *Du Pont de Nemours*, where it confirmed that regional policies were *not* excluded from this rule, is relevant in this regard – see S Arrowsmith and P Kunzlik, 'Horizontal policies under the directives: legislation, jurisprudence and soft law*'*, in S Arowsmith and P Kunzlik, '*Social and environmental policies in ec procurement law: new directives and new directions*' Cambridge University Press, 2009. For an extensive debate on whether competition is a general principle of public procurement or just a direct consequence of the more general principles of equal treatment and non-discrimination stemming from the fundamental rules of the internal market, see A Sanchez-Graells, '*Public procurement and the EU competition rules*', 2nd ed., Hart, 2015 v. S Arrowsmith, '*The law of public and utilities procurement regulation in the EU and the UK'*, vol 1, 3rd ed, Sweet & Maxwell, 2014, 631 or P Kunzlik, '*Neoliberalism and the European public procurement regime*' (2013) 15 Cambridge Yearbook of European Legal Studies 283, 312–356.

[1443] See P Syrpis, '*The relationship between primary and secondary law in the EU'*, (2015) 52 Common Market Law Review 461, or P Syrpis, 'Regio Post – a constitutional perspective', in A Sanchez-Graells (ed), '*Smart public procurement and labour standards. Pushing the discussion after RegioPost'*, Hart Publishing, 2018.

[1444] On the whole, this line of cases shows that, in the exercise of their executive discretion, contracting authorities seeking to engage in responsible procurement by enforcing key employment standards through the contract expose themselves to judicial censure where such conditionalities would result in a distortion of the

the Court explained that, whatever criteria a contracting authority would choose, they may not give an 'unrestricted freedom of choice' to that authority. This should mean that, if chosen *objectively* and *non-discriminatorily*[1446], competition is preserved, even if the pool of suppliers who would qualify is smaller (due to the circumstantiation brought about by the imposition of various qualitative – including in terms of sustainability – criteria).[1447] It only remains to verify whether the inclusion of these circumstances is, *itself*, in line with the EU law or, more to the point, with the accepted exceptions to the rules imposed therein. It also must be clarified *who* has the legitimacy to pursue social considerations in the current EU public procurement context.

The answer to the first question comes, inevitably, from the substantial changes in the EU law itself, at both the constitutional / prime law and the secondary law levels, and the officially acknowledged possibility to circumvent the internal market rules in line with the exceptions consecrated by the Treaties themselves (*eg*, through Articles 36, 45 or 52 TFEU) or the CJEU case law on public policies and mandatory requirements as exceptions to the traditional internal market rules. An in-depth discussion on all these aspects is contained in Chapters II and III above.

As for the right to set up 'mandatory requirements', we strongly opine that, in order for them to be able to justify an exception to the EU fundamental freedoms, they must necessarily be 'officialised' through a legally operable instrument such as policy-generating structures (political declarations and national strategies adopted via various government

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potential competition for that contract, especially where the cross-border trade is affected. This case law also indicates that, where justification is possible, it entails a proportionality test (*eg* they could require payment of domestic minimum wage, or payment of jurisdictionally-adjusted wage levels to the workers employed in the execution of a specific contract – see also A Sanchez-Graells, 'Some reflections on the artificial narrowing of competition' as a check on executive discretion in public procurement', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law*', Hart Publishing, 2019, 86).

[1445] Para 26, which has been further reiterated as such in many other judgements, *eg*, Case C–19/00, *SIAC Construction v. Mayo CC* [2001] ECR I–7725, para 37; Case C–513/99, *Concordia Bus Finland*, para 61, *etc*.

[1446] See, along the same line of arguments, the considerations laid down by the Court in Case C-411/00 *Felix Swoboda*, [2002] ECR I-10567, especially paras 57–60. See also A Sanchez-Graells, 'Some reflections on the artificial narrowing of competition' as a check on executive discretion in public procurement', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law'*, Hart Publishing, 2019, 89, 90 *et seq*.

[1447] This conclusion is supported also by the findings of the Court in *Concordia Bus* – see para 61 cited above. For a different opinion, see A Sanchez-Graells, 'Some reflections on the artificial narrowing of competition' as a check on executive discretion in public procurement', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law'*, Hart Publishing, 2019, esp. 85, 87. See also R Caranta, 'Sustainable public procurement in the EU' in R Caranta and M Trybus (eds), '*The law of green and social procurement in Europe'*, DJØF Publishing, 2010, 15 – who discusses the consequences of the Case C-243/89 *Commission v Denmark* (Case C-243/89 *Commission v Denmark* (the *Storebaelt Bridge*), EU:C:1993:257) where the Court found a clause requiring the extensive use of local materials, consumer goods, labour and equipment 'not in conformity with [Union] law' as, 'by its nature, was likely to affect both the composition of the various consortia and the terms of the tenders submitted' – para 26.

instruments, laws or other administrative tools which may generate binding obligations *etc*).[1448]

As a matter of principle, there is a legal requirement to abstain from any measures which may hinder competition in the internal market. We also agree with other authors that such 'competition-based constraints' apply both to the wielding of *legislative* powers (that is, in the context of the transposition of the EU Directives which, in line with the basic rules of the non-exhaustive harmonization, allows of a certain degree of discretion for the legislatures of Member States and thus encourage, at least in the sustainability area, domestic preferences, or with regard to the elaboration of general policies which contracting authorities must apply as such) but also at the *executive* level (in relation to each contracting authority and its liberty to embrace a sustainable approach).[1449]

On the other hand, it is officially accepted that 'the original objectives of the procurement Directives, as first enacted in the 1970s, are now to be matched with (if not substituted by) further aims, like strategic procurement'.[1450] In this regard it is worth reminding that the Commission, in its Explanatory Memorandum which accompanied its proposal for a new Directive on public procurement (the future Directive 2014/24), insisted – even since the very first line thereof – on the idea that '*The Europe 2020 strategy for smart, sustainable and inclusive growth [COM(2010) 2020] is based on three interlocking and mutually reinforcing priorities*: developing an economy based on knowledge and innovation; promoting a low-carbon, resource-efficient and competitive economy; *and fostering a high-employment economy delivering social and territorial cohesion*'[1451] so that 'the existing public procurement legislation needs to be revised and modernised in order to make it better *suited to deal with the evolving political, social and economic context*.' (emphasis added),

[1448] See S Arrowsmith, '*The law of public and utilities procurement regulation in the EU and the UK'*, vol 1, 3rd ed, Sweet & Maxwell, 2014, A Sanchez-Graells, '*Regulatory substitution between labour and public procurement law: the EU's shifting approach to enforcing labour standards in public contracts'*, (2018) 24 European Public Law 2, or A Beckers, 'Using contracts to further sustainability? A contract law perspective on sustainable public procurement', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016.

[1449] A Sanchez-Graells, '*Public procurement and the EU competition rules*', 2nd ed, Hart Publishing, 2015, 217, 218.

[1450] M E Comba, 'Variations in the scope of the new EU public procurement Directives of 2014' in F Lichère, R Caranta and S Treumer (eds), '*Modernising public procurement: the new Directive'*, Djof Publishing, 2014, 29, 41. For an in-depth discussion on the competence of the European Commission to promote horizontal considerations or impose the use of various sustainable values in and through public procurement law, see S Arrowsmith and P Kunzlik, 'Public procurement and horizontal policies in the EU: general principles. The EC's role in promoting or requiring use of horizontal policies', in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law. New Directives and new directions*', Cambridge University Press, 2009.

[1451] Proposal for a Directive of the European Parliament and of the Council on public procurement, COM/2011/0896 final - 2011/0438 (COD).

which appears to have constituted the most important driver for reformation in this area.[1452] To this purpose, Recitals 2 and 123 from Directive 2014/24 reiterate that 'public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth' and that 'In order to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth, environmental, social and innovation procurement will also have to play its part.' The fact that the majority of over 450 amendments proposed by the European Parliament during the negotiations (of which more than a half contained social considerations) were rejected by the Council[1453] did not change the rapport of forces, sustainability remaining a dominant feature of the new Directive. In fact, as some have justly noted, sustainability, in the new legal arrangement, 'is almost taking over the realm of public procurement.'[1454]

In spite of this evident tendency, there is a particular concern with regard to the possibility that a contracting authority acts as a 'regulatory authority'[1455] and impose – via the contract that it is about to award – specific measures and requirements, without such an action to have been duly based on concrete laws or policies adopted by the customary legislative bodies (hence with *no* legal or policy background, or *beyond* the minimum standards consecrated via the existing laws and policies).[1456] In this context, it is important to

[1452] The same Explanatory Memorandum clarified that one of the main objectives of the new Directive was to 'Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.'

[1453] For a discussion, see M Andhof, 'Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?', S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law'*, Hart Publishing, 2019, 119.

[1454] D C Dragos and B Neamțu, 'Sustainable public procurement in the EU: experiences and prospects', in F Lichere, R Caranta and S Treumer (eds), '*Modernising public procurement: the new Directive'*, DJOF Publishing, 2014, 304.

[1455] 'The economic rationality of the contracting authority is built on that of an individual economic operator acting as a strategically thinking purchaser, and the ECJ in particular has generated in its case law on environmental and social aspects in procurement restrictions on the possibilities for contracting authorities of acting as pure regulators in their purchases.' M Ukkola, '*Systemic interpretation in EU public procurement law'*, Unigrafia, Helsinky University, 2018, 24. In reality, even if the social dimension of the EU's new constitutional framework is reflected into the procurement Directives on both the substantial and the procedural levels, the concrete possibility to include social matters in a public procurement equation largely depends on the observance of the procedural requirements of transparency, equal treatment and non-discrimination which are marks of the internal market rules. Moreover, the entire construct of the Directives is based on the idea of government as a purchaser, and not a regulator! (Ukkola, p 27).

[1456] This is particularly relevant in the context of globalization where 'traditional top-down regulation remains limited due to its narrow territorial scope and the lack of an international consensus on the appropriate form of regulation in relation to social and environmental matters.' – A Beckers, 'Using contracts to further sustainability? A contract law perspective on sustainable public procurement*'*, in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 209.

keep as well in mind that, at least in some jurisdictions[1457], public procurement contracts are administrative *contracts* and, as such, contain, inevitably, clauses which are as such mandatory and cannot be subject to negotiation. These clauses have a binding character and not accepting them *as such* may trigger the immediate exclusion of the denying bidder from that procedure.[1458] On the other hand, the regulatory scope of a clause contained in a public procurement contract is drastically limited, as it would be binding only for the parties to that contract and cannot be enforced by the real beneficiaries of the measure which it contains – *eg*, the workers which it intends to protect or the community which should benefit from the delivery of that contract[1459]. Even more, their effect would, in general, be limited to the duration of the contract itself.[1460] This has the potential to intensify the discriminatory character of such a clause. Moreover, if it is not confined to the context of the contract (that is, linked to the subject matter thereof[1461]) but rather refers to a general behaviour of the supplier, things get (as already remarked) way out of the scope of the EU procurement law — and case law.[1462] It is, in our opinion, precisely the need to set (and maintain) a link with the subject matter of the contract (as understood in the light of the *Concordia Bus* or *Wienstrom* cases and the ensuing official documents elaborated by the European Commission) which constitutes the strongest argument in favour of the idea that contracting authorities cannot create, through their contracts, out of the blue, 'generic' standards and rules (authority as *regulator*) but only, eventually, implement punctual or general policies via concrete measures adapted to the situation at hand (authority as *purchaser* and *implementing actor for rules and*

[1457] Such as France, Romania or Italy.
[1458] This is, for example, the solution provided by the Romanian law transposing the Directive 2014/24.
[1459] We do not agree, on this particular issue, with other authors (see for ex A Beckers, 'Using contracts to further sustainability? A contract law perspective on sustainable public procurement', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016, 219) who see an escape door in Article 1 from the Remedies Directive Directive 89/665/EC on coordination of laws and administrative provisions relating to the application of review procedures to the award of supply and public service contracts – OJ 1989 L395/33. It is rather clear that, inasmuch as the parties that could have an interest in submitting a claim are concerned, many transposing laws refer, limitedly, to suppliers or entities that manifest an interest in bidding for that contract, but not the community or the public, in general. The latter may submit claims based on the common law on administrative disputes but, in general, the general public or the community, as such, is not explicitly acknowledged as having such an interest (and the national case law only confirms this approach).
[1460] M Vogel, '*The added value of tender-based public procurement as an instrument to promote human rights compliance: what impact may be expected from the instrument?*', (2018) 14 Utrecht Law Review 2, 58.
[1461] Which, in the public procurement area, appears to be the standard for the proportionality test. See A Gerbrandy, W Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: How 'social' is public economic law?*', in (2019) 15 Utrecht Law Review 2, 39.
[1462] This effect is explicitly explained in Recitals (97) and (104) from Directive 2014/24. The link with the subject matter of the contract is thus seen as a safeguard which should serve to 'ensure that the purchase itself remains central to the process in which taxpayers' money is used' and to discourage discriminatory practices in the procurement process – see the European Commission, *Green Paper on the modernisation of EU public procurement policy: towards a more efficient European procurement market*, COM (2011) 15 final, p 39.

policies created elsewhere).[1463] The same conclusion may be drawn, for example, from the explicit reference made by the Court, especially in *Concordia Bus* and *Wienstrom*, to Article 11 TFEU – ex Article 6 TEC (in the sense that it practically permits the inclusion of 'environmental protection requirements' into all procurement contracts). The text does not explicitly mention the source of these requirements, but it is obvious that it acknowledges environmental protection as an important policy goal at the very EU level so that Member States are thereby mandated to adopt measures through which to implement it to the fullest extent. This might verify, to a certain extent, also the validity of the so-called 'self-regulation' arrangements.[1464] Things are nevertheless not that simple with social policy 'requirements', since this area is, as opposed to environmental protection, largely – that is with the exception of those aspects regulated under the Treaties (see Article 4(2)(b) versus (e) TFEU) – a matter of *national* competence.[1465]

Acknowledging the 'legitimacy' of a contracting authority's actions (authorities as 'regulator') may also have significant *constitutional* implications. On a general

[1463] This conclusion appears to also be confirmed by other authors – see for ex M Martens and S de Margerie, *'The link to the subject-matter of the contract in green and social procurement'*, (2013) 1 European Procurement and Public Private Partnership Law Review, 17, who cite Arrowsmith and Kunzlik ('*Social and environmental policies in EC procurement law: new directives and new directions*', Cambridge 2009, 213) only to conclude that such an approach is in fact 'consistent with "a [more] general approach […] of allowing governments to implement social and environmental policies as a purchaser, *but limiting use of procurement as a tool of regulation*."' (emphasis added). Moreover, according to Hettne (see J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 36), even if minimum harmonization (of the lack of it) allows, in principle, the use of other externalities such as social or environmental (or, in other words, makes possible a 'constitutional' balance of interests), provided however that the general principles of the Treaties and the relevant case law are observed, '(…) when it comes to procurement, it is not sufficient to consider only these general requirements. *A decision by a contracting authority is not identical to general regulatory measures issued by a Member State. The context is much more specific and the Court has therefore held that a contracting authority must not go beyond the subject-matter of the contract* […]. *Thus, the criteria set by the authority must be linked to the object of the contract and be suitable for ensuring that it is attained*.' (emphasis added).

[1464] Which are not very widely used across Europe but rather characteristic to the Northern countries. See the Danish example given by S Treumer in his 'Green public procurement and socially responsible public procurement: an analysis of Danish regulation and practice', in R Caranta and M Trybus (eds), '*The law of green and social procurement in Europe*', Djøf Publishing, 2010, 58. See also J Black, '*Constitutionalising self-regulation*', in (1996) 59 The Modern Law Review 1, 24-55 (particularly p.27 regarding 'individualized regulation'). For the opinion that public procurement is *not* a regulatory tool, see A Semple, 'The link to the subject matter. A glass ceiling for sustainable public contracts?', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016 (in particular 16-17). For an opinion to the contrary, see A Beckers, 'Using contracts to further sustainability? A contract law perspective on sustainable public procurement', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law*', Cambridge University Press, 2016.

