

Providing Social Enterprises with Better Access to Public Procurement: The Development of Supportive Legal Frameworks

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This article discusses the issue of social enterprises gaining access to public procurement processes and contracts at the EU and national level. It primarily examines the opportunities for social enterprises to access public procurement contracts provided for in the Public Procurement Directive 2014/24/EU (Public Procurement Directive). It also investigates measures introduced by the Greek government to provide social enterprises with access to public service contracts at a national level through tailor-made law, namely the Social Economy and Social Entrepreneurship Law of 2011 and its amendment in 2016 (Social Entrepreneurship Law of 2011 and amendments).

I. Introduction

This article comprises of an introduction to the concept of social enterprises in the public procurement context, at both the European Union (EU) and national level. It introduces the concept of social enterprises as developed in EU secondary legislation and in the national legislation of one EU country. Subsequently, it examines social enterprises' eligibility and their barriers to access public procurement at the EU level. At a national level, the article emphasises measures introduced in Greece that are aimed at providing social enterprises with access to public contracts through a tailor-made law, namely the Social Entrepreneurship Law of 2011 and its amendment in 2016. The Social Entrepreneurship Law of 2011 and its later amendment stipulate that municipal authorities and public law entities can directly conclude programmatic agreements (a type of public contract) with social enterprises. Accordingly, the article elaborates on Greek case law by the Greek Court of Audit as opposed to a recent judgment, i.e. the *Spezzi* judgement, issued by the Court of Justice of the European Union (CJEU) regarding the direct award of social service contracts to social enterprises and non-profit organisations. The discussion aims to demonstrate that there is a lack of comprehensive understanding of the social enterprise concept both in national and EU legal jurisprudence. Likewise, scholarship concerning public procurement is far from being able to embed the hybrid character of so-

cial enterprises into the legal discussion on the matter.

With a view to building a framework for sustainable and responsible development, the institutions of the European Union (EU) as well as the national governments of the Member States of the EU, are progressively acknowledging the concept of 'social enterprise'. Social enterprises in the EU represent a paradigmatic type of entrepreneurial practice that contributes to a smart, sustainable and inclusive growth aimed at sustainability,¹ environmental responsibility,² social equality and social cohesion.³

An indicative example of a social enterprise can be found in the Netherlands. Taxi Electric provides transportation services in the city of Amsterdam by means of electric taxis operated by long-term, unem-

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1 In the form of designing products, services and organisational structures that furnish solutions to social and environmental challenges while catering for social needs; see A Picciotti, 'Towards sustainability: the innovation paths of social enterprise' (2017) 88 (2) *Annals of Public and Cooperative Economics*, 235. Picciotti citing C Seelos and J Mair, 'Social Entrepreneurship: The contribution of individual entrepreneurs to sustainable development' (2004) IESE Working Paper No. 553, 8.

2 WK Smith, M Gonin and ML Besharov, 'Managing social-business tensions: A review and research agenda for social enterprise' (2013) 23 (3) *Business Ethics Quarterly*, 427-430; Picciotti (n 1), 236-237.

3 For instance by offering economic opportunities (in labour and entrepreneurship) and social opportunities to disadvantaged and

ployed individuals.⁴ Other examples of social enterprises can be found in other EU countries, such as the Café Dobre & Dobré in Slovakia which employs the homeless, or Cyclefi in Greece that offers mobile and Wi-Fi internet service to customers who – in return – recycle their waste.⁵

Social enterprises are organisations with a hybrid character.⁶ This hybrid character is reflected in the European Commission's (Commission) uniform definition of the term 'social enterprise' in its Social Business Initiative⁷ Communication (SBI Communication 2011).⁸ On the basis of cumulative and uniform criteria, the definition prescribes that a social enterprise⁹ (i) is an operator of the social economy; (ii) has as its main objective to have a social impact rather than to make a profit; (iii) operates by providing goods and services for the market in an entrepreneurial and innovative fashion; (iv) uses its profits to primarily achieve a social mission; (v) is managed in an

open, participatory and responsible manner; and (vi) involves employees, consumers and stakeholders affected by its commercial activities. An identical definition was thereupon introduced in the main text of the EU Regulation on Social Entrepreneurship Funds (EuSEF Regulation) regarding 'social undertakings' as 'qualifying portfolio undertakings' that are eligible to receive social entrepreneurship funds.¹⁰

Various EU Member States have, in their national legislation, institutionalised the concept and practice of social enterprises, primarily to support this type of innovative, sustainable and responsible business activity, and secondarily to introduce public policies that target serious social and environmental challenges, e.g. unemployment, social exclusion, poverty, environmental degradation and climate change.¹¹ To this end, various EU Member States supply social enterprises with legal forms provided for in national civil and company laws.¹² They thereby enable

marginalised groups; see R Spear and E Bidet, 'Social enterprise for work integration in 12 European countries: A descriptive analysis' (2005) 76 (2) *Annals of Public and Cooperative Economics*, 197-199; A Colenbrander, A Argyrou, TE Lambooy, RJ Blomme, 'Inclusive governance in social enterprises in the Netherlands- a case study' (2017) *Annals of Public and Cooperative Economics*, DOI: 10.1111/apce.12176; A Argyrou and S Charitakis, 'Gender Equality in Employment Utilizing Female Social Entrepreneurship in Greece' (2017) 12 (2) *International and Comparative Corporate Law Journal*, 36-60; F Cafaggi and P Iamiceli, 'New frontiers in the legal structure and legislation of social enterprises in Europe: a comparative analysis' in A Noya (ed.), *The changing boundaries of social enterprises*, (OECD Publishing 2009).

4 Taxi Electric, see <<http://www.taxielectric.nl/>> Last accessed on 15 June 2017.

5 Cyclefi, see <<http://www.cyclefi.com/gr/>>; regarding the fields that social enterprises predominantly operate, see also <http://ec.europa.eu/growth/sectors/social-economy/enterprises_en> both links accessed on 15 June 2017.

6 Hybrid organisations combine features that belong to organisations in the for-profit sector, e.g. commercial activities to provide goods and services for the market, with characteristics that belong to organisations in the not-for-profit sector, e.g. the pursuit of a social (and/or environmental) purpose for the benefit of society and community. This is achieved through the reinvesting of generated profits in fulfilling the social (and/or environmental) purpose rather than distributing profits among the investors. See J Battilana and M Lee, 'Advancing Research on Hybrid Organizing—Insights from the Study of Social Enterprises' (2014) 8 (1) *Academy of Management Annals*, 399; G Galera and C Borzaga, 'Social enterprise: an international overview of its conceptual evolution and legal implementation' (2009) 5 (2) *Social Enterprise Journal*, 211; H Haugh, 'A research agenda for social entrepreneurship' (2005) 1 (1) *Social Enterprise Journal*, 3-4.

7 The Social Business Initiative (SBI), available at <http://ec.europa.eu/growth/sectors/social-economy/enterprises_en> Last accessed on 15 June 2017.

8 The Communication aimed at promoting the idea of an enabling regulatory environment for social enterprises in the EU. European Commission, Communication to the European Parliament, the Council, the European economic and social committee and the

committee of the regions social business initiative: Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation (SBI Communication), COM (2011) 682 final, 2-3.

9 Ibid.

10 European Regulation (EU) No 346/2013 of the European Parliament and of the Council on European social entrepreneurship funds [EuSEF Regulation], OJ 2013 L115, art 3(d)(i)-(iv) and recital 12; *SBI Communication* (n 8), 2; European Commission, Proposal for a Regulation of the European Parliament and of the Council on European Social Entrepreneurship Funds (Proposal for a EuSEF Regulation), COM (2011) 862 final - 2011/0418 (COD), 2 and 9 and in footnote 1 it is noted that the term 'social undertaking' and 'social enterprise' can be used interchangeably for the purpose of the Regulation. See in European Commission, Commission staff working paper, Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European Social Entrepreneurship Funds (Impact Assessment), COM (2011) 862 final, SEC (2011) 1513 final, 18-19.

11 J Defourny and M Nyssens, 'Conceptions of social enterprise and social entrepreneurship in Europe and the United States: convergences and divergences' (2010) 1 (1) *Social Enterprise Journal*, 36-37; Galera and Borzaga (n 6), 218-223; Cafaggi and Iamiceli (n 3), 26-27; C Borzaga and J Defourny, *The emergence of social enterprise* (Routledge 2001), 14; A Argyrou, T Lambooy, RJ Blomme and H Kievit, 'An understanding how social enterprises can benefit from supportive legal frameworks: a case study report on social entrepreneurial models in Greece' (2016) 16 (4) *International Journal of Business and Globalisation*, 491-511 [Argyrou et al. 2016a]; A Argyrou, T Lambooy, R Blomme et al., 'An empirical investigation of supportive legal frameworks for social enterprises in Belgium: A cross-sectoral comparison of case studies for social enterprises from the social housing, finance and energy sector perspective' in V Mauerhofer (ed.), *Legal Aspects of Sustainable Development: horizontal and sectorial policy issues*, (Springer 2016), 152-153 [Argyrou et al. 2016b]; European Commission, 'A map of social enterprises and their ecosystems in Europe: Synthesis report (Synthesis Report)' (European Union 2015), 49-61; Country reports, available at <<https://www.seforis.eu/>> Last accessed on 15 June 2017.

12 Defourny and Nyssens (n 11), 33, 36-37; Galera and Borzaga (n 6), 218-219; *Synthesis Report* (n 11), 42, 51 and 55.

them to assume legal personality and carry out commercial activities with a social and/or environmental purpose.¹³ However, not all legal systems accommodate legal forms that combine ‘both for-profit and non-profit legal characteristics [...] to enable the dual pursuit of economic and social interests’.¹⁴ A large majority of EU Member States have already introduced special legislation that is tailor-made for social enterprises.¹⁵ Examples include the United Kingdom (UK),¹⁶ Italy,¹⁷ Belgium,¹⁸ Greece¹⁹ and others.²⁰

Notwithstanding the emerging character of the social enterprise concept and its wide acceptance across the EU, the Commission has noted that social enterprises are organisations that face significant barriers in the internal market, e.g. in attracting investors and resources.²¹ Following the Commission’s findings based on the EU mapping study regarding the ecosystems of social enterprises in the EU, barriers have been identified that prevent social enterprises from effectively competing with other economic operators to access public markets and public contracts at the national and the EU level.²² The barriers faced by social enterprises in accessing public contracts are discussed in the sections that follow.

II. The Eligibility of Social Enterprises to Participate in a Cross-Border Public Procurement

1. Social Enterprises as Economic Operators and Social Undertakings

By definition, social enterprises are business organisations offering various goods and services on the internal market. As such, they should enjoy the same benefits provided by the internal market as any economic operator, regarding, in particular, the free movement of goods, capital, services and persons in an equal and non-discriminatory way. In the legal order of the EU, social enterprises constitute eligible economic operators²³ and (social) undertakings²⁴ for the participation in public procurement.

In the context of EU competition law, the term ‘undertaking’ has been widely interpreted by the CJEU to comprise every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.²⁵ The economic activity of an entity determines whether an entity is an undertaking and an economic operator.²⁶ According to the

13 *Borzaga and Defourny* (n 11), 17; *Galera and Borzaga* (n 6), 218.

14 C Liao, ‘Limits to corporate reform and alternative legal structures’ in B Sjöfjell and B Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press 2015), 292.

15 *Synthesis Report* (n 11), 52; A Argyrou and T Lambooy, ‘An introduction to tailor-made legislation for social enterprises in Europe: A comparison of legal regimes in Belgium, Greece and UK’ (2017) *International and Comparative Corporate Law Journal* (forthcoming).

16 For the purpose of this article the UK is considered a Member State of the EU; Community Interest Company Regulations 2005 (SI 2005/1788) introducing the Community Interest Company.

17 Law on Social Enterprises (155/2006) [Decreto Legislativo 24 Marzo 2006, n. 155 ‘Disciplina dell’impresa sociale, a norma della legge 13 Giugno 2005, n. 118’ pubblicato nella Gazzetta Ufficiale n. 97 del 27 Aprile 2006].

18 Belgian Companies Code 1999, Articles 661-669 introducing the Company with a Social Purpose (i.e. Vennootschap met Sociaal Oogmerk) [Boek X, Hoofdstuk I, Wetboek Van Vennootschappen van 7 mei 1999 (BS 06.08.1999)].

19 Law 4019/2011 on the Social Economy and Social Entrepreneurship 2011, Nat.Gov.Gaz. A 216/30.09.2011 introducing the Social Cooperative Enterprise (i.e. Κοινωνική Συνεταιριστική Επιχείρηση) and amendments in Law 4430/2016 concerning social and inclusive economy and development of its institutions and other provisions, Nat.Gov.Gaz. A’ A 205/31.10.2016.