[1465] As relatively recent studies show, 'public procurement in the EU is guided by national policy frameworks, coupled with an overarching EU policy framework that is designed to open up the EU's public procurement market to competition, outlawing "buy national" policies and promoting the free movement of goods and services.' However, as compared with the environmental policies, EU social policies are rare and, where there are, they are rarely coupled with public procurement (S Brammer and S Walker, '*Sustainable procurement in the public sector: An international comparative study'* (2011) 31 International Journal of Operations & Production Management 4, 457).

scale, a government's authority cannot spread beyond national borders and its decisions cannot have extraterritorial effects (except maybe where they regard nationals located abroad). To this extent, it is hard to believe that a (national) measure seeking to protect long-term unemployed may refer, in general, to *all* long-term unemployed, as a ubiquitously-applicable measure, *ie*, including the nationals of other states. Consequently, a law (adopted by a national or regional government of a Member State) requiring that all contracting authorities (located in that State or region) award their contracts to only entities able to deliver them with long-term unemployed is most certainly fated to protect, limitedly, just *local* unemployed. This practically means that a foreign provider can hardly qualify to win that contract by just showing that it may deliver it by hiring long-term unemployed nationals of its own country. Put bluntly, all measures that a government takes are, constitutionally, limited in effect, to the relevant national borders (or citizens) as a *national* social measure cannot have impact on a general scale (except where an EU law would say otherwise), just as a measure taken at the EU level cannot have a worldwide impact (except where such an impact would be assumed via an international treaty – such as the GPA *etc*), but only with regard to the Member States (and the EU citizens). It is therefore hard to believe that a national government can be considered to have been constitutionally mandated to act for the benefit of the nationals of other states (except, probably, for the situation where such a requirement comes from a law with a stronger impact than the constitution itself (*eg*, an EU Treaty or other international treaties or accords etc.)

If the conclusion above is right, any social measure taken at a national level with purpose to promote local values or protect local communities (that is, which is not pursuing a goal established at the very EU level) is *per se* discriminatory, as it forces foreign companies to take and implement measures in another state than that of residence and for the sake of the citizens of that other state. This is in itself and by itself generating additional economic, administrative and financial burdens for these companies, placing them in a less favourable condition than that shared by the domestic suppliers. It is therefore crucial to approach this issue top-down, from the larger, EU context.

On the other hand, as the functional dynamics of EU integration indicates that the economic and the social policy dimensions of the internal market are bound to remain closely intertwined,[1466] this requires a deeper integration of sustainable objectives in *all* areas and at *all* levels. In this context, many authors spotted a need, manifested particularly at

[1466] A Crespy, '*Welfare markets in Europe: the democratic challenge of European integration*', Palgrave Studies in European Political Sociology, Palgrave Macmillan, 2016, Kindle Edition, 805.

national levels, to integrate social values into all decision-making aspects (which corresponds to the obligation postulated in Article 3(3) TEU to integrate social policy goals into all Union's actions and policies).[1467] This nonetheless requires mainstreaming social policy into all aspects of the day-to-day governing. In public procurement in particular, this should go hand in hand with even deeper harmonization and coordination (especially in the social field) and the reach of a higher level of uniformity, as more flexibility usually offers unexpected opportunities for market fragmentation.[1468] Or even corruption. Conversely, the choice made by the European legislature (somewhat imposed by the constitutional principles of conferral, shared competences and subsidiarity) not to standardize the use of social considerations[1469] in public procurement practice correspond to a strong interest to let social policies and social goals to develop freely, based on concrete national specificities and interests (which, in turn, need, as already said, coordinating more firmly).[1470] All these factors are allegedly encouraging not only national governments (/ legislatures) but also contracting authorities with no legislative powers or attributions to integrate social elements into their day-to-day decisions, via administrative tools, even in the lack of any clear policies or instruments of empowerment. To this extent, it is highly relevant that the CJEU case law (apparently) indicates a clear preference for the practice of using social goals under specific legal

[1467] The advantage of this approach is that it is *anticipatory*, *participatory* and *integrated* – for details, see C McCrudden, '*Buying social justice. Equality and public procurement*', (2007) 60 Current Legal Problems 1, 137.

[1468] 'The latter development reveals also the importance of public procurement in relation to harmonization and even standardization of national policies. Public procurement in such cases serves as a conveyer belt for transferring homogenous legal or policy standards across the common market.' - C Bovis, 'The principles of public procurement regulation*'*, in C Bovis (ed), '*Research Handbook on EU public procurement law'*, Edward Elgar, 2016, 57.

[1469] As proposed by some experts – see for ex. C Bovis (cited above, under n 1470) or B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', (2017) Rivista Trimestrale di Diritto Pubblico 4.

[1470] In the absence of harmonization at the EU level, and as long as they do not have a discriminatory, or otherwise a restrictive effect for the cross-border trade, Member States enjoy a broad discretion to take any measure they like in order to safeguard their national interests 'which are deemed fundamental to their identity' and which the EU cannot disregard – except maybe for those shared values for which the Union must, in line with the Treaties, ensure a proper coordination and uniformity – see K Lenaerts, 'The Court's outer and inner selves; exploring the external and internal legitimacy of the European Court of Justice', in M Adams, H de Waele, J Meeusen and G Straetmans (eds), '*Judging Europe's Judges: The legitimacy of the case law of the European Court of Justice'*, Hart Publishing, 2013, 16. This 'value diversity' is sacred for the European Union and the CJEU case law only confirms this conclusion (see for example the *Omega* or *Sayn-Wittgenstein* cases). See also A von Bogdandy and S Schill, '*Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*' in (2011) 48 Common Market Law Review 5 (according to which 'National identity (…) does not enjoy absolute protection under EU law, but has to be balanced against the principle of uniform application of EU law; implementing this duty is a task of both the ECJ and national constitutional courts as parts of a system of composite constitutional adjudication' (1420). Consequently, even where the discretion of the national government is incontestable, and there are no harmonization issues, the Court usually measures the opportunity of a national measure not only in rapport to the national provisions that made it possible (as read in the light of the EU law), but with the internal legal framework of that court as a whole, following to censure any abuses (see for ex Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891).

obligations stemming from concrete legal and administrative provisions (instead of other considerations without a clear legal background).[1471] This however translates into a need to fine-tune the role played by national legislatures,[1472] as it should encourage national lawmakers to intensify their efforts for harmonization, eventually through the specific mechanisms developed in the social policy area, such as the OMC, and through the setting of some coherent policy goals – in line, where necessary, with the goals set at the EU level – and the selection of suitable means of action[1473], including by establishing uniform legal standards, clear procedures and attainable thresholds which to be further pursued by public buyers.[1474]

As for the possibility to set social requirements (eventually linked to the subject matter of the contract but) at a level *higher* than the minimum thresholds established by law (here including the available policies and/or official strategies or even statements[1475]), this is, we say it again, rather hard to accept[1476] especially where such requirements are (effectively or just potentially) harmful for the cross-border trade, precisely due to the difficulties arising in the justification stage, including with regard to the need to pass the

[1471] S Treumer, '*The discretionary powers of contracting entities - towards a flexible approach in the recent case law of the European Court of Justice?*', in (2006) Public Procurement Law Review 3, 71-85. It would probably be relevant to cite here the conclusions of the Court in C-27/15, *Pippo Pizzo* (ECLI:EU:C:2016:404), that 'As the Advocate General points out, in essence, at point 65 of his Opinion, *a condition governing the right to participate in a public procurement procedure which arises out of the interpretation of national law* ***and the practice of an authority****, such as that at issue in the main proceedings, would be particularly disadvantageous for tenderers established in other Member States, inasmuch as their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers.* (para 46, emphasis added).

[1472] B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', (2017) Rivista Trimestrale di Diritto Pubblico 4, 5.

[1473] 'While it may be safe to assume that the ECJ will support such initiatives, especially in cases referring to BSAs [*ie*, 'buying sustainable approaches'] that are fully regulated by national provisions, it may be less safe to forecast whether national legislators will (successfully) undertake such task and lay down a clear and safe regulatory scenario for BSAs or whether they might simply prefer to leave BSAs to the discretionary power of the contracting authorities (and that of courts too).' – B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', (2017) Rivista Trimestrale di Diritto Pubblico 4, 7.

[1474] D Diverio, '*Il ruolo degli stati nella definizione del modello sociale europeo*', in (2015) Studi sull'integrazione europea 3, 515 et seq.

[1475] We could argue that, since a political statement may, in certain conditions, be interpreted as an officially binding measure capable of determining a certain behavior among traders and, as such, of being challenged in court for its hindering effect to the cross-border trade – see Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749 discussed above, such statements may as well lay at the basis of any further actions by contracting authorities, which could see such a statement as a sufficient legal determinant.

[1476] As opposed to what other authors argue – see for ex S Arrowsmith, 'Application of the EC Treaty and directives to horizontal policies: a critical review' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions*', Cambridge University Press, 2009, Kindle Edition, esp 6375 *et seq*. The author suggests that 'the policy of the directives requires that the concept of subject matter of the contract should be expansively interpreted in the context of award criteria, to cover all issues that could be addressed through special conditions' – p 6681.

proportionality test.[1477] The interpretation offered by the Court in *Laval* and *Rüffert* for the thresholds set via the Posted Workers Directive is enlightening in this regard. It could hence be hardly accepted that a contracting authority may adduce arguments residing in the public policy zone, or even reasons linked to a general, overriding public interest, without also being able to justify that it has all the constitutional and administrative tools to intervene in those area in the name of that public interest – see, in the following pages, especially the examples involving schools or hospitals as regulators *etc* (p 375 *et seq*).[1478]

In a nutshell, the practice favouring the use of 'voluntary' *ad-hoc* considerations (*ie*, not necessarily required by an 'external' norm) has the palpable potential to generate a highly fragmented market, with less certain and therefore less cost-effective results. Another problem with this kind of 'indirect regulation'[1479] is that it is inevitably targeting only government contractors, but not *all* the suppliers active on the relevant market (so it doesn't have a general application). The discussion generated by the *Rüffert* case is highly relevant for this discussion.

Even more, by using sustainable criteria in a hieratic manner (in the lack of a general law or policy which to set a uniform trend), contracting authorities are bound to infringe also the fundamental principle of the rule of law[1480] as enshrined in Article 2 TEU and reiterated in the Preamble to the Charter of Fundamental Rights of the European

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[1477] For a similar argument, see M Andrecka and K P Mitkidis, '*Sustainability requirements in EU public and private procurement – a right or an obligation?*', in (2017) 55 Nordic Journal of Commercial Law 1, 78. See also A Gerbrandy, W Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: How 'social' is public economic law?*', in (2019) 15 Utrecht Law Review 2, 39, who use the example of a requirement to employ a high percentage of long-term unemployed (or people with disabilities or from other disadvantaged categories *etc*) to fulfil the promises of a catering contract to conclude that it simply fails to pass the proportionality test (by not being sufficiently linked to the subject matter of the contract).

[1478] As Arrowsmith notes, '[The] restrictions on contract conditions and award criteria [*ie*, requiring that they be linked to the subject matter of the contract] *can be seen as manifestations of a general approach in the directive of allowing governments* ***to implement social and environmental policies as a purchaser***, ***but limiting use of procurement as a tool of regulation***. *This approach is also carried through to exclusion and selection of tenderers, processes which must be linked to a firm's ability to deliver certain contractual requirements (…).* ***The policy behind this approach seems to be to reduce the restrictive effect on trade of using procurement as a regulatory tool*** *and possibly to limit opportunities for abuse of discretion*.' S Arrowsmith, 'Application of the EC Treaty and directives to horizontal policies: a critical review', in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions'*, Cambridge University Press, 2009, Kindle Edition, esp. 6681 (emphasis added).

[1479] S Arrowsmith, '*The purpose of the EU procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies'* (2012) 14 Cambridge Yearbook of European Legal Studies 1, 160.

[1480] H Kováčiková and O Blažo, '*Rule of law assessment – case study of public procurement*', in (2019) 7 European Journal of Transformation Studies 2, 221 *et seq*. In some member States, this is becoming common practice, as such an approach, although debatable in terms of legitimacy and 'conformity with the EU law', is encouraged by also the competent national regulatory bodies – see for example the Guidelines released by the Romanian Authority for Public Procurement (ANAP) – available at https://www.achizitiipublice.gov.ro/workflows/view.

Union[1481] (applicable to both the EU and the Member States institutions), which has further implications in the area of human rights – see for ex. Article 41 of the Charter of Fundamental Rights of the European Union which refers to the right to good administration, another principle of EU law the scope of which was continuously extended by both the CJEU and the ECHR,[1482] and which require public administration to ensure a high level of legal certainty by accessible, foreseeable and consistent actions.

Social priorities pursued by public buyers must hence necessarily be defined at a *legislative* or at least *policy* level. They also have to be defined in a top-to-bottom approach.[1483] So, where policies are crafted at the EU level (*eg*, under a European social model), contracting authorities may *directly* refer to them (or the national instruments that implement them). Otherwise, contracting authorities cannot, in principle, act as regulators and impose, as such, social requirements through/in their contracts ─ unless a concrete national law or policy (the legitimacy of which, in the lack of any links to a European model, remains to be further checked in court) is already in place.

A possibility would nonetheless be to use such criteria (as technical specifications or award criteria or even contract performance conditions) in order to address concrete needs of the people who represent the ultimate beneficiaries of the purchase (that is to say, criteria directly linked to *consumption effects*), provided however that those needs represent a priority in that authority's activity (*ie*, an important element of its public mission) and a continuous concern and, of course, that the applied criteria do not discriminate against foreign suppliers.[1484] A good example may be offered by a contracting authority's decision to

[1481] The principal connotations of which have been explicitly detailed by the Venice Commission of the Council of Europe in its official "*Rule of Law checklist*' (2016) – at https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

[1482] X Groussot, J Hettne and G T Petursson, 'General principles and the many faces of coherence: between law and ideology in the European Union', in S Vogenauer, S. and S Weatherill (eds), '*General principles of law. European and comparative perspectives*', Hart Publishing, 2016.

[1483] T Tatrai and G Piga, 'Supporting social considerations through public procurement: economic perspective', in G Piga and T Tatrai (eds), '*Public procurement policy (the economics of legal relationships)*', Routledge, 2016, or C Cravero, '*Promoting supplier diversity in public procurement: a further step in responsible supply chain*', in (2018) 2 European Journal of Sustainable Development Research 1, 08, 4.

[1484] According to Recital (98) from Directive 2014/24, '(98) It is essential that award criteria or contract performance conditions concerning social aspects of the production process relate to the works, supplies or services to be provided under the contract. *In addition, they should be applied in accordance with Directive 96/71/EC, as interpreted by the Court of Justice of the European Union and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the GPA or to Free Trade Agreements to which the Union is party. Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive. Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the*

procure specific services only from providers that would be ready to return part of the price by investing it in various social projects for the benefit of the local community *etc*.

Yet again, as a matter of principle, contracting authorities are free to use any considerations which are not (directly or indirectly) discriminatory or which do not create concrete or potential barriers to intra-community trade. On the other hand, at least inasmuch as *social* considerations are concerned, their impact on cross-border trade is significant only where they are associated with the promotion (or protection, upon the case) of various *local* concerns. It follows that, where a requirement set in connection with a concrete public contract, even if with no legal or policy background, creates for local bidders a situation no more favourable than that created for foreign bidders, such a condition requires no additional justifications and should in general be accepted as being in line with the EU law hence legally enforceable.

8. Tackling discrimination through public procurement

As it may be easily observed, most of the social features included in the new directives correspond to punctual elements developed under the European social model. One of the most intriguing such elements is that linked to the category of people with disabilities which are supposed to be helped by various schemes implemented via public procurement contracts. This category of people is of particular importance for the EU legislature and several laws were adopted to help them integrate into the society and the economy. However, no law (at least none adopted at the EU level) offers a definition (not even generic) for 'disability' or 'disabled persons'. Nor are there any definitions for other key terms with which Directive 2014/24 is juggling with, such as 'members of disadvantaged minorities'[1485] or 'socially marginalised groups' (see Recital 36 thereto), or 'members of vulnerable groups' (as in Recitals 93 or 99), or even of the 'disadvantaged persons' to which Article 20(1) makes explicit reference. It appears that the EU legislature has allegedly chosen to give a certain

environment or animal welfare and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.' (emphasis added).

[1485] In would probably be useful to recall that, according to Article 2 TFEU, 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, *including the rights of persons belonging to minorities*.' (emphasis added). This should be enough to conclude that the protection of the rights of persons belonging to minorities is a fundamental duty of both the Union and the Member States and a strong justification for discriminatory measures. However, in the lack of clear definitions, this may easily transform into an opportunity for abuse of rights.

degree of discretion to the national *legislatures* (but not necessarily to contracting authorities!) to be able to achieve their *own* social objectives (which in general vary substantially from region to region and from Member State to Member State).[1486] However, helping these people is a priority, there is no doubt about it. But, in the lack of any coherent or unitary definitions, we deem it would in the end be very difficult to make full use of all these opportunities.