20 *Defourny and Nyssens* (n 11), 36-37; *Cafaggi and Iamiceli* (n 3), 31-36, 42-45, 45-50; *Galera and Borzaga* (n 6), 218-223; Several EU Member States, e.g. Malta are in the process of developing similar national laws; *Synthesis Report* (n 11), 51-53 and the White Paper on a Social Enterprise Act. In few other Member States, e.g. the Netherlands, a special legal regime for social enterprises is not considered necessary in the national legal

system. *Synthesis Report* (n 11), 49; Sociaal-Economische Raad (SER), ‘Summary of Council Advisory Report on Social Enterprises’ (2015), available at <<http://www.ser.nl/~media/files/internet/talen/engels/2015/2015-social-enterprises.ashx>> Last accessed on 15 June 2017.

21 This is in principle due to an inconsistency in the understanding of the ‘social enterprise’ concept in the EU, which results in ambiguity for the social impact investors. Accordingly, the objective of the EuSEF Regulation was to increase the visibility of social enterprises to social impact investors and improve the effectiveness of fundraising for social enterprises through investment funds; Proposal for a *EuSEF Regulation* (n 10), 2-3; *Impact Assessment* (n 10), 18-19.

22 *Synthesis Report* (n 11), 97; *SBI Communication* (n 8), 27.

23 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 (Public Procurement Directive), OJ 2014 L94, Article 1(1).

24 *EuSEF Regulation* (n 10).

25 Among other cases: Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, [21]; Case C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-00637, [17-20]; Case C-67/96 *Albany* [1999] ECR I-05751, [77-79]; Case C-205/03 *FENIN v Commission* [2006] ECR I-06295, [25]; Case C-138/11 *Datenbank* [2012] ECLI-449, [35]; Case C-185/14 *EasyPay and Finance Engineering* [2015] ECLI-716, [37-40]; See also the Opinion of AG Fennelly of 6 April 1997, in Case C-70/95 *Sodemare* [1997] ECR I-03395 [24-25]; See also the remarks of *Cafaggi and Iamiceli* (n 3), 30, concerning not-for-profit organisations considered as undertakings and the references that they provide to the CJEU case law, i.e. Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-00289 [120-123].

26 *Ibid.* See also M Lorenz, *An introduction to EU Competition Law* (Cambridge University Press 2013), 67-72.

CJEU, economic activity constitutes any activity consisting of offering goods and services regardless of the entity's for-profit or not-for-profit objectives and intentions, legal status and structure.²⁷ In contrast to economic activities, following the case law of the CJEU, non-economic activities exempted from the scope of EU competition law include, amongst others, activities undertaken by entities in relation to 'the exercise of public powers' and/or the fulfilment of social functions, i.e. social services.²⁸ The application of these activities, i.e. activities fulfilling social functions, is determined by the principle of solidarity or by their close supervision from the State. The principle of solidarity is - to a significant extent - subject to limitations prescribed in the CJEU case law.²⁹ As such, it is understood that a social undertaking may, by definition, be an entity engaged in economic activities offering goods and services on the market. These services may fulfil a social function but not on the basis of the principle of solidarity and its prescribed limitations, nor is it under any supervision from the State.

In the SBI Communication of 2011 and the recital of the EuSEF Regulation, social enterprises are defined as operators of social economy that operate on

the internal market. Notably, Article 1(10) of the Public Procurement Directive specifies that the term 'economic operator' covers multiple concepts. In particular, an economic operator may also mean 'contractor', 'supplier' and 'service provider'. The term 'economic operator' is broadly defined in the Public Procurement Directive as any natural or legal person or public entity or group of such persons and/or bodies that offer to the market the execution of work(s), products or services.³⁰ Recital 14 also suggests that 'the notion of 'economic operators' should be interpreted in a broad manner, so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate'.³¹ Therefore, social enterprises qualify as 'economic operators' in the scope of the application of the Public Procurement Directive.

2. The Cross-Border Interest of Social Enterprises in EU Public Contracts

EU Public Procurement Directives only apply to tenders that have a cross-border interest and whose monetary values exceed certain thresholds.³² The thresholds vary according to the type of contract, its value and the type of contracting authority (central governmental or sub-central).³³ If the tender has a cross-border interest and its monetary value is above the particular threshold, the public procurement is subject to the harmonised rules included in the applicable EU public procurement regime. If, however, the monetary value of a tender is below the threshold and the contract is of no cross-border interest, the national public procurement rules of the Member State apply.³⁴ Consequently, not all tenders in which social enterprises may wish to participate are subject to the EU public procurement rules. In some instances, and for tenders below the threshold with no cross-border interest, the national public procurement legal framework may be of more relevance to social enterprises than the EU public procurement rules.

An empirical examination of social enterprises' aggregate participation in EU public procurement could reveal to what extent social enterprises have an interest in EU public contracts of other Member States. However, this task is not easily carried out, primarily because the Commission's SBI definition regard-

27 Ibid. See also the case law provided in (n 25) and V Hatzopoulos, 'The concept of 'economic activity' in the EU Treaty: from ideological dead-ends to workable judicial concepts' Research Paper in Law 6/2011, College of Europe, Department of European Legal Studies.

28 Ibid. *Lorenz* (n 26), 70-72.

29 Ibid. *Lorenz* (n 26) provides a definition for the principle of solidarity citing the Opinion of AG Fennelly of 6 April 1997, in Case C-70/95 *Sodemare* [1997] ECR I-03395, [29]: 'Social solidarity envisages the inherently uncommercial act of involuntary subsidization of one social group by another'. See also in *Hatzopoulos* (n 27), 11-12, the listed elements that would indicate a non-economic activity following the CJEU case law.

30 Public Procurement Directive, Article 1(10).

31 Ibid, recital 14.

32 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 (Classic Directive), OJ 2004 L134, Article 7; Public Procurement Directive, Articles 4-6.

33 The current thresholds can be found at <https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en> Last accessed on 15 June 2017.