Indeed, so far there have been adopted, at the EU level, several laws which concern the people with *physical* disabilities, or with *mental* disabilities, or even the *obese* (which, as explained above, is acknowledged as a particular form of disability). But, no piece of legislation which to define, in general, the common features of 'disability' or of what means to be 'socially disadvantaged or vulnerable' *etc* has been adopted to date. This only means that national policies which strive to include other diseases or affections or other physical or social impairments, not officially assumed as such at the EU level, risk being censured by the CJEU for example for creating additional inacceptable burdens for the cross-border trade.[1487]

Anyway, when it comes to discrimination, a clear distinction should be made between *bidders'* discrimination (which, in general, entails hindering the access of certain categories of people – *eg*, foreign – bidders to a public contract) and *people's* discrimination (in principal, between EU citizens but also other people associated with a EU citizen).[1488] Discrimination (between traders) based on nationality is a matter of internal market concern (since it bears an evident *economic* value and falls, as such under the free-movement rules - Articles 35, *etc* TFEU), while discrimination between the EU citizens *eg*, based on race, or that of the minorities, or of the disabled *etc*, is a matter of *social* concern and falls within the general scope of Articles 2 and 3 TEU. The EU legal framework, as it stands today, allows, in

[1486] A Gerbrandy, W Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: How 'social' is public economic law?*', in (2019) 15 Utrecht Law Review 2, 39.

[1487] This because, 'although restrictions may be justified by reference to an unlimited number of public interest motivations, which include the protection of social interests, the defendant (state) bears the burden of proving justification and proportionality, and the Court has taken a [rather cautious] approach to social justification in its recent case law.' - A Ludlow, '*The public procurement rules in action: an empirical exploration of social impact and ideology'*, (2014) Cambridge Yearbook of European Legal Studies 16, 20.

[1488] In other words, '*school segregation policy discriminating between blacks and whites does not compare to discriminatory income tax rates imposed on citizens of different regions; discrimination between women and men in hiring employees does not compare to a government-contracting decision that discriminates between two computer firms with regard to purchasing computers; discrimination on grounds of religion, race, gender, ethnic origin, colour of skin, etc. is not akin to discrimination that does not involve these types of criteria. All the above examples could involve a possibly unjustifiable form of discrimination and, yet, everyone will agree that the types of discrimination are not the same in the sense that the first kind is more objectionable and more severe than the second*.' (O Dekel, *'The legal theory of competitive bidding for government contracts'*, (2008) 37 Public Contract Law Journal 2, 251, emphasis added).

principle, the sacrifice of the former for the sake of stifling the latter. For example, requiring that the suppliers implement concrete measures by which to ensure that, in the delivery of a public contract, their employees involved in this activity are not subjected to any forms of discrimination may, generally, be acceptable, even if this measure would render that contract less motivating for foreign traders. Such an approach may for example be used to discourage racial and sexual harassment and discrimination against the disabled, or to enhance diversity and equal opportunities with respect to gender, age, disabilities, or cultural heritages, or to stimulate the payment of fair wages and a fair distribution of income *etc*. Similarly, public procurement may successfully be used to enforce respect for human rights in various industries, by for example ensuring human rights implementation and integration in areas such as those to do with child labour, forced labour, freedom of association, or collective bargaining *etc*. Not least, public procurement may be used as an efficient tool against corruption, but also to foster ethical values and ethical responsibilities to the community and society as a whole.[1489]

Even if discrimination creates, as a matter of principle, significant obstacles to the intra-Union trade, some forms of discrimination are, upon the case, accepted. Legal consecration at the EU level serves in general as a good justification for any measures which could discriminate (*eg*, against foreign bidders) whereas the lack of any concrete norms or policies which to justify a discriminatory measure may seriously threaten the validity thereof.[1490] Also, some forms of discrimination *are* subject to legal provisions consecrated at the EU level (either by the Treaties themselves – such as the principle of equal pay for male and female workers for equal work or work of equal value, contained in Article 157 TFEU, or via secondary norms – such as those to do with the protection of the disabled and their accessibility to places, working instruments and basic services, or those concerned with the fight against discrimination based on race, *etc*). Others are, sadly, not.

Discrimination based on race, just as that of the disabled, are among the most destructive forms of discrimination and a source of structural imbalances in most local communities, and their tackling raises, in practice, a lot of sensitive problems. However, although accessibility is a highly topical issue in the 2014 package of Directives on public procurement, *disability*, as a key notion in this area, is overlooked not only in the legislation concerned with particular health issues (as cited above), but also, at a more general level, in

[1489] L Montalbán-Domingo, T García-Segura, M A Sanz and E Pellicer, *'Social sustainability criteria in public-work procurement: an international perspective*', in (2018) Journal of Cleaner Production 198, 1355.
[1490] R Nielsen, *'Discrimination and equality in public procurement'*, in (2005) EU & Arbetsrätt 82.

the EU anti-discrimination legislation itself[1491]. The Employment Equality Directive[1492] (which is the most important piece of legislation in this area) does not provide any clear definition of disability as a ground of discrimination. In the last few years however, the Court has tried to fill this gap and touched upon the concept of disability in several decisions, in the attempt to identify a common ground and provide a general definition.[1493] The ratification by the European Union of the UN Convention on Rights of Persons with Disabilities, has forced the Court to shift from a '*medical*' approach to an explicitly '*social'* one.[1494] The cited convention has thus become a milestone for the CJEU, which came to the conclusion that it is its duty *to define disability in line with the European social model*, under the principle of consistent interpretation.[1495]

Race, on the other hand, is not even mentioned in the new Directives.[1496] Nor is religious (or political) discrimination although, depending on the political context, they

[1491] Thus, although Articles 10 and 19 TFEU confers strong legislative competences to the EU in the area of combating discrimination (including on disability grounds) and the European Disability Strategy 2010-2020 (European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final) proposed a number of ambitious actions, disability remained a vague (rather ethical than legal) concept. A definition of 'workers with disabilities' has indeed been proposed by the General Block Extemption Regulation (Commission Regulation (EU) 51/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1). Unfortunately, it 'refers to national legislation in a vain attempt to respect the diversity of legal cultures and approaches to disability across the Member States.' (S Favalli and D Ferri, '*Defining disability in the EU non-discrimination legislation: judicial activism and legislative restraints*', in (2016) 22 European Public Law 3, 3). For an in-depth discussion on the European social model in the area of 'disability', see, again, S Favalli and D Ferri, '*Defining disability in the EU non-discrimination legislation: judicial activism and legislative restraints*', in (2016) 22 European Public Law 3, esp. 8 *et seq*.

[1492] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

[1493] See for ex Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467, or Case C-303/06, *S Coleman v Attridge Law and Steve Law* [2008] ECR I-5603.

[1494] See for ex. Joined cases C- 335/11 and C- 337/11, HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11), ECLI:EU:C:2013:222, Case C-312/11, *Commission v Italy*, ECLI:EU:C:2013:446 or Case C-363/12 *Z. v A Government Department and the Board of management of a community school*, ECLI:EU:C:2014:159.

[1495] S Favalli and D Ferri, '*Defining disability in the EU non-discrimination legislation: judicial activism and legislative restraints*', in (2016) 22 European Public Law 3, 1. This may explain the decision in *Fag og Arbejde* (Case C-354/13, *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, ECLI:EU:C:2014:2463) where the court decided that obesity *is* a disability.

[1496] Directive 24, just like its previous sister, Directive 18, makes, again, no reference to race as a potential factor for abuses and discrimination (hence forming a disadvantaged group). See for ex. R Boyle, R Boyle, 'Disability issues in public procurement', in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions*', Cambridge University Press, 2009. However, racial issues have always been seen as a serious threat to social integration and regional development, especially in those areas with a long discrimination based on race history, which encouraged governments to include race considerations into public procurement schemes – see C R Noon, '*The use of racial preferences in public procurement for social stability'*, in (2009) 38 Public Contract Law Journal 3, 2009 or R Fee, P Maxwell and A Erridge, *'Contracting for services - a double jeopardy? An analysis of contract compliance in the context of European and UK social and public procurement policy'*, (1998) 13 Public Policy and Administration 1, 80 et

may weight much heavier than customary economic considerations (whence a strong justification under the 'mandatory requirements' mechanism).[1497]

Another sensitive notion is that of disadvantaged people (a syntagma used explicitly by the 2014 Directives, but for which the new laws offer, again, no definition). What are vulnerable/disadvantaged groups? Are single parents a vulnerable group (or otherwise a disadvantaged minority)? What about abandoned children who turn eighteen and need to leave the orphanage as independent adults? Or the refugees? Some Member States include in this category, for example, imprisoned people or those undergoing a rehabilitation programme[1498] just to allow set asides for sheltered workshops that fight for their (re)inclusion. But is there a limit for the creation of such enclaves? The answer is not simple.[1499] It resides, in principle, in the concrete context of each state or region. The economic and social particularities that define these areas may justify (or not) a measure aimed at helping a certain community. Moreover, the viability (or non-viability) of a certain policy or measure targeting a specific category of people largely depends on the specific vehicle through which it is implemented. There is, in terms of discrimination (or its potential

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seq. The latter study at least shows that race prejudices could be a very efficient cross-cutting policy stimulus and that, if implemented correctly, race-fighting policies could cure severe social imbalances. Moreover, empirical studies found (especially based on procurement experiences from territories with a heavy race-discrimination load such as the US, Australia or South Africa) that the employment of black males rose more rapidly among traders who were constant participants in the award of public contracts as opposed to those who were not -- which only proves the impact of public procurement on the market in general (see O Ashenfelter and J Heckman, 'Measuring the effect of an antidiscrimination program' in O Ashenfelter and J Blum (eds), '*Evaluating the labor market effects of social programs'*, Princeton University Press, 1976, J Heckman B S Payner, *'Determining the impact of federal antidiscrimination policy on the economic status of blacks: a study for South Carolina'*, (1989) 79 The American Economic Review 1, J S Leonard, '*The impact of affirmative action regulation and equal employment law on black employment',* (1990) 4 Journal of Economic Perspectives 4, A K Chatterji, K Y Chay and R W Fairlie, '*The impact of city contracting set-asides on black self-employment and employment*', (2013) IZA Discussion Paper 7298, J McNeill, *'Insights into social procurement: from policy to practice*', Social Procurement Australasia, 2015 or G Quinot, 'Promotion of social policy through public procurement in Africa', in G Quinot and S Arrowsmith (eds), *'Public procurement regulation in Africa'*, Cambridge University Press, 2013 *etc*). Moreover, the same studies confirmed an increase in the number of public contracts awarded to minority-owned firms in those areas where affirmative action programs were in place (see T Bates and D Williams, *'Do preferential procurement programs benefit minority business?*', in (1996) 86 American Economic Review 2 *etc*). See also P Bolton, '*Government procurement as an instrument of policy*' (2004) 121 South African Law Journal, P Bolton, '*Government procurement as a policy tool in South Africa*' (2006) 6 Journal of Public Procurement, or R B Watermeyer, '*The use of targeted procurement as an instrument of poverty alleviation and job creation in infrastructure projects'* (2000) 9 Public Procurement Law Review.

[1497] See, again, R Fee, P Maxwell and A Erridge, *'Contracting for services - a double jeopardy? An analysis of contract compliance in the context of European and UK social and public procurement policy'*, (1998) 13 Public Policy and Administration 1, 81. The study describes how the UK used procurement, especially in the 1970s and 1980s, 'in a more purposive way to support the policy of overcoming religious and political discrimination in Northern Ireland'.

[1498] As for ex in the Polish law.

[1499] We should recall that, in *Bettray* and, later, in *Trojani*, the Court already decided that work done under a compulsory *social rehabilitation* programme is *not* 'work' in the meaning of the Union law (so that such forms of activity should escape the internal market rigors due to its evident *social* load which simply overwhelms the economic features thereof) whereas work performed under a *sheltered programme*, is.

to restrict the cross-border trade) a significant difference between requiring tenderers to employ long-term unemployed or ensure crèches for the children of their employees who are involved in the delivery of the contract and are single parents *etc*, and reserving the same contract for sheltered workshops whose main aim is to help unemployed or single parents. The latter has a much more restrictive effect and therefore requires a more careful, and narrow, approach.

CHAPTER VI
CONCLUSIONS

Laying deep in the Keynesian doctrine[1500], the use of public procurement for the implementation of strategic social policy goals has long been promoted as one of the best solutions for stimulating the economy but also for redressing severe social imbalances. This is in general explained by the fact that 'the award of public contracts is not a mere economic activity, but necessarily implies broader considerations of political philosophy, oriented towards attaining the economic and social welfare of the citizens.'[1501]

However, the clash between the economic and other (sustainable) dimensions of public procurement have, since the first years of integration, when protectionist practices were still very strong, made rounds in the dedicated literature. While some authors continue to stress that economic development can only be achieved in a competitive environment[1502] and that any attempts at driving innovation or social orientation or other sustainable goals via public procurement undermines its own efficiency and effectiveness[1503], many others militate for the instrumentality of public procurement and its crucial role in the implementation of various policy objectives.[1504] Without trying to side with any of the parties, we have tried to show, throughout this thesis, that the process, at least at the EU level and among all the EU institutions, evolved, not necessarily surprisingly, to respond to the most stringent needs of this extraordinarily complex construction that is the European Union. After a contorted evolution, the sustainable dimension of the internal market therefore became a prime feature thereof.

[1500] M A Corvaglia, *'Public procurement and labour rights towards coherence in international instruments of procurement regulation'*, Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 1447; P Trepte, '*Regulating procurement: understanding the ends and means of public procurement regulation*' (Oxford University Press 2005), 137-141.

[1501] Corvaglia (n 1502), 1785.

[1502] See for example S L Schooner, '*Desiderata: objectives for a system of government contract law'* (2002) 11 Public Procurement Law Review, A Sanchez-Graells, '*Public procurement and the EU competition rules'*, 2nd ed., Hart, 2015 or A Sanchez-Graells, '*Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies*?', presented at the UACES 45th Annual Conference, Bilbao, Spain, September 2015 and available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638466, last visited 14 November 2019.

[1503] S L Schooner, 'Commercial purchasing: the chasm between the United States Government's evolving policy and practice, in S Arrowsmith and M Trybus (eds), '*Public procurement: the continuing revolution'*, Kluwer Law Internationa, 2005.

[1504] See for example the literature signed by McCrudden, Arrowsmith and Kunzlik, Semple, Caranta and Trybus *etc*.

There are various ways to justify the inclusion of social requirements and considerations in a public procurement equation. They have generally been subsumed into two principal categories, one of an economic nature and the other having a political character. Systemically and constitutionally speaking, it cannot be ignored that governments are not only mere buyers, but also political actors and wielders of public functions. In this context, their role as promoters of economic and social welfare for the community that they represent cannot be demoted, when procuring goods and services, just for the sake of public purse (the functioning of which is usually dominated by the principle of maximizing the economic efficiency by economies of scale). As architects of various public policies, they must ensure their implementation in a holistic, structured, strategic and coherent way. Public buyers are not only buyers, but also guarantors of the enforcement of any and all laws and policies subsumed to their public mission. Also, by their decisions, they are bound to influence the behavioural evolution of the entire market, change the suppliers' habits and encourage (or, upon the case, discourage) innovation.

Economically speaking, 'the instrumental use of procurement has the potential to effectively address the problem of negative externalities and to enable their costs to be internalised.'[1505] On the other hand, public buyers ensure, through public procurement, that communities are served with all the necessary goods and services, in particular with those of general interest which the people they serve cannot easily procure themselves from the market due to a poor or inadequate supply (*eg*, infrastructure, water and sanitation, social protection, health and education *etc*). This in the context where 'the achievement of social equality does not necessarily constitute a goal, or a priority of private business firms and it is not in the interest of the firms to provide a level of social and labour protection comparable to the level desired by the national governments.'[1506]

Against the use of public procurement as an instrument in the implementation of external (in particular, social) policy goals have been adduced, beyond legal and political arguments, also several practical ones, among which a significant increase in the overall costs, the creation of unnecessary administrative burdens, the real difficulties in balancing the so many objectives, many of which even collide, and the undermining of transparency which,

[1505] M A Corvaglia, *'Public Procurement and Labour Rights Towards Coherence in International Instruments of Procurement Regulation*', Studies in International Trade and Investment Law, Bloomsbury Publishing, 2017, Kindle Edition, 1817.
[1506] Ibidem.

in the end would translate in an abuse of power and a failure of the good governance principle.[1507]

In the EU context, the possibility for public actors to buy social impact is limited. These limitations are stemming in principle from the internal market and the competition rules. Based on these rules, for example, any domestic initiative or law suggesting or requiring that contracting authorities buy local is impinging on the very essence of the internal market, therefore not conform to the EU law.

The question then remains on exactly how much social can public procurement take in in this environment? One thing is sure: given the specific reasons behind the enforcement of the EU procurement legislation, the freedom of action conceded for the national governments of the Member States is limited. They are allowed to protect their nationals but only to a certain extent, *ie*, up to where the collision between the economic dimension and the social dimension of the procurement process renders the internal market (or the competition) rules ineffective.

In the lack of precise clauses in the fundamental laws of the Union, it is the Court of Justice of the European Union that was called to enter into a complex process of assessment and interpretation. Its conclusions are yet not so simple to decode.

Strategically speaking, the implementation of specific social (and, in general, sustainable) considerations via public procurement may occur as early as possible in the process. According to some authors[1508], the mere decision to buy or not to buy something can determine the path to follow (for example, a contracting authority may decide *not* to buy something simply because the purchase of that something may impact heavily on the environment, or on other particular social aspects that connote that community's common life. Or, to the contrary, it may decide to buy it). As a matter of principle, public buyers enjoy, with a few exceptions (see above, with regard to the limitations imposed by the reference to a number of secondary laws which place an obligation on public buyers to purchase ecologically friendly products[1509]) a really wide latitude of liberty in deciding *what*

[1507] Ibidem.
[1508] S Arrowsmith, '*Horizontal policies in public procurement: A taxonomy',* in (2010) 10 Journal of Public Procurement 2, 149-186.
[1509] Where the Union itself requires that contracting authorities promote social or environmental interests, this is no more an option for them, but a clear obligation which, as such, restricts the discretion which contracting authorities may have with regard to what to buy (the setting of the subject matter of the contract) - J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 38.

to buy (*ie*, the subject matter of the contract).[1510] This decision is nevertheless objectively contingent upon several factors, among which the real needs of that authority, the available budgets, the policies it is called to implement and so on, and the impact on trade must be assessed on a case-by-case basis.[1511] Moreover, given the 'pragmatic' character of the sustainable considerations (which, in general, are a reflection of specific policies and, especially those with social load, define features which are not *directly* linked to the substance of *what* the authorities want to purchase), they are in general supposed to bow to the procedural principles laid down in the text of the Directives on public procurement.[1512]

The instrumentality of public procurement also triggers certain constitutional concerns. For example, it is only normal for a city hall to seek to implement various social considerations via its public procurement (the instrumentality thereof is normal here, as city halls are habitually called to act for the protection of local environment, or the integration of the disadvantaged or, more generally, to raise the standard of living in the area etc.). They customarily do so by decisions (*eg*, of the city councils *etc*) which, in general, fall within the general definition of 'law'. But when the same considerations are used by a hospital, or a school, *etc*, things are different, as such institutions have a specific, limited role (*ie*, administrative scope) and cannot pursue, at least not easily and not without an explicit mandate, goals external to their public mission — unless the promotion of such goals by such institutions is permitted or even imposed by a law or policy adopted at a higher level, by a competent body (see the Dutch case, where *all* public institutions are called, by government

[1510] For the conclusion that 'what to buy decisions' or 'excluded buying decisions' should normally not be treated as restrictions on trade see J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 37 or Arrowsmith and Kunzlik, 'Public procurement and horizontal policies in EC law: general principle*s'*, in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions'*, Cambridge University Press, 2009, 25.

[1511] J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 38.

[1512] See for example para 31 of the Beentjes case. Thus, allegedly, 'the fundamental logic of public procurement legislation is of *procedural nature* (a tendering procedure), [therefore] the Court has chosen to *prioritize* legal standards based on the procedural rights of the economic operators in a procurement process by presenting these standards as principles. The *system* of public procurement legislation has been built on these procedural rights (…). The competitive tendering procedure does, by itself, nothing to promote environmental or social protection or innovations. The *objectives* of EU public procurement legislation have been used more as *counterweights* (supporting a choice made by the contracting authority in terms of its decisions concerning requirements, subject-matter or other criteria) with a lesser autonomous status than the principles of equal treatment. Although these objectives of policies mirror the *desirability* of a certain state of affairs, they cannot, by themselves, completely override the protection of the procedural rights of the economic operators in a procurement procedure.' (M Ukkola, '*Systemic interpretation in EU public procurement law*', Unigrafia, Helsinky University, 2018, 49). According to this author, 'moral reason (principles) set limits to the use of pragmatic reason (policies). Consequently, social, environmental or innovation considerations cannot be invoked in overriding the principles of equal treatment, transparency or proportionality. On the other hand, the principles of equal treatment and transparency *do not prevent* contracting authorities in taking account such considerations, especially *within* a procurement procedure.' (Ibidem).

or regional laws, to contribute to the protection of the environment or the promotion of social values by concrete measures).

Historians of public procurement retained surprisingly early examples of sustainability.[1513] The overwhelming bulk thereof consisted of measures destined to protect *local* economies, *local* communities, *local* people, *local* employment market.[1514] This practice started nonetheless to be censured in the context of the conclusion of a number of international treaties which aimed to ensure a stable framework for cross-border trade between the signatory states and asked for non-discrimination.[1515] The GPA, as the paradigm on which the very legal framework of the European Union was built, is one of the most important examples in this regard.[1516] But sustainability remained a topical issue and a

[1513] See for ex. C McCrudden, '*Buying social justice: equality, government procurement and legal change'* Oxford University Press 2007. At the EU level however, a time-lapse assessment would conclude that social public procurement became fully fledged only after 2000 – as until the late 1970s, public procurement entailed an essentially economic approach (price, quality and risk assessment), whereas between 1970 and until 2000, the star was the environment. Progressively though, social procurement grew from a merely legal character (*ie*, minimum involvement and external force) to an ethical issue (more philanthropy and CSR-oriented). The paradigm soon evolved further to require active engagement (the collaborative face of it) and, finally, to an essential policy instrument – for discussion, see A Horsnell, '*Exploring social procurement'* – presentation delivered at the Community Innovation and Social Enterprise Conference, 9 July 2015, available at https://www.cbu.ca/wp-content/uploads/2015/12/Exploring-Social-Procurement-Andy-Horsnell.pdf. See also L Knight, C Harland, J Telgen, K V Thai et al, '*Public procurement: international cases and commentary'*, Routledge, 2007.

[1514] See for ex C McCrudden, '*Buying social justice: equality, government procurement, and legal change*', Oxford University Press, 2015, 13, or C Cravero, *'Socially responsible public procurement and set-asides: a comparative analysis of the US, Canada and the EU'*, in (2017) 8 Arctic Review on Law and Politics, 176. However, this practice has proved that, 'Where jobs are lost to non-national service providers, society has to bear the costs of rising social security payments. Consequently, procurement decisions that have these sorts of social consequence may not represent best value in its broader (national) societal sense. This is why procurement decisions can prompt such intense political debate and public reaction.' – A Ludlow, *The public procurement rules in action: an empirical exploration of social impact and ideology'*, (2014) Cambridge Yearbook of European Legal Studies 16, 17.

[1515] See for ex the World Bank, 'Preferential public procurement' – a study prepared in 2016 by the World Bank Group for the G20 Global Platform on Inclusive Business, at https://www.inclusivebusiness.net/sites/default/files/inline-files/Preferential%20public%20procurement_for%20web_final_0.pdf, 6.

[1516] For an in-depth discussion on the provisions on sustainability contained in the GPA see M A Corvaglia, '*Public procurement and labour rights towards coherence in international instruments of procurement regulation'* (Studies in International Trade and Investment Law), Bloomsbury Publishing, 2017, M A Corvaglia and K Li, '*Extraterritoriality and public procurement regulation in the contextof global supply chains' governance'* in (2018) 16 Europe and the World: A law review 2(1), A Semple, '*Reform of the EU procurement Directives and WTO GPA: Forward steps for sustainability?*', 2019, at https://www.academia.edu/6659397/FORWARD_STEPS_FOR_SUSTAINABILITY_REFORM_OF_THE_EU_PROCUREMENT_DIRECTIVES_AND_WTO_GPA, or S Arrowsmith, J Linarelli and D Wallace (eds), "*Regulating public procurement: National and international perspective*", Kluwer Law International 2000. However, relatively recent studies confirm that, in spite of the clear instructions contained in the GPA aimed at censuring preferential practices, they are still widely spread – see M Mougeot and F Naegelen, *'A political economy analysis of preferential public procurement policies'*, (2005) European Journal of Political Economy 21, 484.

priority on the agenda of many landmark international organizations.[1517] After the creation of an internal market (especially after the first economic crisis in the early 1970s), and since more and more European states became members of the Community and later Union, all forms of discrimination[1518] became *non grata* also in the intra-European context.[1519] In an interesting twist of fate however, and in principle owing to a spiral of economic crisis which caused serious social and political ferment, the European actors conceded that intervention in the social area was no longer avoidable. It was in fact extremely necessary. In such favourable circumstances, it was only normal that the first burgeons of sustainability in public procurement appear across the EU.

Thus, inspired by a long practice of other, non-EU countries, like the US, Australia, or Japan *etc*, the EU Member States started to use public procurement as an implement of sustainability. Step by step, public procurement moved from a merely *technical* instrument which helped governments find the cheapest solution that fitted their needs, in a continuous struggle to make economies of scale, to a multifaceted *policy* tool.

Especially in the last years, public procurement has evolved to reach the highest degree of complexity. A recent survey ran by a group of high-profile experts revealed that, on a worldwide scale, procurement systems cover a very wide latitude, from very rudimentary to very complex, the last and most evolved ones being placed on the seventh (and last) stage of development on a scale where sourcing and delivering goods and services is the roughest way of using public procurement, and at the bottom of it, while the deliverance of broader government policy objectives is the most refined form thereof (see *Figure 4* below). And, read holistically, in the whole political/policy, social and economic context, the actual European procurement model seems to be aiming at the top of this pyramid.

[1517] See for ex. UN, '*Public procurement as a tool for promoting more sustainable consumption and production patterns*, (2008) Sustainable Innovation - Briefs 5, or WTO, '*Competition policy, trade and the global economy: existing WTO elements, commitments in regional trade agreements, current challenges and issues for reflection'*, authors: R D Anderson, W E Kovacic, A C Müller and N Sporysheva, Staff Working Paper ERSD-2018-12. See also the World Bank's '*Sustainable Procurement. An introduction for practitioners to sustainable procurement in World Bank IPF projects'*, April 2019.

[1518] Including reverse discrimination: a constant case law from the Court shows that preliminary questions may be addressed the Court when a national government creates breaches favouring reversed discrimination for its own citizens and firms even if there is no clear cross-border interest.

[1519] In this context, many studies showed that discrimination in favour of domestic traders too often responds to concrete interest groups. Thus, instead of maximizing the welfare of *the community*, in general, national governments are captured by domestic producers and choose awarding rules in favour of domestic firms (see M Mougeot and F Naegelen, *'A political economy analysis of preferential public procurement policies'*, (2005) European Journal of Political Economy 21, 484, 485). Faced with these risks, the European legislature decided to follow in the footsteps and adopt strict rules which to preserve the fundamental freedoms, while the Court went even further and invaded territories which before that were traditionally seen as 'sovereign' enclaves.

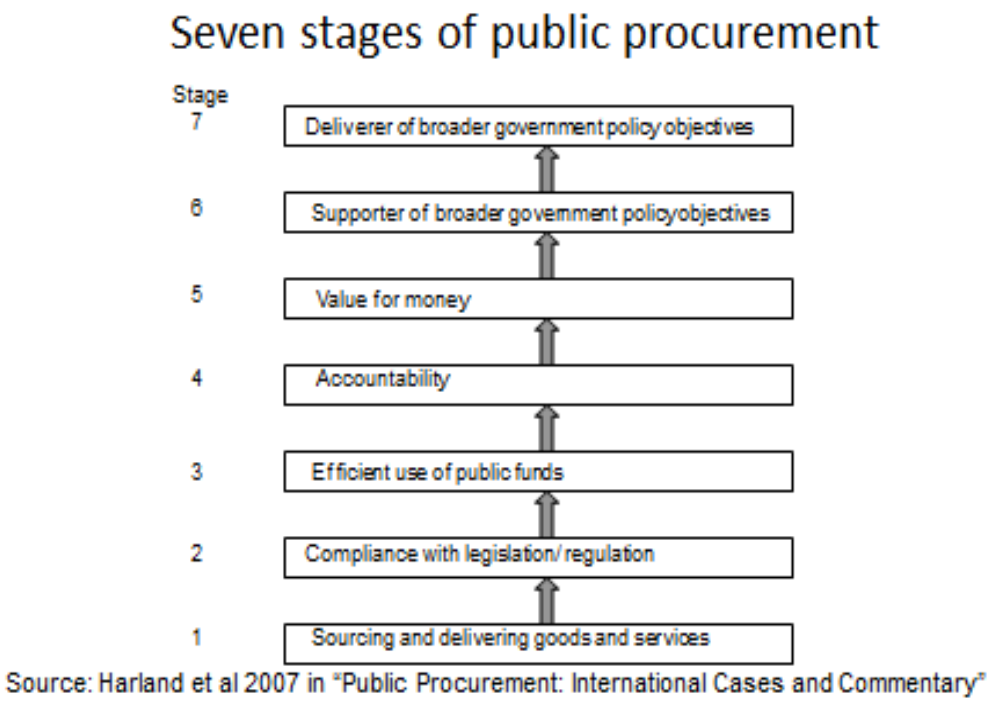

Figure 4: *The seven stages of public procurement*[1520]

In this last scenario, public procurement is not used to purchase goods, services or works, but such purchases are in fact a *pretext* for the implementation of various sustainable goals (seen as the *principal* goals). In practice however, the best promotors of this solution at the EU level are some of the Northern countries (the Netherlands, Sweden, or Finland) and France, with the UK very close behind. Some nonetheless remained reticent. At the other pole, there are Eastern European Countries like Romania or Bulgaria. The latest maps of good practices reveal that, even after the adoption of the 2014 package, there still are (at the EU level) huge gaps between Member States, which remain placed on several stages of development.[1521]

Nonetheless, driven by the massive changes brought about at the EU's political and legislative levels, public procurement has eventually become (at least in the EU context) not only a strategic instrument in the implementation of various policy goals but a *policy in itself and by itself*. It is hence generally accepted that contracting authorities are

[1520] See L Knight, C Harland, J Telgen, K V Thai et al, (eds) '*Public procurement: international cases and commentary'*, Routledge, 2007.
[1521] See for example the mapping revealed by the BSI- Buying for Social Impact Project or the official data offered by the Single Marker Scoreboard.

given a wide range of discretion about *whether* and *how* to incorporate sustainable considerations into their procurement arrangements.[1522]

But, owing precisely to its instrumental nature, public procurement is inevitably caught in the clash between the traditional internal market and competition policy rules, on the one hand, and those accompanying the new approach set forth in the Treaty of Lisbon, in particular the ones pertaining to the social policy, on the other hand.[1523] In spite of this conflict, free market remains, as the dedicated literature have justly observed, a "neutral and timeless notion" which rather needs to be construed as "a means to increase welfare".[1524] Unfortunately, the EU law seems placed somewhere between international law and national laws and, due to the specificities and atypical patterns associated with this pose, has got significant holes in it.[1525] The Court tried to fill out as many such holes as possible, through innovative solutions which brought about new procedural rules, and isolated a set of new principles (such as that of transparency, non-discrimination and effectiveness) as stemming from the Treaties but the efforts of the Member States to adapt to these requirements while preserving a certain level of discretion continued, to a significant degree, to be hieratic. Surprisingly though, and in spite of a idiosyncratically weird, totally unpredictable and sometimes contradictory case law, the EU public procurement law makes an exception. With its thick set of substantial, procedural and remedies provisions, it seems to be an 'especially vivid and well-developed corner of EU internal market law'. In short, the EU procurement law is 'internal market law made *better'*.[1526]

It nevertheless fails to clarify *what* social considerations are suitable for this purpose, as not *all* social values fall within the ambit of the Treaty exceptions (in particular

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[1522] B Sjåfjell and A Wiesbrock (eds), *Sustainable public procurement under EU law – new perspectives on the state as stakeholder*', Cambridge University Press, 2016; R Caranta and M Trybus (eds), '*The law of green and social procurement in Europe*', DJØF Publishing, 2010; S Arrowsmith, '*The purpose of the EU procurement Directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies*' (2012) 14 Cambridge Yearbook of European Legal Studies 1; P Kunzlik, '*Neoliberalism and the European Public Procurement Regime*' (2013) 15 Cambridge Yearbook of European Legal Studies 283, M Andhof, 'Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law*', Hart Publishing, 2019.