34 Although there are cases in which public contracts below the EU public procurement thresholds may be subject to EU law to the extent that there is a cross-border interest from undertakings in other Member States. See R Caranta, 'Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts' in F Lichère, R Caranta and S Treumer, *Modernising public procurement: The new Directive* (DJØF Publishing 2014), 92; P Telles, 'The Good, the Bad and the Ugly: EU's Internal Market, Public Procurement Thresholds and Cross-Border Interest' (2013) 43 (1) Public Contract Law Journal, 12-13.

ing social enterprises is not uniformly applied in the EU Member States or by the Commission itself.³⁵ In fact, in various Member States the organisations that adhere to the different national definitions of ‘social enterprise’ happen to vary in terms of legal structure, size and type of social enterprise.³⁶ Moreover, a significant number of social enterprises in various EU Member States use new tailor-made legal structures that are constantly overlooked, i.e. the Community Interest Company (CIC) being adopted by almost 7,000 organisations in the UK.³⁷ There is therefore no comparative statistical data to indicate the aggregate cross-border public procurement activity of social enterprises in the EU. It is thus difficult to determine with any certainty whether national or EU public procurement rules are more relevant to social enterprises in the EU when it comes to public procurement participation. Consequently, it is important for the purpose of this article to consider both EU and national public procurement laws with regards to the social enterprises participation in public contracts.

3. EU Public Contracts Relevant to the Economic Activities of Social Enterprises

The types of economic activities that social enterprises usually undertake in accordance with the Commission’s operational definition are relevant to the existing types of public contract prescribed in the Public Procurement Directive.³⁸ In the SBI Communication of 2011, the economic activities of social enterprises are categorised into two overarching types.³⁹ The first

economic activity involves businesses providing social services and/or goods and services to vulnerable persons (categorised as Type A for the purpose of this article). Indicative examples of these types of services offered by social enterprises are, among others, access to housing, healthcare, and assistance to elderly or disabled persons. The second overarching type of economic activity involves businesses using a method of production of goods or services with a social objective, but whose activity may be outside the realm of the provision of social goods or services (categorised as Type B for the purpose of this article).⁴⁰ With regards to category Type B social enterprises, the example provided by the Commission refers to businesses that offer social and professional integration opportunities to disadvantaged, excluded and marginalised persons through employment, also known as work-integration social enterprises (WISEs).⁴¹ However, Type B social enterprises cannot be limited only to WISEs, as there are other social enterprises that apply methods of production of goods or methods in the provision of services with a social and/or environmental objective, e.g. recycling, environmental protection and fair trade amongst others.⁴²

III. The Barriers Faced by Social Enterprises in Accessing Public Contracts in the EU

The Commission has identified certain barriers at the EU level that prevent social enterprises from effec-

35 The Commission claimed that there are approximately 2 million social enterprises in the EU, representing 10% of all EU businesses and more than 6% of EU’s labour force on the basis of a study which demonstrated information regarding social economy organisations that do not conform well to the SBI definition. *SBI Communication* (n 8), 3; JL Monzón Campos and RC Ávila, ‘The Social Economy in the European Union: Report drawn up for the European Economic and Social Committee by the International Centre of Research and Information on the Public’ (2012) *Social and Cooperative Economy* (CIRIEC), 47-51, available at <<http://www.eesc.europa.eu/resources/docs/qe-30-12-790-en-c.pdf>> Last accessed on 15 June 2017.

36 Triodos Bank for example, a large organisation in the Netherlands is commonly perceived as a social enterprise, available at <<http://www.triodos.co.uk/en/about-triodos/corporate-information/key-figures/>> Last accessed on 15 June 2017.

37 Another example is the VSO, i.e. Company with a Social Purpose in Belgium being adopted by over 1,000 organisations. See *Argyrou and Lambooy* (n 15).

38 These contracts can be: (i) public works contracts, for the execution, or the design and execution, of a work or works related to

any of the specified activities included in the Directives, e.g. construction; (ii) public supply contracts, for the purchase, lease, rental or hire purchase, with or without an option to buy, of products including as an incidental matter, siting and installation operations; and (iii) public service contracts, for the provision of services other than those related to public works contracts. The Public Procurement Directive also contains rules in Articles 74-77 concerning the award of contracts for the provision of social and other similar services to economic operators; Public Procurement Directive, Articles 2(6)-(9), annexes II and XIV, 74-77; CH Bovis, *EU Public Procurement Law* (Edward Elgar Publishing 2012), 333.

39 *EuSEF Regulation* (n 10), recital 14; *SBI Communication* (n 8), 2-3.

40 Ibid.

41 S Campi, J Defourny and O Gregoire, ‘Work integration social enterprises: are they multi-stakeholder and multiple goal organizations?’ in M Nyssens (ed.), *Social enterprise: at the crossroads of market, public policies and civil society* (Routledge 2006), 31; *Spear and Bidet* (n 3), 197.

42 Case C-368/10 *Commission v Netherlands* [2012] ECLI-284.

tively competing with other economic operators concerning access to public contracts in the EU. These barriers include (1) the lack of legal recognition of social enterprises in the EU and across its Member States; (2) the limited scope for the award of public contracts on the basis of social considerations; and (3) the existing complex and formalised public procurement regime. Each will be discussed in turn.

1. The Lack of Legal Recognition of Social Enterprises in the EU and its Member States

The Commission claims that the lack of legal recognition of social enterprises in the EU and in the national jurisdictions of some Member States does not allow the development of policies and measures to support social enterprises and subsequently give them better access to public contracts.⁴³ As mentioned in Section I, some EU Member States have not yet developed a special legal regime that is tailor-made for social enterprises, whereas others have already developed such legal frameworks. The Commission's initiative to introduce a uniform definition of 'social enterprise' in its EuSEF Regulation was also acknowledged in this article. However, there is no concrete reference to the concept of social enterprise *per se* in the applicable EU public procurement law. The recital of the previous Classic Directive on public procurement acknowledged the important role of 'sheltered workshops' that promoted the integration of margin-

alised groups, e.g. the disabled, but this did not mean they were able to obtain contracts under the normal conditions of competition.⁴⁴ The Public Procurement Directive makes a more sophisticated reference to 'sheltered workshops' and to 'social businesses'. However, social businesses are only narrowly defined in Recital 36 of the Public Procurement Directive as undertakings that aim 'to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as the unemployed, members of disadvantaged minorities or otherwise socially marginalized groups'. This definition is similar to the Type B work integration social enterprises provided in the SBI Communication of 2011.⁴⁵ Accordingly, sheltered workshops that provide employment to disabled and disadvantaged minorities are - following Article 20 of the Public Procurement Directive - eligible to compete for contracts reserved by the national contracting authorities of the Member States. This is as long as their main objective is social and professional integration and they employ more than 30% disabled or disadvantaged employees.⁴⁶