[1523] See C Barnard, "EU 'Social' policy: from employment law to labour market reform" in P Craig and de G Búrca (eds.), '*The evolution of EU law* '(2nd ed), Oxford: Oxford University Press, 2011, 641 or M Ross, 'SSGIs and solidarity: constitutive elements of the EU's social market economy?' in U Neergaard, E Szyszczak, van de J W Gronden, M Krajewski (eds.), '*Social services of general interest in the EU',* T.M.C. Asser Press, 2013, 99.

[1524] E Manunza, W J Berends, 'Social services of general interest and the EU public procurement rules', in U Neergaard, E Szyszczak J W van de Gronden, M Krajewski (eds.), '*Social services of general interest in the EU',* T.M.C. Asser Press, 2013, 380.

[1525] S Weatherill, 'EU law on public procurement: internal market law made better', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law*', Hart Publishing, 2019, 22.

[1526] Ibidem.

social policy goals) or under that of the possible mandatory requirement schemes.[1527] We argued above that social-policy values and objectives may reasonably easily be included in the public procurement processes to the extent they are also consecrated at the EU level (through the European social model). Social values not consecrated at the EU level may still be included in a public procurement equation but only to the extent they are justified by concrete and verifiable 'mandatory requirements' (a reach yet thorny concept, developed throughout a dense, slippery CJEU case law). We also expounded above that (especially in the light of a very thorny case law from the CJEU) goals set under *ad-hoc* national policies, or laws, not falling within a specific European social model are, on the other hand, pretty hard to justify. *En fin*, regardless of the chosen scenario, for each of these values, a justification (and proportionality) test is always necessary.[1528]

This because the particularities of all these social objectives generate, as opposed to other 'sustainable' goals, significant distortions in the competition area – identifiable under the guise of various forms of discrimination based on *nationality*, since many of the measures devised by national governments usually involve favouring *local* trade (*eg*, support for the local worforce, or for the local poor, or for the economic development of certain disadvantaged regions, *etc*). Inevitably, this impinges heavily on the fundamental principles on which the European internal market has been built, eroding the very idea of liberalisation of the domestic procurement markets.[1529] In other words, if the purpose of these measures is to protect the domestic markets against particular economic, or social constraints, the result will be that all foreign suppliers will be obliged to put a lot more effort (in both administrative and financial terms) into the process, being forced to take specific measures (adapted to the requirement) which they would otherwise not take. For example, a requirement forcing bidders to hire local long-term unemployed for the delivery of a services contract would force all foreign providers to undergo the muddy process of hiring those people *abroad* or, alternatively, to set up a *local* vehicle through which to hire them locally (for, of course, the purpose of delivering the contract *on site*). Each of these alternatives involves a complex administrative procedure and requires additional budgets, which places

[1527] For a similar conclusion, see C Cravero, '*Promoting supplier diversity in public procurement: a further step in responsible supply chain*', in (2018) 2 European Journal of Sustainable Development Research 1, 08. The author proposes a distinction between two main categories of social objectives that *could* be pursued via public procurement: the promotion of work standards and fundamental human rights (as a hard core), and the promotion of inclusion and supplier diversity (as a further step of the social-oriented approach).

[1528] See H Handler, '*Strategic public procurement: an overview'*, WWWforEurope Policy Paper No 28 (2015), at https://www.researchgate.net/publication/284725763_Strategic_Public_Procurement_An_Overview.

[1529] P Trepte, 'The agreement on government procurement' in P F J Macrory, A E Appleton and M G Plummer (eds), *The World Trade Organization: Legal, economic and political analysis'*, Vol 1, Springer, 2005, 251–52.

them *ab initio* on a less favourable position than their domestic rivals.[1530] The lowest price (especially when set as the main award criterion) would hence inevitably be offered, invariably, by local traders, with the exclusion of all foreign ones.

Generally speaking, the inclusion of social elements into the procurement process has a strong potential to make it more complex (*eg*, by requiring evaluation mechanisms not very easy to manipulate) or even to render it opaque (that is, by stifling the necessary transparency). So, where the setting of social targets is done to the detriment of the specific public procurement rules (such as those to do with the objectivity of the contracting authority, the link to the subject matter of the contract or the possibility for all interested bidders to access the necessary information, and understand it, in conditions defined equality and impartiality), the legality of the entire procurement process becomes questionable. Otherwise, the use of social considerations may just put into question the effectiveness of the fundamental principles stemming from the Treaties. Is such a case, an assessment of the primacy of one or the other of the colliding values (that is, a balancing approach – see our discussion in Chapters III and V above) is necessary. This may be done following the Dworkinian or, upon the case, the Alexian models of determination.

However, such a balancing exercise is a very challenging task, even for experienced practitioners, as the line between conformity and non-conformity (in the internal market context) is, owing to a surprisingly reticent approach manifested by the Court in the public procurement area, thinner than ever. This makes a very trenchant approach (in the norms transposing the Directives at the national level) hardly possible – especially due to the same hieratic CJEU case law which seems to encourage cautiousness rather than trailblazing solutions.

The number of cases where the Court was called to test the resistance of the internal market rules in a public procurement context is, in fact, rather small. Even smaller is the number of cases where it assessed the scope of social policy considerations through the prism of the *public procurement* rules as such (it maybe suffices to cite the *Viking*, *Laval* or *Rüffert* cases, which are of the highest import for public procurement, but where the Court preferred to discuss the subject matter thereof by reference to the applicable social and labour law, disregarding the public procurement context). Even where public procurement *was* in the

[1530] As fairly retained by the Court in C-319/06, *Commission v Luxembourg*, every national measure '*involves an additional administrative and financial burden for undertakings established in another Member State, so that the latter are not on an equal footing, from the point of view of competition*, with employers established in the host Member State and they may be dissuaded from providing services in the latter Member State.' (para 85, emphasis added).

limelight (as, for example, in *Beentjes*, *Nord-Pas-de-Calais* or *RegioPost*), the Court refrained from elaborating on a too comprehensive argumentation. It simply resumed to observe that, in principal, social considerations *may* be used in a public procurement scenario, but only provided that this is done in strict accordance with the EU law (in other words, only to the extent that such a measure is not directly or indirectly discriminatory and, if it is, only if such discrimination may be justified and proportional). So, in the lack of any *substantial* additional contributions to the theories and tests developed by the Court in the area of application of the fundamental economic rules of the internal market, public procurement remains to be governed by these rules and, upon the case, the acceptable exceptions thereto as defined throughout that case law. We consequently dedicated an entire Chapter (*ie*, Chapter III) to the case law developed in this context. The mapping drawn based on these cases is directly relevant for public procurement as well. Its main conclusion is that, except for those pursued (or at least acknowledged) by the EU institutions themselves, eventually under a European social model, public policies are, in general, a too risky environment, with no safe harbours. Regional development is, thanks to *Du Pont de Nemours* and *Commission v Italy*, a very good example in this regard. Same is *Rüffert* in the labour area, *etc*. With regard to the so-called 'mandatory requirements', things are even vaguer. But, depending on the concrete context, the latter may, indeed, offer sufficient justifications (see, for example, the case of the recent waves of refugees, or the COVID-19 pandemics, which required urgent interventions for the protection of *local* communities, *etc*).

On the other hand, the fact that public procurement is one of the largest economic markets in the world makes the question to what extend governments are allowed to connect public contracts to certain horizontal policies and ask for compliance by the private sector absolutely critical. It is now common knowledge that policies such as those aiming at the promotion of acceptable working conditions, minimum salaries, human rights and abolition of child labour along the supply chain or at the promotion of employment, equal opportunities and accessibility, safeguarding working conditions and supporting the social economy are very often present in public procurement, giving raise to practices generally captioned as "ethical procurement" and "social procurement".[1531] Most of these values and goals are developed at the EU level, through the various arms of the so-called 'European social model'. These aspects were developed in Chapter IV above.

[1531] D Hoffmann, '*Social linkages in public procurement*', University of Lund, 2009, available at http://lup.lub.lu.se/student-papers/record/1555391.

Otherwise, in the context where Europe is witnessing some dramatic changes in the social context, where poverty and unemployment have reached a tipping point whereas migration and the need to integrate and find suitable forms of inclusion for the newcomers, frequently associated – due to the recent attacks – with terrorism, generated a surging waive of nationalism, it is decisively important to identify the accurate place of public procurement on the map of the internal market (the principal aim of which is 'to limit policies with a disproportionate impact on trade'.[1532]) Horizontal policies appear therefore to be occupying more and more space in the national but also the international procurement systems. They are customarily discussed and classified based on three main elements of differentiation: (a) policies concerning the compliance with specific legal requirements or that go beyond legal standards; (b) policies that have an impact solely on that contract or that influence the general behaviour of suppliers; and (c) various mechanisms by which such policies may or may not be implemented. 'These mechanisms involve different advantages/disadvantages, including in balancing horizontal policies with other objectives, such as value for money and efficiency, and are also differently treated by trade regimes because of the differing extent to which they impact on trade'[1533]

The place that social policy considerations have gained in the recent legislative reforms at the European Union level is a strong indication of the fact that it will be very difficult in the future for the Union to gain legitimacy or support for major *economic* reforms without stronger guarantees for the protection of its *social* values.[1534] A good case in point is the recent rejection of the Constitutional Treaty[1535] by the Dutch and French voters or the even more recent negative referendum on the Lisbon Treaty in Ireland. The amendments to the original text of the Directive No. 123/2006 on services in the internal market (the 'Services Directive') proposed in order to reconcile the effects of an expanding market liberalisation with the diverse models of European labour and employment laws[1536] can as well be adduced. Arguably, settling on the scuffles flurried around the key issues that define

[1532] S Arrowsmith, '*Horizontal policies in public procurement: A taxonomy'*, in (2010) 10 Journal of Public Procurement 2, 149.
[1533] Ibidem, 151-152.
[1534] N Hös, '*The Principle of proportionality in the Viking and Laval Cases: an appropriate standard of judicial review?*', EUI Working Paper, European University Institute, 2009, 1.
[1535] Treaty establishing a Constitution for Europe - OJ C 2004 310/01.
[1536] Editorial Comments, *'The services directive proposal: Striking a balance between the promotion of the internal market and preserving the European social model?*', (2006) 43 Common Market Law Review, 3.

the social dimension of the European Union became a source of legitimacy for most actions subsumed to the integration project.[1537]

It is in fact in response to more and more stringent social challenges that the TFEU made (after a long but constant evolution) room to social considerations in the traditional arrangement of the internal market. On the other hand, the fragile balance that now exists between the competition policy rules and principles and those born in connection with the social component of the same internal market cannot be infringed to the detriment of either one of them. In other words, the promotion of social values cannot infringe the traditional, economic rules of the internal market (than only where a superior interest is at stake), just as the latter cannot exclude the pursue of other fundamental (external) values deriving from other horizontal policies, like the social ones. To this end, public procurement cannot or should not be used beyond its real purpose, and in any case, not outside a very well defined social context (but based on either the exceptions granted by the Treaties themselves or just under the umbrella of various pieces of secondary legislation stemming from concrete mandatory requirements). Such contexts must offer some palpable objectives that may be transposed into a public procurement equation. Each contracting authority should thus be able to justify its choice and explain how, by choosing to pursue concrete social-policy objectives, the rapport between value and money - assessed in the social market economy context - remains positive.

It is on the other hand clear that the clash between the economic and the social dimensions of the internal market cannot be imagined (and explained) other than if assessed and fathomed in connection with values of the same import. And, if there is something certain, is that the social market economy postulated by the new Treaties lays on a corpus of social values which the Treaties themselves acknowledge as fundamental and which make for a basic European social model. The existence of this model is incontestable (otherwise the existence of a distinct chapter in the TFEU destined to cover precisely the social policy of the Union, as well as the huge number of initiatives crafted under its framework, could not be satisfactorily explained.[1538] This, in spite of the fact that the actual framework is still elusive

[1537] C Joerges and F Rödl, '*On de-formalisation in European politics and formalism in European jurisprudence in response to the "Social Deficit" of the european integration project, Reflections after the judgments of the ECJ in Viking and Laval*', in (2008) 4 Hanse Law Review 1.

[1538] As an official acknowledgement, the Buying Social Guide released by the European Commission in 2011 refers specifically to the European social model, by stating that "3.1 *One of the major benefits of SRPP (...) is that it can be used by public authorities to further the European social model*. The *European social model is a vision of society that combines sustainable economic growth with improved living and working conditions*. This has been seen to involve creation of a successful economy in which a particular set of social standards are progressively achieved: good-quality jobs, equal opportunities, non-discrimination, social protection for all,

and leaves pretty much latitude for variation at the national level. The model contains a bundle of *fundamental* social values which are at least on a par with the economic ones. All these values (economic and social alike) define and mark, in a unitary way, the internal market.

Furthermore, it is already common ground that the European social model is shaping, inevitably and irreversibly, also the public procurement legal landscape. This model appears to be, in turn, modelled by the political compromise ― between national actors ― which usually takes place at the Union's institutional level, particularly in the Parliament and the Council.[1539] See, for example, the case of the German Land of Bavaria which, in the particular context that defines, especially after 2008, the German economy, and in exchange for its substantial (some claim disproportionate) contribution to the national economic stability, puts a heavy pressure on the federal government to force the obtaining of various economic advantages from the EU.[1540] Or the context that led to the adoption, in a quite contested form, of the crucially important Services Directive, the creation of Mr. Frederik Bolkestein, the policymaker behind it (and better known as the 'Bolkestein Directive') which was a huge compromise between several political factions.[1541] In the latter case however, since the Bolkestein Directive still remains[1542] to cover an important number of services, of which some in connection with which revolve many colliding national interests, the fight is

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social inclusion, social dialogue, high-quality industrial relations and involvement of individuals in the decisions that affect them. (…) 3.2 *Social standards have come to play a central role in building Europe's economic strength, by developing what has been described by EU institutions as a 'unique social model'* (…). *Economic progress and social cohesion have come to be regarded as complementary pillars of sustainable development and are both at the heart of the process of European integration*. 3.3. There has been increasing emphasis in the EU on social rights and equality, particularly in the workplace. As sustainable development moved beyond environmental issues into social issues, social standards were increasingly identified as one factor in the growing movement for corporate social responsibility. Taking gender equality as an example, at both European and national levels gender equality has become increasingly 'mainstreamed', meaning that the gender perspective has been progressively integrated into every stage of institutional policies, processes and practices, from design to implementation, monitoring or evaluation." (p 10) – emphasis added.

[1539] S Weatherill, '*The Consumer Rights Directive: how and why a quest for "coherence" has (largely) failed*', 2012 49 Common Market Law Review 1, 1279.

[1540] T G Ash, '*The crisis of Europe. How the Union came together and why it's falling apart'*, in (2012) 91 Foreign Affairs 5, 7.

[1541] S Weatherill, '*The internal market as a legal concept*' (Collected Courses of the Academy of European Law) Oxford University Press 2017, Kindle Edition, 213, 222 *et seq*. For a critical review of the political compromise that Directive 123 represents, and the askew harmonization that it brings about, see also C Barnard, '*Unravelling the Services Directive*', 2008 45 Common Market Law Review 323 or V Hatzopoulos, '*Le principe de reconnaissance mutuelle dans la libre prestation de services*', 2010 46 Cahiers de Droit Européen 47, *etc*.

[1542] Although, due to the political fight around its scope, it has eventually dispensed with key areas such as that of non-economic (*eg*, social) services of general interest or financial services and so on, as explicitly enumerated under its Article 2.

still fierce.[1543] The conclusion must therefore inevitably be that it is the *political context* and the *political compromise* between the Member States that actually determine the legal landscape of the Union. Such compromises often raise intricate questions of constitutionality and legitimacy, as they appear to generate anomalous arrangements and bring limp harmonization (such as the Bolkestein Directive itself)[1544]. This also explains the slow but determined shift from an essentially economic framework to an obtrusively social one, where – as a reflection of the *political* (before economic) evolution in the Member States – many social values have been acknowledged as fundamental for the entire Union, and also why they are now on equal footing with the traditional economic values that have been defining the internal market since its very conception. In the burgeoning context of the European social market economy and under a continuously developing European social model, the balance between the internal market and competition rules and the social goals set via various policies must therefore be seen in a reversed perspective.

The conclusion above is obvious in the case of all those values that define the European social model at one point or another. This also justifies the decisions taken by contracting authorities to pursue such *fundamental* social goals (*ie*, pertaining to a generally assumed European model) even if, at the level of their Member State, there is no concrete policy on which to base their restrictive decision. Put otherwise, a social value or right included as such in the European social model and recognized at the very EU level, is enough to justify any national restrictions implemented with the purpose to protect it.

But what about those social goals which are *not* falling within the ambit of the European social model (and hence, in one way or another, escape the EU's direct interest, to

[1543] See for example, the fightback to the latest proposed changes to Directive 123, available at https://corporateeurope.org/en/power-lobbies/2018/11/bolkestein-returns-eu-commission-power-grab-services.

[1544] This is because the cited Directive had made the object of fierce negotiations, the result of which was transposed into a text representing a *sui generis* type of harmonization (as the initial draft presented by the Commission was eventually set aside and the full harmonization – based on a 'one size fits all' approach - it had proposed dropped as such in a… political attempt to leave room for certain enclaves of national protection and save local providers from foreign threats like the (in)famous 'Polish plumber' – see for ex. J Loder, '*The Lisbon strategy and the politicization of EU policy-making: the case of the Services Directive*', 2011 18 Journal of European Public Policy 4, 566). Under this resulting structure, the bulk services fall into the stronghold of the internal market rules while others are excepted – and may therefore make the object of particular restrictions, while even in connection with the services falling within its realm Member States are allowed, under the condition of providing satisfactory justification (and allegedly in spite of Article 16 from the Charter of Fundamental Rights), to derogate from the minimum standards contained therein by setting stricter, *ie*, more restrictive, rules (see Articles 15 (2) and 16 (3) from the Directive). Interestingly enough, even the CJEU was reluctant in acknowledging with full vigour the functional complementarity of the two sets of rules with apparently colliding purports – see for ex. cases C-426/11 *Alemo-Herron*, ECLI:EU:C:2013:521, in particular at para 36, or C–544/10 *Deutsches Weintor* [2012] ECR I-0000, paragraphs 54 and 58 – cited also in the *Alemo-Herron* case. This even if, on a general level, the Court did *not* contest, as such, the constitutionality of the minimum harmonization proposed by Directive 123 (see for ex. Case C-593/13 *Rina Services*, ECLI:EU:C:2015:399.

define just a national one)? Could they be construed to have enough force so to tip the balance in their favour? Or, in a nutshell: can they feed a sufficiently solid national policy, or represent reasonable mandatory requirements and, as such, justify any national (or even regional or local) measures, even if they may impact on the cross-border trade? This still remains to be seen. In Chapter V above we discuss at length these aspects, insisting on the fact that the new Directives on public procurement came with too few solutions and far too weak instruments, which leave deep holes in the economy of the procurement process.

However, as the Court of Justice of the Union has hinted in a number of cases, it is only that Court that may offer a concrete answer to all these questions, and this, on a case-by-case basis. We therefore argued, based on the examples offered by its case law, that other policy objectives (promoted at the state, regional or local levels), which do not fall within the scope of the European social model as such (the *fundamentality* of which is therefore, at least in principle, refutable), remain (at least for the moment) hard or, in many cases, impossible to explain and justify (see for ex. the cases C-35/76 *Simmenthal* - para 14, or C-41/74 *van Duyn* - para 18, but also C-268/99 *Jany* – para 59). In all these cases, the harm that such measures allegedly did to the basic internal market (and competition) rules was considered very hard to compensate or redress.

The CJEU has nevertheless clarified so far that all such policies need to be assessed against the concrete political, economic and social context and in comparison with the public interest at stake (*ie*, how proportionate it is in rapport with it and the concrete context). Its viability also very much depends on the *time* of assessment. A few years ago, for example, the protection of merely disadvantaged people was, as compared to people with disabilities, inconceivable in a public procurement scheme. This explains why the former were not, for example, caught in Article 19 of the former Directive 2004/18 on set asides.

Another helpful example for this discussion is the case of migrants which, in the prime years of integration, was an irrelevant issue, since the national economies of the Member States that founded the EC were relatively uniform and so too few were really interested in leaving their home and country to leave and work abroad but which, in the ensuing waves of integration – when several Eastern European countries, much less developed, joined the EU – become a serious problem. The same goes for the refugees which, owing to the latest regional conflicts, fled from the Middle East, or from other, *eg*, African, countries to the EU. The integration of these people became crucial for the very existence of the Union only in the last couple of years. Other categories of disadvantaged people may as well be caught by the matrix designed under the latest package of the Directives on public

procurement for their protection. It is probably worth noting that the explicit reference, in Article 20 from Directive 2014/24, to 'disadvantaged persons' was made at the extraordinary pressure of the social economy organizations which, witnessing the deepening plight of more and more social categories, insisted on having this specific goal clearly stated therein. The cited paragraph unfortunately does not offer sufficient elements for a general definition of disadvantaged people. Another sensitive case is that of single parents: somewhat contrary to what the Commission retained in the Green Paper that preceded the adoption of the 2014 set of Directives on public procurement[1545], in the 2011 EC's Buying Social guide[1546] the set-up of kindergartens or crèches for the children of single parents involved in the delivery of a public contract and who needed to work in night shifts or long day shifts and had no alternative than to leave their kids alone, was cited as an example of a measure that could *not* serve to justify the inevitable restrictions on competition generated by the imposition of such a performance condition. But, in the latest years, owing to the worryingly increasing number of single parents who, due to their status, are obliged to face discrimination and layoff, this example is served by more and more stakeholders as an excellent example of policy goal. So, justified by a concrete 'overriding' need to tackle the shortcomings with which single parents are confronted in certain economies, such a restriction may successfully pass the 'mandatory requirements' test. Or, alternatively, where safeguarding single parents and their access on the labour market is promoted as a matter of national (or regional etc) policy, Article 36 (or *etc*) TFEU may instead be invoked.

However, the key question still remains unanswered: what national policy goals (*ie*, those meant to protect *local* people, *local* communities, groups in difficulty due to *local* constraints and economic specificities *etc*) *could* be justified? Hard law is evidently silent in this regard. Unfortunately, nor the CJEU case law is much more helpful. Its evasive contribution could not help practitioners too much. People with disabilities, just as migrants and, of late, refugees, became only recently (and in stages) an EU-wide problem, whence their *now* undisputable 'conformity'. But single parents is not *yet* a matter of EU concern. To this extent, it can hardly be assessed to respond to a *currently* essential public interest. Things may however change in case it is proved that single parents make for a significant portion of the EU's labour force and, in the European economic context, fall often prey to various forms

[1545] Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, COM(2011) 15, 40.

[1546] https://op.europa.eu/en/publication-detail/-/publication/cb70c481-0e29-4040-9be2-c408cddf081f/language-en, 43. The Guide refuses to accept the validity of such a requirement based on the argument that this is not linked to 'performance of the contract'.

of discrimination. For now, at least, single parents are, just as long-term unemployment was until *Beentjes*, a matter of a much significant import for national governments than it is for the EU institutions.

In *Beentjes*, nonetheless, the Court decided that long-term unemployment may stand for a mandatory requirements justification only provided that the national measures adopted to tackle it were *in line with the EU law*. This condition was constantly reiterated in the ensuing case law, to become a genuine principle. But what this syntagma means is still a conundrum for many pundits. It may be construed to refer to the fact that the inclusion of long-term unemployed into the labour market must necessarily be free of any local preferences (in short, that such a measure may be accepted only inasmuch as it is designed to help, equally, all people sharing the same condition, *eg*, which are long-term unemployed, and not just the *nationals of the Member State where that measure was adopted*).

It is indubitable that, as argued above, values falling within the scope of various laws adopted at the EU level and defined a European social model can be successfully defended against any trade-restriction claims. On the other hand, it would be inconceivable to conclude that only values of a pan-European import could be pursued in a national public procurement context. Returning to the refugees example, it would not be possible to accept that those Member States who were gravely affected by the subsequent waves of 'invaders' (like Italy, or Greece) could not make use of concrete mechanisms to fight against the problems generated by this invasion because many other EU countries (like Romania, Bulgaria or even the Northern states) were much less affected and, for them, the integration of these refugees is not a similarly important problem (which means that these states have not taken any substantial measures to that purpose, which left their companies in an evident disadvantage as compared to the Italian or the Greek ones which, forced by strong internal policy measures, have). The pursue of these aspects as matters of national concern clearly impinge on the internal market rules and, thus, bring the relevant national measures in the non-conformity zone, which means that they should be considered to have failed the CJEU tests. On the other hand, not tackling these problems would not just push local economies adrift, but would also create significant economic, social and political imbalances at the entire EU level. All these should be enough to justify the rules, measures and actions taken to solve local problems and protect local communities, even if discriminatory.

Surprisingly, not even in the case of all social values placed at the core of the European social model things are always clear. Posted workers is a very good example in this regard. They don't look any better even after the delivery of the two landmark judgements in

Rüffert and *RegioPost*. On the face of it, the Court seems to have settled the debate by deciding that a measure aimed to help these workers may pass the conformity test inasmuch as it also stays within the framework set by the Posted Workers Directive, even if it concerns, limitedly, just public contracts (hence has no *general* application). It is not however very clear what happens with those measures which, confined to the public procurement sector or not, go *beyond* the minimum standards to which that Directive makes reference.

Generally speaking, the EU legal and policy framework as it stands today creates several sets of restrictions to the use of social considerations in public procurement, placed on several tiers. Some restrictions derive from to the need to be in line with the EU internal market and competition rules – including the *state aid* rules (which, as per the Treaties themselves, or the relevant case law, may accept certain exceptions); others come from the secondary law, in particular the Directives on public procurement which impose a concrete link to the subject matter of the contract, a limitation of the types of concerns stated in the technical specifications or restrictive rules on the exclusion of bidders (in the sense that only the situations limitedly set out in the Directives may trigger such an effect, so that a tenderer may never be eliminated from the competition based on its failure, for example, to adopt 'proactive fair recruitment policies'[1547]). Also in the light of the same case law, certain other elements circumscribe the use of social and, in general, sustainable considerations in public procurement to make it all the more difficult: such considerations or requirements must not give contracting authority unlimited discretion – see in particular *Beentjes* (para 26), *Concordia Bus* (para 61) or *SIAC Construction*[1548] (para 37); they must be objective and quantifiable – see *Concordia Bus* (para 66); and their application must be capable of verification – see *Wienstrom* (paras 51-52).

Another conclusion that should be drawn is that, although levers do exist, (they are quite numerous and much more coherently regulated – at least as compared with the previous legal framework), their application remains governed by the fundamental (economic) principles of the internal market. Consequently, if, under the original arrangement, with the exception of those cases explicitly stated in the European Treaties, no

[1547] S Arrowsmith, 'Application of the EC Treaty and directives to horizontal policies: a critical review', in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions'*, Cambridge University Press, 2009, Kindle Edition, 7080.

[1548] In *SIAC*, the Court also underscored that contracting authorities are, as a principle, free to set whatever award criteria they like, but only inasmuch as such criteria are concretely aimed at identifying the most economically advantageous tender, while in *Concordia Bus* it clarified that also criteria which do *not* have a direct, concrete *economic* value *per se* may be used as award criteria. For discussion, see R Caranta, 'Sustainable procurement' in M Tyrbus, R Caranta and G Edelstam (eds), '*EU public contract law. Public procurement and beyond'*, Bruylant, 2013.

deviations from the internal market and competition rules were possible, now, under the current legal framework (and owing to a reach CJEU case law but also to a fundamental change in the political programme at the EU level), both policies which aim at creating advantages for local businesses to the detriment of foreign ones (that is to say, directly discriminatory) or measures which, by their very structure and nature, and without being directly discriminatory, simply discourage foreign traders from bidding for public contracts awarded in the Member States that took that measure (*ie*, justified by some mandatory requirements), are possible in certain circumstances. Applied to public procurement, this conclusion would indicate that a measure which would give a privileged access to public contracts to *local* enterprises must be discarded as being directly discriminatory unless it is justified under a public policy developed in line with the EU law itself.[1549] In the same way, a measure which involves active implication, from the suppliers, in helping the local community (*eg*, by requiring that they hire local unemployed or migrants, or return part of the price in the form of various local social projects[1550], *etc*), even if it creates additional burdens for foreign suppliers, may be accepted inasmuch as the circumstances under which such a measure was taken fall into the accepted definition of 'mandatory requirements'. We however deem that, where economic reasons are present, such schemes cannot be easily justified (*eg*, in the case where suppliers are required to resort to *local suppliers* for raw materials or subcontracting purposes *etc*), even if they would involve also strong social considerations (for example the support of the local small businesses ran by former employees which were subject to redundancy for macro-economic reasons, *eg*, miners let off from local quarries or mines due to the collapse of the mining industry, and which were

[1549] See, again, the *Du Pont De Nemours* or *Commission v Italy* cases, discussed above, where the Court rejected economic arguments even if they were directed at helping local economy coming out of an obvious abyss. Again, we reiterate the opinion that, based on the case law of the Court, cohesion-policy schemes may not justify discriminatory measures.

[1550] A specific form of this practice is the so-called 'Social Return' mechanism employed by the Dutch authorities, which consists of an obligation placed on tenderers to spend a minimum percentage of the contract price on the increasing of the level of employment among people who are long-term unemployed or disabled. This mechanism was however harshly contested for its riptide effect on SMEs – see P Oden, '*SMEs cooperate to meet social procurement conditions*', presented at the Understanding Small Enterprises Conference – A Healthy Working Life in a Healthy Business, 21–23 October 2015, Groningen, The Netherlands, at https://research.hanze.nl/nl/publications/smes-cooperate-to-meet-social-procurement-conditions. The author also reveals another negative impact of the Dutch social procurement, namely the 'crowding out' effect (which in short entails the temporary layoff of existing employees and their replacement with people who are currently unemployed, followed by the displacement of the former and the return of the original employees once the contract has been delivered).

offered subventions and help to re-enter the economy as entrepreneurs, *eg* under a cohesion-policy measure)[1551].

As for the toolbox offered by the new Directives, although it seems well equipped, the instruments contained therein are rather frail (in any case, not so efficient as originally promoted). For example, many of these tools revolve around the idea of *discrimination*. Discrimination is, unfortunately, also assumed as a core element of the European social model, one of the most complex aspects, with many facets still under the veil of uncertainty due to the lack of necessary definitions and clarifications (see above the discussions on what could mean 'disability', or 'disadvantaged people' *etc*). Of course, the wording used in Directive 24 seems reasonably vague so that to permit the inclusion, in these categories, of various groups of people which Member States may declare disabled or, otherwise, marginalized groups. But isn't this just an escape door for abuses? When restrictive schemes such as set asides are too generalised and get to engulf a much larger portion of the market than that hand in mind by the European legislature, the very stability of the internal market is at risk.

Discrimination is, on another hand, linked to the protection of fundamental human rights. The heavy load that these rights got in the European context could create nice opportunities for contracting authorities to bypass (legally) the internal market rules. But balancing these rules with human rights is not always easy – as we showed in Chapter IV above.

Discrimination is not easy to tackle even in the case of set asides, one of the few tools extensively regulated by the new Directives. As we have mentioned above (see Chapter IV above but also our previous papers on this issue[1552]), the confusing wording used in Article 20 led to a hieratic transposition thereof. As for Article 77 of Directive 24, it was not even transposed in all national legislations, whereas in those where it was, it is hardly used.[1553]

Other useful tools which may now be used at large are standards, certifications and labels. However, quality (which these standards and labels should reflect) is too often

[1551] Studies show that, in general, preferential treatment of the domestic firm increases when the proportion of shareholders having the majority decreases and that the domestic firm may have a greater expected profit when the awarding rule is left to the discretion of politicians for some high values of procurement contracts for the consumers – see M Mougeot and F Naegelen, *'A political economy analysis of preferential public procurement policies*', (2005) European Journal of Political Economy 21, 483.

[1552] I Baciu, '*The possibility to reserve a public contract under the new European public procurement legal framework*', in (2018) European Procurement & Public Private Partnership Law Review 4

[1553] See, again, the conclusions of the recent BSI project.

shunned in practice while the extensive use of the lowest price criterion raises in many cases issues linked to child labour or slavery. There also are specific cases where quality is linked to local products (or production) – see the example of fresh fruits for schools *etc*, which makes, again, its employment very challenging. And, especially in the labour sector, the use of labour standards is even more problematic due to the intricate aspects linked to the sources thereof – in particular the ILO Conventions.