In the Section on 'Particular Procurement Regimes', Articles 74–77 of the Public Procurement Directive include new rules that distinguish public contracts from a list of social and other related, specific services that are subject to a lighter touch regime.⁴⁷ These rules may be of a great importance and relevance to social enterprises. The prescribed social services in the Public Procurement Directive, as noted by the Commission, have characteristics 'which make them inappropriate for the application of the regular procedures for the award of public service contracts'.⁴⁸ Due to the special characteristics of these social services, i.e. administrative, organisational and cultural, and due to their very limited cross-border dimension, they are subject to a discretionary EU public procurement regime. The regime concerning social services is itself subject to a high threshold and to limited obligations for the contracting authorities regarding the publication of the tender in question and the award of the contract.⁴⁹ The contracting authorities are therefore given greater discretion to organise and implement public procurement related to these services in a way that best fits their special characteristics.⁵⁰

In particular, Article 77(1) of the Public Procurement Directive allows contracting authorities to reserve the right for a certain category of 'organisations' to exclusively participate in public procurement and

43 *Synthesis Report* (n 11), xx, 50, 61.

44 Classic Directive, recital 28; FJL Pennings and ER 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 2015), 178.

45 Public Procurement Directive, recital 36.

46 *Bovis* (n 38), 65 and 144; Public Procurement Directive, Article 20.

47 *Caranta* (n 34), 90; S Smith, 'Articles 74 to 76 of the 2014 Public Procurement Directive: The new 'light regime' for social, health and other services and a new category of reserved contracts for certain social, health and cultural services contracts' (2014) 4 *Public Procurement Law Review*, 161.

48 Public Procurement Directive, recital 114; European Commission, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final 2011/0438 (COD), 10.

49 Public Procurement Directive, Articles 74 and 75; *Caranta* (n 34), 90; *Smith* (n 47), 162.

50 *Ibid*, *Caranta* (n 34); Public Procurement Directive, recital 114.

in the award of public contracts for specific social and other related services.⁵¹ The foregoing, consequently, leads to preferential treatment of such ‘organisations’ in the provision of social services. To that end, the scholarship on the matter contemplates whether the provision of reserved contracts should lead to the direct award of public contracts to such ‘organisations’ or it should lead to a restricted competition in the award of a contract for this type of ‘organisations’.⁵² The reservation of certain contracts to the aforementioned undefined ‘organisations’ outlined, to a very limited extent, in Recital 118 and Article 77(2)(a)–(d) of the Public Procurement Directive aims to ensure the ‘continuity of public services’.⁵³ Subsequently, these organisations according to Article 77(2)(a)–(d), should have the following characteristics:

- a) its objective should be the pursuit of a *public service mission* linked to the delivery of the services referred to in Article 74 and 77(1), such as health, social and cultural services, etc.;
- b) the profits should be reinvested with a view to achieving the organisation’s objective;
- c) the structures of management or ownership of the organisation performing the contract should be based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- d) the organisation should have not been awarded a contract for the services concerned by the contracting authority within the past three years.⁵⁴

These ‘organisations’ that are not related to or referred to as social enterprises *per se* (or as social busi-

nesses) have characteristics which are almost identical to the broader list of characteristics that Type A social enterprises have in the Commission’s definition and/or in the EuSEF Regulation. In other words, they provide services which are socially oriented, they have a social purpose, they employ participatory governance, and they impose profit distribution constraints. However, in the body of the Public Procurement Directive these ‘organisations’ are not recognised as social enterprises, neither do they fall within the scope of the definition of social businesses. It is also worth pointing out that emphasis is given in Recital 118 to the organisations’ ‘employee ownership or active employee participation in their governance’ for the purpose of ‘participat[ing] in delivering these services to end users’. However, this does not explain how these provisions ensure the continuity of public services. The legislative history of Article 77(2) does not provide a comprehensive explanation of the nature of these ‘organisations’. Scholarly research indicates that Article 77 was unforeseen in the Commission’s proposal for a Public Procurement Directive.⁵⁵ Indeed, the provisions in Article 77(1) and (2) appear in the preparatory documents of the European Council in July 2013, as an extension of Article 76, i.e. Article 76a.⁵⁶ Preliminary elaborations of these provisions concern the limitation of ‘the participation in a tender procedure for the provision of social and health services to non-profit organisations’⁵⁷ and following the case of *Sodemare*,⁵⁸ they appear in the preparatory documents of various committees of the European Parliament from May 2012 till September 2012.⁵⁹ However, Article 77 as

51 These are indicatively among others: administrative educational activities, administrative healthcare services, administrative housing services, supply services of domestic help personnel, supply services of nursing personnel etc. See *Caranta* (n 34), 92.

52 R Caranta, ‘Sustainable Procurement’ in M Trybus, R Caranta and G Edelstam, *EU public contract law: Public procurement and beyond* (Bruylant 2014).

53 Public Procurement Directive, recital 118; *Caranta* (n 34), 93; *Smith* (n 47), 167.

54 *Ibid*, Article 77(2)(a)–(d).

55 *Caranta* (n 34), 93.

56 Background documents of the European Council, Proposal for a Directive of the European Parliament and of the Council on public procurement (First reading) - Approval of the final compromise text (10 July 2013) ST 12167 2013 INIT, 493 and Proposal for a Directive of the European Parliament and of the Council on public procurement (Classical Directive) (First reading) - Approval of the final compromise text (12 July 2013) ST 11745 2013 INIT, 189.

57 The provision continues as follows: ‘provided that a national law that is compatible with European law provides for restricted

access to certain services for the benefit on nonprofit organisations, in line with the CJEU’s jurisprudence. The call for competition shall make reference to this provision. The basic principles of transparency and equal treatment should be respected’ in European Parliament; see Opinion of the Committee on Employment and Social Affairs for the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on Public procurement, COM(2011)0896 – C7-0006/2012 – 2011/0438(COD), 42.