Finally, the need to link all these external criteria to the subject matter of the contract hinders the spread of social considerations in public procurement (especially since they are, in general, placed far too remotely. It is, on the other hand, worth insisting on the fact that pushing for the drop of the link to the subject matter of the contract, for which many pundits currently advocate[1554], is definitely a fake path especially because, as discussed above, public policies (or, even more acute, general laws) cannot be developed (or adopted) via punctual contracts but (necessarily) outside them. It cannot be public contracts the source of public policies, but vice-versa! Where public policies do exist, they may, of course (owing to both a constant case law and the new Directives) be, depending on the importance of the public interests at stake, pursued via public contracts. But, naturally, each contract should remain faithful to its context (see again, the discussion above on public buyers as 'regulators' and the CJEU's very clear stance on this issue). In a nutshell, the solution is not to drop the condition requiring a link to the subject matter of the contract, but to encourage Member States (*ie*, national legislatures) to take the letigimately right measures (that is, to adopt the necessary policies and / or laws). Once this framework is established, it would be easy for contracting authorities to decide, on a case by case basis on the most appropriate way to implement it (*ie*, on how that policy should be adapted and applied to each specific procurement context, in strict relation with the relevant subject matter of each contract).

Otherwise, due to the multitude of particularities that, on a national level, render the social instrumentality of public procurement inefficient, some authors have proposed a standardization of the 'buying sustainable approaches' (BSAs) developed at the EU level.[1555] However, such a solution would go against the EU constitutional framework which acknowledges the specificities of each Member State and supports their efforts to adapt thereto.

[1554] See for ex. M Andhov and R Caranta (eds), *'Sustainability through public procurement: the way forward – Reform Proposals*', SMART Project Report, University of Copenhagen, 2020, at https://static-curis.ku.dk/portal/files/238003899/Sustainability_through_public_procurement_the_way_forward_Reform_Proposals.pdf.

[1555] B Boschetti, '*Social goals via public contracts in the EU: a new deal?*', (2017) Rivista Trimestrale di Diritto Pubblico 4, 7.

To conclude, the legislative gaps (including too vague provisions and a not very coherent CJEU case law) are evident, and constitute a powerful hindrance for the engagement with socially responsible public procurement, in general. The 2014 Directives on public procurement contain insufficient provisions on socially responsible public procurement. There are too few and too vague provisions, mainly tributary to the CJEU case law and a highly technical social soft-law blanket. Moreover, key provisions (such as those contained in Articles 20 and 77 on set asides) have been, probably due to their problematic wording and the political context which led to their inclusion in the Directive, transposed rather askew, or even in collision with the general principles of EU law[1556], which crushes much of their vigour and efficiency.[1557] In short, the vagueness of the current legal provisions doubled by the inconsistency of the CJEU case law or, upon the case, the too technical interpretation thereof, make their application problematic.

Other, more 'practical' elements, add to these regulatory obstacles to make sustainable (and in particular social) procurement even harder to pursue. Among the wildly cited deterrents [1558] we may find: a wide perception that sustainable products and/or services are more expensive than the 'traditional' ones and of a lower quality; lack of expertise on SRPP implementation; lack of coherent policy commitments and/or corresponding action plans or, where they exist, lack of (or insufficient) monitoring, evaluation and/or enforcement tools; lack of a strong political support and of organizational leadership, but also of good inter-agency cooperation; lack of mandatory rules/legislation (practice shows that optional choices stir a too low interest)[1559]; lack of sustainable products and/or services to purchase

[1556] For details, see I Baciu, '*The possibility to reserve a public contract under the new European public procurement legal framework*', in (2018) European Procurement & Public Private Partnership Law Review 4 and the Commission's report available at https://aeidl.eu/docs/bsi/index.php/study-report.

[1557] Article 20 is meant to protect *European* values (that is, the importance of which is acknowledged at the Union's level, as part of a stable European social model), and not merely local values. Seen this way, it becomes clear that no Member State may restrict competition by requiring, for example, all sheltered workshops to obtain a local authorisation (as a proof of their effective implication in the pursuing of *local* social policy goals) before bidding for a local contract, *etc*.

[1558] United Nations Environment Programme (UNEP), '*Global review of sustainable public procurement 2017*', p 46.

[1559] Recent studies insist on the role of 'external forces' in turning things on the right track – see for ex. R Vluggen, C J Gelderman, J Semeijn and M van Pelt, '*Sustainable public procurement—external forces and accountability*', in (2019) MDPI Sustainability Journal 11. The authors identified 'minor legal pressure to enforce sustainable procurement' and the fact that '[n]ational legislation, guidelines and principles are considered non-binding, due to a lack of penalties in the case of non-compliance' as one of the main drawbacks in this area. They also show that '[r]eal pressure (…) from lobbying by branch organizations and political pressure initiated by citizens' is not enough, as current practices indicate that 'municipalities appear to place more emphasis on legal and financial accountability, in contrast to performance accountability' while [a]ccountants mainly focus on legitimacy and the finance department only monitors spending within budget'. Additionally, '[t]he hybrid organization of the procurement function seems to impede sustainability development. Only the larger projects are subject to sustainability requirements, set by centralized purchasing

(insufficient adaptation of the market to the public demand); competing procurement priorities; lack of professionalization and of relevant, hands-on training programmes; lack of good best practice data basis[1560]; lack of measurement of the SRPP outcome (in terms of both economy and sustainability); lack of a clear definition of sustainable products, services and/or supplier operations; little or no visibility into supply chains; a too wide perception that procurement is administrative, not policy-driven; lack of relevant SP criteria and specifications; a too weak pressure from stakeholders and no activism campaigns; lack of tools available that measure life-cycle costs[1561]; lack of personal commitment to SP by staff; lack of external recognition for SRPP implementation; lack of credible (or comprehensible) social labels and sustainability standards.[1562] Additionally, in many Member States

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departments. Smaller projects, responsible for 2/3 of the total spend are managed by decentralized groups, remaining under the radar of sustainability policies' (p 1). Other authors point to the inevitable financial constraints and the tight budgets that public authorities must face and deal with in the recent years, which force them to go for rather short-term policies and chase cheap bargains, leaving aside quality and a more policy-oriented approaches, only to conclude that 'a more encompassing inclusion of social award criteria will require legally binding provisions to be incorporated into procurement law.' – see the study of W Kahlenborn, C Moser, J Frijdal and M Essig "*Strategic use of public procurement in Europe*", Final Report to the European Commission, MARKT/2010/02/C, 2011.

[1560] Such data basis are scattered among private organizations – see for ex https://procuraplus.org/interest-groups/Socially-Responsible-Public-Procurement/ or http://www.socioeco.org/bdf_fiche-document-4640_en.html *etc*, but still no official relevant data basis on social procurement good practice is currently available at the EU level. A first attempt at building such a basis has been just started but it is not fully functional – see the collection gathered under the latest project ran by the Commission on Buying for Social Impact - https://aeidl.eu/docs/bsi/index.php/good-practices .

[1561] As shown above, the restrictive wording of Article 67 from Directive 2014/24 makes the use of life-cycle costing in SRPP almost impossible, in particular due to the lack of any concrete methodologies which to factor in various social aspects. However, as the dedicated literature shows, social elements such as human rights, working conditions, health and safety, cultural heritage, etc. are seen as potential determinants in a life cycle approach (LCA), which is close to, but not identical to, life cycle costing (LCC). Some even argue that the life cycle of a product can eventually be broken down into labour units (hours) to calculate the income per unit which can further be used to approximate the well-being of people in different regions, with the consideration of certain basic needs such as food and housing. 'The ultimate goal of the S-LCA technique is to promote improvement of social conditions throughout the life cycle of a product.' – see D C Dragos and B Neamțu, 'Sustainable public procurement in the EU: experiences and prospects', in F Lichere, R Caranta and S Treumer (eds), 'Modernising public procurement: the new Directive', DJOF Publishing, 2014, 120. See also D C Dragos and B Neamțu, "*Sustainable public procurement'*, in (2013) 8 European Procurement & Public Private Partnership Law Review 1, or D C Dragos and B Neamțu, 'Life-cycle costing for sustainable public procurement in the European Union', in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016. For a more in-depth discussion, see D Hunkeler, '*Societal LCA methodology and a Case Study*', (2006) 11 International Journal of Life Cycle Assessment, 371–82, cited by also D C Dragos and B Neamțu. For now, though, such methodologies are not assumed at the EU level, hence their potential use remains limited. Other authors even claimed that, based on Recital 96(3) of Directive 2014/24, it may be concluded that the Directive makes direct reference to the possibility to resort to the model developed by the UN (namely, UNEP 'Guidelines for Social Life Cycle Assessment of Products' (2009) 85 http://www.unep.fr/shared/publications/pdf/dtix1164xpa-guidelines_slca.pdf) – see R Lunner, *'Human rights in public procurement: protecting them properly*?', in (2018) 3 European Procurement and Public Private Partnership Law Review, 202.

[1562] Studies suggest that a basic weakness of the methodologies proposed for the identification of sustainable products may explain the lack of strong sustainability ideas and aspects which are essential for the selection procedures of environmentally or socially friendly products – see I E Nikolaou, T Tsalis, '*A framework to*

(especially former socialist or communist countries) practitioners point to a stubborn corpus of controlling bodies which usually are more familiarized with economic and budgetary stuff and do not grasp the technical niceties of SRPP, thus censuring any attempts at it.

As for a concrete feedback, from the market, on the real, *practical* potential of the new Directives to channel and make efficient social policy efforts, the available studies are still inconsistent.[1563] However, a general conclusion is that the majority of governments *have* started to use various SPP provisions in their policy or regulatory framework [1564], which is a signal that things are on the right track[1565]. Most of these provisions are included, according to these studies, in general or thematic policies and strategies (but not in policies dedicated specifically to SPP!). Sporadically, SPP provisions are reported to be stemming directly from laws and regulations, without any support from the policy side. Moreover, in almost all Member States the transposition process seems to have been done automatically, with both eyes set on national interests rather than on the common purposes promoted by the European legislature which proved pretty hard to grasp by national legislatures (lack of understanding which led to hesitant implementation measures).[1566]

Anyway, apart from the scenario where social criteria are included in the technical specifications that describe the technical merits of the subject matter of the contract (so that their value to be reflected directly in the estimated value thereof), all other possible ways of having such considerations employed in a public contract would involve a 'best-

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evaluate eco- and social-labels for designing a sustainability consumption label to measure strong sustainability impact of firms/products', in (2018) 182 Journal of Cleaner Production, 105.

[1563] For a collection of some relevant good practice examples, with valuable discussion on the influence of the latest changes brought by the 2014 legislative package, see (2017) 30 International Journal of Public Sector Management 4 and also A Popescu, M Onofrei and C Kelley, *'An overview of European good practices in public procurement*', (2016) 7 Eastern Journal of European Studies 1, esp. 81 *et seq*. For the latest collections of good practices made public under the European Commission's patronage, see https://www.aeidl.eu/docs/bsi/index.php/good-practices/92-bsi-goodpract-web/file or, that released in May 2020 under the title '*Making socially responsible public procurement work - 71 good practice cases*' (available at https://op.europa.eu/ro/publication-detail/-/publication/69fc6007-a970-11ea-bb7a-01aa75ed71a1).

[1564] The UNEP '*Global review of sustainable public procurement 2017*', p 10. See also https://aeidl.eu/docs/bsi/index.php/study-report or the collection 'Making socially responsible public procurement work - 71 good practice cases'.

[1565] Also sources pre-dating the adoption of the 2014 package of Directives on public procurement anticipated the trend – see for ex. the study issued by the Centre for European policy studies and College of Europe under the name '*Monitoring the uptake of green public procurement in the EU27*' (European Commission, 2012). With specific regard to social criteria, other materials confirmed that, by 2011, approx. 23% of contracting authorities were including them in tenders either 'regularly' or 'as much as possible' (see also W Kahlenborn, C Moser, J Frijdal and M Essig, '*Strategic use of public procurement in Europe: Final Report to the European Commission*', MARKT/2010/02/C, Berlin, 2011)).

[1566] For an in-depth discussion on these aspects, see S Treumer and M Comba (eds), '*Modernising public procurement. The approach of EU Member States*', Edward Elgar, 2018.

value-for-money' assessment which, in pure economic terms, is considerably hard to do,[1567] especially due to a rather impossible estimation of their *impact*.[1568] As a consequence, other studies show that a rather small number of Member States make an *efficient* use of social considerations in their public procurement.[1569] This conclusion is supported by the latest survey ran by the European Commission.[1570] A collection of good practices published in 2020[1571] shows that only 8 of the 22 examples come from the 15 Member States targeted by

[1567] See for ex N Dimitri, '*Best Value for Money in procurement'*, Working Paper No. 2012/02, Maastricht School of Management, 2012. With particular regard to the difficulties specific to the measuring and evaluating the social value of a contract see D Halloran, 'The social value in social clauses – methods of measuring and evaluation in social procurement', in K Thai (ed) *Global public procurement theories and practices. Public administration, governance and globalization*, Vol.18, Springer, Cham, 2017. The author argues that, '*In the context of social procurement, 'value for money' is a complex, multi-faceted and value-driven concept that does not equate to neoliberal notions of 'efficiency' as it encompasses not only the value to be achieved by meeting the purchaser's functional need but also wider benefits to society*' (p 5, emphasis added). She also shows that social value is most often obtained as an indirect impact of various activities connected to public procurement. Moreover, '[t]he cost of Social Value (…) outweighs whatever purported good it is supposed to achieve. Therefore, finding effective methods of measuring and articulating Social Value has, in a sense become the Holy Grail of social procurement, in an attempt to square the circle in providing an answer as to whether it is, in economic terms, legitimacy and efficiency to use public procurement to achieve social and environmental goals. The core principle of social procurement is to create Social Value through purchasing. However, there is a dearth of empirical evidence on the outcomes and impact of social procurement (…). Assessing the evidence on how social procurement produces Social Value requires defining what is Social Value and then finding ways to determine how Social Value has been measured. There is little evidence in the literature of analysis of the Social Value obtained with the original strategic procurement objectives, while academic case studies tend to focus on generalised assumptions by the authors of what constitutes social value, rather than examining the types of value produced in relation to stated aims. Academic research in this area is still in its infancy, with studies dominated by the grey literature of non-profit organizations, consultancies, research organizations and third sector funding bodies.' (p 5). For a similar conclusion, see also P L Lorentziadis, *'Post-objective determination of weights of the evaluation factors in public procurement tenders'*, (2010) European Journal of Operational Research 200, 261 *et seq*, or the study ran by Konkurrensverket (the Swedish Competition Authority) in 2012 on '*The cost of different goals of public procurement*', at http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/the-cost-of-different-goals-of-public-procurement.pdf.

[1568] This is precisely why the OECD has set up a taskforce to build large international databases for measuring the social impact or such practices. For more on this, see I Bengo, '*Debate: Impact measurement and social public procurement'*, (2018) 38 Public Money & Management 5, 391. See also A Ludlow, '*Social procurement: policy and practice'*, (2016) 7 European Labour Law Journal 3, according to which 'There have been few empirical studies of public procurement processes in practice; fewer still with a focus on social procurement. This means that it is difficult to determine whether policy differences are merely rhetorical or whether they produce divergent procurement processes and outcomes. Notwithstanding this dearth of empirical evidence, the public procurement rules were identified by the Commission in its Single Market Act I of April 2011 as one of 12 policy 'levers' in need of reform to enable the EU's internal market to realise its full potential.' (p 481).

[1569] Various studies – such as that ran by Public World, '*EU public procurement regulations and core labour standards: a report for DFID*', (2007), at www.publicworld.org/files/dfid2007.pdf, or that conducted by T Schulten, K Alsos, P Purgess and K Pedersen for the European Federation of Public Service Unions (EPSU) under the name '*Pay and other social clauses in European public procurement*' (2012), at https://www.boeckler.de/pdf/wsi_schulten_pay_and_other_social_causes.pdf – show that the practice is significantly incongruous, ranging from the imposition of high-profile policies at either the national level (in general France, Belgium and the Northern countries) or sub-national levels (Germany), to a mere facilitation (Italy). For a very recent set of numbers and examples (ie, after 2014) see, again, https://aeidl.eu/docs/bsi/index.php/study-report or the collection 'Making socially responsible public procurement work - 71 good practice cases'.

[1570] https://aeidl.eu/docs/bsi/index.php/study-report.

[1571] https://www.aeidl.eu/docs/bsi/index.php/good-practices/92-bsi-goodpract-web/file.

the project, while the reminder, from just 4 countries not included in the survey, but with powerful social background: Belgium, Spain, Slovenia, and the UK.