58 Case C-70/95 *Sodemare* [1997] ECR I-03395.

59 An additional text is suggested in Article 76(2)(a) which reads: ‘In contracts for social and other specific services listed in Annex XVI, contracting authorities may require economic operators to re-invest in the specific operation any profit gained in the same operation or only allow non-profit entities as tenderers’, see Draft Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on public procurement, COM(2011)0896 – C7-0006/2012 – 2011/0438(COD), 36.

such appears in full in the Position paper of the European Parliament adopted at its first reading in 2014.⁶⁰

Scholars have contemplated why this was the case. In particular, they have argued that the UK insisted on the introduction of Article 77(2) to accommodate the 'kick start' of such 'organisations'. Those had been set-up predominantly in the UK by former employees of public sector bodies (i.e. contracting authorities or otherwise) - to deliver public services⁶¹ or to make third-party 'externalisation processes less contentious'.⁶² These UK organisations appear to be public service mutuals in the form of the CIC.⁶³ A similar logic is later outlined in this article, with a discussion regarding Greek contracting authorities awarding public service contracts to social cooperatives. The practice appears to be adopted by contracting authorities with the objective to ensure the delivery of social services in areas where the Greek indebted public sector cannot supply quality services due to the impact of the financial crisis. The contracts offer employment to those former employees who were made redundant due to the reduction in public employment. This logic may be used to accommodate other policy aspirations regarding reforming the size and flexibility of the public sector and the promotion of employment in different Member States. This logic could therefore provide an explanation to the justification provided in Recital 118 regarding the role of these 'organisations' to, at a minimum, 'ensure the continuity of public services'.

The explanatory memorandum of the Public Contracts Regulations of 2015, which transposes the Public Procurement Directive into UK law, confirms that the provisions in Article 77 aim 'to encourage certain organisations such as fledgling social enterprises and mutuals to bid for government contracts'.⁶⁴ From the legislative history of Article 77(2), it can be deduced that these 'organisations' – although implicitly referring to the genus of non-profit organisations⁶⁵ and the preparatory documents of the Public Procurement Directive – were never understood nor were they considered by the EU legislator to mean purely non-profit organisations. The abstract wording of these 'organisations' in Article 72(2) contradicts the term 'non-profit organisations' that is consistently used in Recital 28 and Article 10(h) of the Public Procurement Directive. Additionally, if these 'organisations' were to be understood as non-profit organisations, in insisting on the introduction of these provisions, the UK would have had to consider the restrictive effect that these provisions may have had on its policy since 2005 regarding the CIC, which ultimately proved successful. This policy involves the introduction of a tailor-made legal form for social enterprises, which are non-profit organisations i.e. the CIC limited by guarantee, but also for hybrid (not-for-profit) social enterprises, i.e. the CIC limited by shares, which allow a relatively high margin of profit distribution to the shareholders subject to a regulated profit distribution cap of 35%. As such they cannot be easily characterised as non-profit organisations.⁶⁶ This consideration may also explain the abstract wording concerning these 'organisations' and their description on the basis of operational characteristics.⁶⁷ Additionally, the example of 'the cooperative' provided in Recital 118 as an example of such an 'organisation' clearly indicates that the legislator considered examples of such hybrid 'organisations', e.g. the social cooperatives, and that the discussion was not directed at organisations which are by law subject to an absolute profit distribution constraint in their legal structure. It does, however, apply to those entities that approximate more to the hybrid concept of social enterprise as described in the introduction. This line of reasoning concerning social enterprises fits better with the logic of the Public Procurement Directive prescribed in Articles 76(2) and 77(2).⁶⁸

Accordingly, if various types of social enterprises were to be echoed in Article 77(2) why then was the

60 European Parliament, Position of the European Parliament, adopted at first reading on 15 January 2014 with a view to the adoption of Directive 2014/14/EU of the European Parliament and of the Council on public procurement repealing Directive 2004/18/EC (EP-PE_TC1-COD(2011)0438)PE 306-307.

61 *Smith* (n 47), 167.

62 *Ibid. Caranta* (n 34), 93.

63 See the concept of 'Public Service Mutuals' as implemented using the legal form of the Community Interest Company in the UK, available at <<http://www.gov.uk/government/collections/public-service-mutuals>> Last accessed on 15 June 2017.

64 Explanatory Memorandum to the Public Contracts Regulations 2015 No.102 at 8.

65 Case C-70/95 *Sodemare* [1997] ECR I-03395.

66 *Cafaggi and Iamiceli* (n 3), 47; *Argyrou and Lambooy* (n 15).

67 The guidance for the formation of Public Services Mutuals in the form of a CIC limited by guarantee or limited by shares, available at <<http://www.gov.uk/guidance/start-a-public-service-mutual-the-process>> Last accessed on 15 June 2015.

68 *Public Procurement Directive*, Article 76(2).

EU legislator not explicit about it, especially considering that there is a definition regarding social enterprises/social undertakings already developed by the Commission and introduced in the EuSEF Regulation? One possible explanation may be the emerging character of the social enterprise concept and the lack of knowledge and awareness in legal scholarship regarding its content. Other reasons may include the ambiguity that the term 'social enterprise' confers – considering that it comprises a variety of legal forms and structures – but also the uncertainty of legal scholarship regarding its content. Another explanation may be that the EU legislator did not intend to delineate the application of these provisions solely to existing social enterprises, but also to other types of organisations showing similar operational characteristics or aiming to do so for the purpose of winning a contract. If various types of social enterprises were to be echoed in Article 77(2) including hybrid organisations, which are, by definition economic operators and (social) undertakings, should it be understood as though the EU legislator has extended preferential treatment to this type of organisation to the extent that it may possibly disturb competition with other economic operators? This issue is going to be briefly discussed in Section IV in the context of Greece.

2. The Limited Scope for the Award of Public Contracts on the Basis of Social Considerations

The Commission claims that the applicable EU public procurement legal framework only provides limited scope for the award of public contracts on the basis of social considerations.⁶⁹ Therefore, the lack of social considerations relating to public procurement in the award criteria prevents social enterprises from displaying their potential in generating social impact and social value in public procurement.

According to the standard EU approach outlined already in the previous Classic Directive, in awarding the public contracts, contracting authorities are allowed to obtain best value for money on the basis of the two award criteria that determine the selection of the contractor, namely the lowest price and/or the most economically advantageous tender (MEAT).⁷⁰

The Public Procurement Directive facilitates contracting authorities to take into account potential so-

cial and environmental considerations in the award criteria as well as conditions relating to the performance of the contract or technical specifications of the procured goods and services.⁷¹ In particular, with regards to the stage of awarding the contract, in Article 67(1) of the Public Procurement Directive, MEAT is articulated as the only award criterion comprising of the following sub-criteria:⁷² a mandatory criterion, i.e. (i) price or cost, or alternatively cost-effectiveness through lifecycle costing; an optional criterion, i.e. (ii) the best price–quality ratio which can be assessed on the basis of qualitative, environmental and/or – most importantly for social enterprises – social aspects provided they were mentioned in the tender documents and they are linked to the subject matter of the contract in question; or (iii) a combination of both (i) and (ii).⁷³ Consequently, contracting authorities can decide on awarding public contracts by referring to cost effectiveness and lifecycle costing.⁷⁴ In addition, tenders can be evaluated and contracts can be awarded on the basis of the best price–quality ratio. The best price–quality ratio is a formula on the basis of which contracting authorities, when evaluating tenders, may take into account the lowest price combined with qualitative criteria, such as aesthetic

69 *Synthesis Report* (n 11), 50, 96.

70 Classic Directive, Article 53; R Caranta, 'Public Procurement and award criteria' in CH Bovis (ed.), *Research Handbook on EU Public Procurement Law: Research Handbooks in European Law series* (Edward Elgar Publishing 2016), 149-154; CH Bovis, *EU Public Procurement Law* (Edward Elgar Publishing 2007), 365; G Gruber, T Gruber, A Mille and M Sachs, *Public procurement in the European Union: Directives and Case Law as at 01/03/2006* (Intersentia Uitgevers NV 2006), 359.

71 Public Procurement Directive, Article 42 and annex VII, Article 67(2) and Article 70; See B Sjöfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2015), 92.

72 Public Procurement Directive, recital 89-90; Bovis (n 38), 410-412; Caranta (n 70), 150; PB Faustino, 'Award criteria in the new EU Directive on public procurement' (2014) 3 *Public Procurement Law Review*, 124-125.

73 Caranta (n 70), 152; Faustino (n 72), 125-128; Pennings and Manunza (n 44), 188.

74 Lifecycle costing constitutes a cost-effectiveness approach which identifies in monetised terms the tender with the lowest cost by taking into consideration all costs involved in all the phases of the lifecycle of works, supplies or services evaluated on the basis of certain categories of costs mentioned in Article 68; Caranta (n 68), 152; Faustino (n 72), 127-128; DC Dragos and B Neamtu, 'Life-cycle costing for sustainable public procurement in the European Union' in B Sjöfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2015), 114-137; Pennings and Manunza (n 44), 189.

and functional characteristics, accessibility, design for all users, and social, environmental and innovative characteristics.⁷⁵ This award formula may provide leverage in tenders to social enterprises that seek, in principle, the pursuit of social objectives rather than profit-making.

3. Existing Complex and Formalised Public Procurement Regime

The Commission claims that the existing complex and formalised public procurement regime, which is directed at the conclusion of large contracts with high technical and financial pre-qualifications, standards and specification requirements, prevent social enterprises from participating in public tenders.⁷⁶ Many social enterprises – especially those adopting tailor-made legal forms, i.e. the CIC – are young business organisations that may be semi-professionalised business entities applying mostly informal processes in their business practice.⁷⁷ Therefore, they may not yet be in a position to deal with the formalised public procurement requirements or with

more qualified economic operators. In this case, the problem is the reluctance of social enterprises to authenticate their successful and competitive businesses by showcasing formalised professionalism due to their organisational hybridity.⁷⁸ In other words, social enterprises demonstrate a reluctance to invest in their entrepreneurial aspects as opposed to their social aspects, which may undermine their social purpose, social impact and their access to resources.⁷⁹ Peattie and Morley note this social enterprises' competitiveness paradox when pursuing public contracts. They indicate that although one would expect social enterprises to have an advantage over commercial competitors with respect to their 'social added value', contracting authorities may raise concerns regarding their professionalism, ability to scale up or long-term sustainability.⁸⁰ Another study shows that social enterprises often seek to decrease their financial dependence on local authority funds as they view the provision of public contracts as a process that requires them to prioritise professionalism.⁸¹

IV. Measures Enabling Access to Public Contracts at a National Level

According to the Commission's research results from the mapping study regarding the ecosystems of social enterprises in the EU, the policy and legal environment for social enterprises at the national level is still underdeveloped. This is particularly the case with respect to key areas that are important for the growth and development of social enterprises, including the focus area discussed in this article, that is, social enterprises' access to public contracts.⁸² Although various Member States have developed tailor-made legislation for social enterprises, this does not necessarily result in an enabling environment for social enterprises.⁸³

1. Measures in the Greek Social Entrepreneurship Law of 2011

In 2011, the Social Entrepreneurship Law introduced provisions defining and providing a legislative framework for social enterprises in Greece⁸⁴ as well as a new legal form, namely the social cooperative enterprise (Koinsep). The Koinsep is a hybrid, i.e. a

75 A Wiesbrock, 'Socially responsible public procurement: European Value or national choice?' in B Sjöfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press 2015), 85; Caranta (n 70), 164; The best price–quality ratio indicates a comparison between best (lowest) price and quality by demonstrating the numeric relationship between the best price and quality in terms of a quantifiable value. This is a 'comparative assessment' according to Pennings and Manunza (n 44), 188.

76 *Synthesis Report* (n 11), 97.

77 *SBI Communication* (n 8), 3. Campi et al. (n 41).

78 D Pirvu and E Clipici, 'Social Enterprises and the EU's Public Procurement Market' (2016) 27 (4) *Voluntas*, 1619; K Peattie and A Morley, 'Eight paradoxes of the social enterprise research agenda' (2008) 4 (2) *Social Enterprise Journal*, 100.

79 *Ibid.*

80 *Ibid.*

81 B Wallace, 'Exploring the meaning(s) of sustainability for community-based social entrepreneurs' (2005) 1 (1) *Social Enterprise Journal*, 83.

82 *Synthesis Report* (n 11), 50, 93–94.

83 Argyrou et al. 2016a (n 11), 507–509; A Argyrou, T Lambooy, R Blomme and H Kievit, 'Unravelling the participation of stakeholders in the governance models of social enterprises in Greece' (2017) 17 (4) *Corporate Governance: The international journal of business in society*, 661–677.

84 *Social Entrepreneurship Law of 2011* (n 19) and the amendments on the Koinsep provided in Law 4430/2016 concerning social and inclusive economy and development of its institutions and other provisions, *Nat.Gov.Gaz. A'* 205/31.10.2016.

for-profit, limited liability civil cooperative with social (non-profit) objectives, which has *de jure* commercial capacity to undertake economic activities.⁸⁵ Three different types of the Koinsep were introduced into the legal framework, namely (a) the Koinsep of Work Integration; (b) the Koinsep of Social Care; and (c) the Koinsep of Collective and Productive Purpose.