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Although the idea that the internal market must necessarily remain open to the widest level of competition possible is evident and transpires from the most important official documents issued by the European institutions (*eg*, the Europe 2020 Strategy) but also from a substantial part of the CJEU case law, being loudly defended by some of the most important voices of the academia[1572], it is nevertheless undisputable that things have decisively changed and that there is no coming back. Unfortunately, the fact that both the EU political and judicial actors appear to still be clutching tightly onto, and unwilling to relinquish, the idea of keeping competition undistorted in the internal market (a fundamental constitutional principle),[1573] at any cost, make any exceptions thereto[1574] appear, at this moment, and in spite of a relatively generous cluster of provisions on the possibility to circumvent, legally, those rules, rather dwelling on moving sands. This way, by imposing additional external thresholds, national governments create a double-standard construction which is rather hard to justify and monitor.[1575]

Nonetheless, the explicit references to social objectives contained in the EU Treaties, starting with Article 3(3) TEU[1576], together with the substantial policies elaborated at the EU level (which correspond to the constitutional provisions) and the consistent European social model developed under this legislative context, as extensively discussed above, are enough to ensure enough legitimacy for the pursue of strategic objectives in (and

[1572] See for example S L Schooner, '*Desiderata: objectives for a system of government contract law'* (2002) 11 Public Procurement Law Review or A Sanchez-Graells, '*Public procurement and the EU competition rules*', 2nd ed., Hart, 2015.

[1573] For an in-depth discussion on the three dimensions of the principle of free competition in the internal market see A Sanchez-Graells, '*Truly competitive public procurement as a Europe 2020 lever: What role for the principle of competition in moderating horizontal policies?*', presented at the UACES 45th Annual Conference, Bilbao, Spain, September 2015 and available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638466, last visited 14 November 2019, 5.

[1574] Which the Court itself declared to be of a strict interpretation and application. In fact an overwhelming part of the CJEU case law – as discussed hereunder – insist on the importance of protecting the economic dimension of the internal market, even to the extent of tromping over the suveranity and discretion of the Member States.

[1575] A Sanchez-Graells, https://www.howtocrackanut.com/blog/2015/03/a-conversation-on-horizontal-policies.html.

[1576] Concrete references to the obligation to seek to promote a balanced and sustainable development are comprised in also the Charter – see the preamble thereto.

through) the EU public procurement.[1577] So, it would be quite fair to consider that sustainability in public procurement has become a principle of the EU public procurement law[1578], on a par with that of competition, equality, non-discrimination and transparency.[1579]

Of course, competition remains a prime aim in public procurement and all provisions which recommend (or compel) Member States, or contracting authorities, to promote sustainability through their procurement must be read along this conclusion, so that all measures taken for sustainable purposes remain within its realm.[1580] But, on the other hand, it is incontestable that, in the current EU political and legislative context, sustainable and, in particular, social values occupy a similarly important place. What is more, specific circumstances now justify beyond any doubt the prevalence of such social values over economic ones. This means that, in this new political, constitutional and policy-inclusive context, competition is *not* absolute anymore and a balance is necessary in all such conflictual contexts.[1581] To this purpose, some authors have tried to adduce arguments for an

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[1577] See S Arrowsmith and P Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in S Arrowsmith and P Kunzlik (eds), '*Social and environmental policies in EC procurement law: New directives and new directions'*, Cambridge University Press, 2009, 31, R Caranta, '*The changes to the public contract Directives and the story they tell about how EU law works*' (2015) 52 Common Market Law Review 391, or A Wiesbrok and B Sjåfjell, 'Public procurement's potential for sustainability' in B Sjåfjell and A Wiesbrok (eds), '*Sustainable procurement under EU law'*, Cambridge University Press, 2016.

[1578] Which, as the CJEU has established since C-324/98, *Telaustria*, [2000] ECR I-10745, should apply to all contracts, including those falling outside the scope of Directive 2014/24. It should however be noted that, the language of both the relevant Court decisions and laws contains, in general, when referring to the possibility that contracting authorities use strategic considerations into their procurement, merely facultative terms (in the sense that contracting authorities may, but are not – with a few notable exceptions including Articles 18(2), 69 and of Directive 24 – obliged to make use of such considerations) – see M Andhof, 'Contracting authorities and strategic goals of public procurement – a relationship defined by discretion?', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law*', Hart Publishing, 2019, 133. Neither this, nor the fact that many other provisions contained in Directive 24 with direct references to social considerations have not been transposed into their national legislation by all Member States (see for ex. the case of Article 18(2) which has not been transposed by the UK or Denmark, or Article 77 which has not been transposed by Slovakia or the Czech Republic *etc*) are able to change the fact that sustainability is an important element of the general development of the Union and its internal market and must be pursued as such – for an in-depth discussion on whether sustainable development is an actual procurement principle see M Andrecka, '*Public-private partnerships in the EU public procurement regime'*, GlobeEdit Publishing, 2014.

[1579] For a different opinion, see A Sanchez-Graells, 'Some reflections on the artificial narrowing of competition' as a check on executive discretion in public procurement', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU public procurement law'*, Hart Publishing, 2019, 81. See also R Caranta, 'Upholding general principles versus distinguishing cases: on the use of precedent in EU public procurement law' in A Sanchez-Graells (ed), '*Smart public procurement and labour standards – pushing the discussion after RegioPost'*, Hart Publishing 2018. According to these authors, 'because public procurement concerns spending taxpayers' money, a duty for the Member States arises to spend it efficiently and effectively. Hence, public procurement is surrounded by a plethora of objectives, including social objectives, *but EU public procurement law's most prominent objective lies in the creation of the internal market for public contracts* and concession contracts. *As such, the 'social' of Lisbon's social market economy must be assessed in light of this economic endeavour.*' (emphasis added).

[1580] A Gerbrandy, W Janssen and L Thomsin, '*Shaping the social market economy after the Lisbon Treaty: How 'social' is public economic law?*', in (2019) 15 Utrecht Law Review 2, 34 and, again, 38.

[1581] S Arrowsmith, *'The purposes of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies'*, (2012) 14 Cambridge

implied 'rebuttable presumption of artificial restrictiveness in cases where the tendering procedure has been designed in a manner that is in fact restrictive of competition'. It then follows that 'if it could be shown that a 'reasonable and disinterested contracting authority' in an impartial position would have taken the same decision on the design of the tender in a form restrictive of (maximum potential) competition due to environmental, social, employment or human rights-responsible procurement considerations, the presumption of artificial narrowing would be disapplied and, ultimately, the tender would be compliant with Article 18(1) of Directive 2014/24/EU.'[1582]. Such a test is difficult. But, 'the practical difficulty in engaging with a full-fledged substantive assessment to rebut a presumption of artificial narrowing of competition triggered with relative ease (…) can be mitigated through the creation of a procedural safe harbour [*eg* based on the legal obligation to document all decisions and keep accurate records thereof as per as part of the general right to good administration enshrined in Article 41 of the EU Charter of Fundamental Rights which bears important implications also with regard to the access to justice under Article 47 of the Charter, or, more focused, based on Article 84 from Directive 24 or, even more narrower, on Article 40 of the same Directive on preliminary market consultations which give access to the latest trends in the market and may justify certain choices] or *counter-presumption that allows contracting authorities to demonstrate the existence of overriding (or at least compensatory) gains in terms of responsible procurement*.'[1583]

One possible way to mitigate these risks is to ensure a clearly and in-depth regulated framework. This way, contracting authorities would have the needed legitimacy to act.[1584] Yet, without contesting the various economic roles attributed to public procurement and its prominent competition-related dimension[1585], it became clear that, as a result of the fundamental changes in the international (and especially the European) context, hence of the very constitutional structure of the European Union, 'competition' itself has gained an anatomically different substance, receiving new meanings and a new purport. So, policies at the EU level moved from protecting stark competition with the sacrifice of all the other values, to creating an environment where traders prone to nurturing social values enjoy a

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Yearbook of European Legal Studies 1 According to Arrowsmith, the references to competition in the Directives on public procurement need to be read in a rather limited manner and that a balance with other overriding policy goals is absolutely necessary.

[1582] A Sanchez-Graells, 'Some reflections on the artificial narrowing of competition' as a check on executive discretion in public procurement', in S Bogojević, X Groussot and J Hettne (eds), '*Discretion in EU Public Procurement law'*, Hart Publishing, 2019, 91.

[1583] Ibidem, 92 (emphasis added).

[1584] Ibidem.

[1585] A Sanchez Graells, *Public Procurement and the EU Competition Rules*, 2nd ed (Oxford, Hart, 2015), 52-56.

privileged access. Of course, in order to put things in place in a legal way, such a new arrangement needs to be strictly regulated, in line with the EU law – hence the importance of the European social model.

Anyway, in this context, it is crucial to understand the complex nature and legal and juridical structure of the European Union as a *sui-generis* construct.[1586] Under this broad umbrella, social policy falls under the shared competence between the EU and its Member States[1587], with the EU supporting and complementing[1588] (but not replacing[1589]) the social policies of the Member States (which should, in general, have the liberty to go beyond the level of harmonisation set at the EU level).[1590] According to Article 9 TFEU, a high level of employment, the fight against social exclusion and social protection are three overarching objectives that must be taken into account and integrated in *all* EU actions.[1591] Additionally, pursuant to the Declaration on European Identity[1592], social justice 'is the ultimate goal of economic progress' and a 'fundamental element of the European identity'. In this context, almost all experts and authors insist, when describing the interaction between the internal market rules and concrete social policy measures, on the necessity to find *the right balance*. Unfortunately, this balance is often construed as a necessary 'equilibrium', *ie* symmetry or *equal* weighting, and not as a need to find the right *proportions*.[1593] Germane proportionality is the only way to make things work in all zones of conflict, and especially in public procurement.

On the other hand, based on the principles and tests developed by the CJEU case law, the possibility to use public procurement as an instrument for the implementation of various social policy goals exists, but it is (still) *limited*. It is strong especially where strong

[1586] It is in general accepted, at least since *Costa v ENEL* (C-6/64) that, by signing the constitutive Treaties, Member States have voluntarily but unequivocally 'limited their sovereign rights' and transferred their sovereign powers, at least in certain fields, to the EU institutions.
[1587] Article 4(2)(b) TFEU.
[1588] See Article 153(1) TFEU.
[1589] Although, according to Articles 2(2) and 4(2)(b) TFEU, the European Union can still legiferate on certain key aspects of social law.
[1590] See Article 153(4) TFEU.
[1591] According to Hettne (see J Hettne, '*Sustainable public procurement and the single market – is there a conflict of interest?*', in (2013) 1 European Procurement and Public Private Partnership Law Review, 35), 'Articles 7–11 TFEU provide instructions aimed at the Union legislator and are therefore not directly applicable. Hence, the result of the level of ambition and the desire for policy coordination that these articles express remains to be seen. (…) *However, in the day to day application of the public procurement rules, these articles are less crucial, although they can of course serve as interpretation guidelines*.' (emphasis added).
[1592] 'Declaration on European Identity, Copenhagen, 14 December 1973' of the Heads of State or Government of the nine Member States of the enlarged European Community (1973) 12 Bulletin of the European Communities 118.
[1593] R Yotova, 'Balancing economic objectives and social considerations in the new EU investment agreements: commitments versus realities' – in F Vandenbroucke, C Barnard and G De Baere (eds), '*A European Social Union after the crisis'*, Cambridge University Press, 2017, 276, 277.

public policies are in place (especially those crafted in line with the EU policies in the social sector, within the margins of the European social model or, more limitedly, based on concrete measures taken under some mandatory requirements necessitated by specific local circumstances ― *eg*, linked to the regional development of disadvantaged areas, or to the need to tackle grave social problems such as massive waves of refugees that need to be included in the local communities *etc*, or problems that occur after a period of crisis which brings essential economic and social changes, and the aftermath of which cannot be redressed fast and via customary punctual measures – such as the latest COVID-19 epidemic *etc*). But it is weak where the policies are frail (that is, not enough substantiated) or missing.

This impasse is even more evident in the context of the 'horizontal integration'[1594]. Thus, according to some authors, starting with *Cassis de Dijon* (and the birth of the principle of mutual recognition), the Court of Justice of the Union has basically distorted the shape of the principle of the primacy effect of EU law designed in *Costa v ENEL* (and consolidated in *Simmenthal*)[1595], by making room for a '*transterritorial effect of the law on one Member State in another Member State*'[1596] since ''[u]nder mutual recognition, [citizens] must live with regulations adopted in other polities, in which they have no say. In democratic terms such horizontal transfer of sovereignty is a much more radical option than a vertical one'.[1597] Others, on the other hand, see mutual recognition as a 'default condition of political negotiations' in those policy areas where the Court manifested hostility to national regulations. This, apparently, may encourage the Commission to intervene through harmonization instruments in order to consolidate and give that case law a 'legal' status[1598] (it could for example be the case of the Directives on public procurement which now allow explicitly the pursue of various goals proposed by various EU, or national, policies).

[1594] N Nic Shuibhne, '*The constitutional uncertainty of EU law'* in M Poiares Maduro and L Azoulai (eds), '*The past and future of EU law: the classics of eu law revisited on the 50th anniversary of the Rome Treaty',* Hart Publishing, 2010, 510.
[1595] Case 6/64 *Costa v ENEL* [1964] ECR 585 and Case 106/77 *Simmenthal* [1978] ECR 629.
[1596] H C H Hofmann, 'Conflicts and integration: Revisiting Costa v ENEL and Simmenthal II', in M P Maduro and L Azoulai (eds), '*The past and future of EU Law: The classics of EU law revisited on the 50th anniversary of the Rome Treaty'*, Hart Publishing, 2010, 60 (emphasis added).
[1597] K Nicolaïdis, 'Kir forever? The journey of a political scientist in the landscape of mutual recognition', in M P Maduro and L Azoulai (eds), '*The past and future of EU Law: The classics of EU law revisited on the 50th anniversary of the Rome Treaty',* Hart Publishing, 2010, 450.
[1598] See F W Scharpf, '*The asymmetry of European integration, or why the EU cannot be a 'Social Market Economy*', in Socio-Economic Review (2010), Vol. 8, Issue 2, p.211-250, Oxford University Press, 226.

In any case, strong voices from the academia argue, based on several landmark decisions of the Court[1599], that it would rather be impossible to advance social justice through harmonization measures *unless* those measures make, themselves, an adequate contribution to the *improvement of the conditions for the establishment and the functioning of the internal market*.[1600] This might question the vey legality or at least efficiency of the harmonization proposed by the 2014 set of Directives on public procurement, as, on the one hand, the fundamental objective underlying the regulatory framework in this area remained that of ensuring compliance with the TFEU (in particular the free movement obligations)[1601], thereby enabling cross-border competition and conducing to a unified internal market[1602] and, on the other hand, it is not very clear, from the wording of their provisions, in what exactly does this improvement consist (they appear to restrict these liberties rather than improve their application).

All these legislative, technical and practical shortcomings and inconsistencies might, thus, deprive the much praised reforms brought about by the 2014 Directives on public procurement in the social area of most of their merits, leaving them practically dud. In this wobbly legislative context, and in the lack of a determined direct political/policy intervention from the European Union (for all the reasons discussed above), it is the Court of Justice of the European Union who has all the necessary instruments to put things on the right path and open a wide the door to socially responsible public procurement. Regrettably though, the hesitant, too cautious case law coming so far from the CJEU isn't helping much in this direction so, unless it changes the fundamentals of the axiological paradigm that lays behind its decisions, there are many chances that things will evolve at the same slow pace, rather accidentally and in jolts.

[1599] In principal, that rendered in case C-376/98, *Tobacco Advertising*, [2000] ECR I-8419, where the Court drew the first gross lines of the map of the constitutional power of harmonization. It hence annulled one of the most contested measures taken by the Commission (Directive 98/43), on the application of Germany (which 'had been outvoted in the Council'), under the argument that, although it had been taken in the public health policy field (for the regulation of which the EU legislature possessed full competence!) it failed to pass the main purport of harmonization, *that of improving the conditions for the establishment and the functioning of the internal market* (see para 23). In the eyes of the Court, '"*curing" legal diversity per se will evidently not do as an adequate basis for legislative harmonisation*.' - S Weatherill, '*The constitutional competence of EU to deliver social justice'*, (2006) ERCL 2, 140 (emphasis added), as the harmonisation pursued by [any] Directive [should first and foremost be aimed at removing distortions of competition] – see para 25.

[1600] S Weatherill, '*The constitutional competence of EU to deliver social justice'*, (2006) ERCL 2, 143.

[1601] As per C-380/98 *University of Cambridge* [2000] ECR I-8035, para 16, or C-19/00, *SIAC*, [2001] ECR I-07725, para 32.

[1602] M Vogel, '*The added value of tender-based public procurement as an instrument to promote human rights compliance: what impact may be expected from the instrument*?', (2018) 14 Utrecht Law Review 2, 60.

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