The Social Entrepreneurship Law of 2011 introduced two measures that established incentives to support the development of the Koinsep in Greece. Article 16(1) introduced the concept of Public Contracts of Social Reference (PCSR).⁸⁶ PCSR are defined in the legislation as public contracts ‘in which the contracting authorities at the award stage mainly take into account social aspects as award criteria.’⁸⁷ In essence, the PCSR are public contracts, the conclusion of which is based on the co-existence of economic and non-economic award criteria based on social considerations mentioned in Article 16(1)(a)–(ζ). These include, amongst others, (i) employment opportunities; (ii) the social integration of vulnerable groups; (iii) the equality of opportunities; (iv) the design for accessibility for all; (v) considerations of sustainability; and (vi) the wider voluntary compliance with corporate social responsibility. These public contracts could potentially enable contracting authorities to involve social enterprises in the execution of their contracts. However, the aforementioned criteria are subject to interpretation and specification by an inter-ministerial committee that is assigned by law to create the necessary regulatory framework as well as a comprehensive plan for the integration of

policies with respect to the PCSR.⁸⁸ At the time of writing (2017), the inter-ministerial committee has yet to be established, and neither the regulatory framework nor the comprehensive policy plan followed the introduction of the PCSR, ultimately making the PCSR an unenforceable policy.⁸⁹ Moreover, the Hellenic Single Public Procurement Authority (HSPPA)⁹⁰ indicated in its National Strategy Plan for Public Contracts (NSPPC) 2016–2020⁹¹ the lack of a necessary policy for the implementation of the PCSR in conformity with the Public Procurement Directive concerning social considerations in public procurement.⁹²

Additionally, Article 12(5) of the Social Entrepreneurship Law of 2011 allows municipal authorities and public law entities to directly conclude ‘programmatic agreements’ with Koinsep social enterprises as part of an inter-municipal collaboration scheme which is exempted from public procurement law.⁹³ Such agreements allow the Koinsep to support the Greek public law entities and municipal authorities in delivering services of a social character and to access public markets by operating in areas where the public sector cannot provide quality and efficiency in those services due to the impact of the financial crisis.⁹⁴ In combination with the critical condition of the indebted Greek public sector and the need to reduce public expenditure, such contracts could potentially provide employment for those who were made redundant as a result of the retrenchment of the public administration, following the reduction in public employment and redundancies in the public sector.

85 Ibid, Article 2; Explanatory notes to the Social Entrepreneurship Law of 2011 (August 2011), 1. See also the amendments on the categorisation of the Koinsep provided in Article 14 of Law 4430/2016 concerning social and inclusive economy and development of its institutions and other provisions.

86 Ibid, Article 16(1).

87 Ibid. See also M Tzouvelekas and K Zoehrer, ‘Law 4019/2011—Prerequisites for Social Economy function for a sustainable labour market’ (2015) 3 Social Policy: Hellenic Social Policy Association, 129.

88 Social Entrepreneurship Law of 2011, Article 16(2)–(3).

89 Economic and Social Council of Greece (OKE), ‘Own-Initiative Opinion: The Social Economy and Social Entrepreneurship’, No 285/2013, 10; European Commission, A map of social enterprises and their eco-systems in Europe—Country Report: Greece (European Union 2014), 4; The provisions regarding the PCSR do not appear in the later amendment of the Social Entrepreneurship Law of 2011 in Law 4430/2016.

90 This public authority has the competence to safeguard the compliance of the national public procurement with the national and EU public procurement law.

91 The Greek National Strategy Plan for Public Contracts (NSPPC) 2016–2020 (March 2016, available at <<http://www.opengov.gr>> and <<http://www.hsppa.gr>> Last accessed on 22 June 2017; Tzouvelekas and Zoehrer (n 87) 129. The Greek parliament transposed the Public Procurement Directive into national law on 2 August 2016.

92 Ibid. Greek National Strategy Plan for Public Contracts, 89–91.

93 Social Entrepreneurship Law of 2011, Article 12(5) and Article 6 in the Law 4430/2016 concerning social and inclusive economy and development of its institutions and other provisions, Nat.Gov.Gazette A’ 205/31.10.2016.

94 TN Tsekos and A Triantafyllopoulou, ‘From Municipal Socialism to the Sovereign Debt Crisis: Local Services in Greece 1980–2015’ in H Wollmann, I Koprić and G Marcou (eds), *Public and Social Services in Europe: From Public and Municipal to Private Sector Provision, Governance and Public Management*, (Springer 2016), 145.

2. Programmatic Agreements and the Greek Court of Audit

In principle, programmatic agreements are contracts that promote inter-municipal collaboration⁹⁵ concluded between municipal authorities and/or public law entities in the public domain. They are aimed at facilitating the efficient exercise of activities in the public sector and at the implementation of projects at a local and/or regional level, subject to a pre-contractual review by the Greek Court of Audit (the Court).⁹⁶ However, according to Article 12(5) of the Greek Social Entrepreneurship Law of 2011, programmatic agreements can also be concluded directly between a Koinsep and a public law entity or municipal authority for the implementation of public projects. They can also be concluded directly without following public procurement law,⁹⁷ ‘outside [of] the constraints of the competition rules and of the tendering procedures’, subject to specific limitations.⁹⁸ In 2014, the Court reviewed the direct programmatic agreements concluded between Koinsep and the municipal authorities. Those programmatic agreements mandated the implementation of various public service projects undertaken by Koinsep in return for reimbursable expenses and working salaries. The Court did not consider the rules provided in the Public Procurement Directive. On the contrary, it examined and confirmed that the concluded programmatic agreements for the provision of specific public services fell within the scope of the application of the previous EU public procurement law as transposed into the

Greek Presidential Decree No. 60/2007 (Greek Presidential Decree) concerning the adaptation of Greek legislation to the provisions of the Classic Directive.⁹⁹

The Court indicated that according to the provisions for the award of a service contract in the Greek Presidential Decree, a public tender is required. Only exceptionally and in very limited instances included in Article 25 of the Presidential Decree, the direct award of a public service contract would be allowed by following the negotiated procedures or where a prior contract notice is not published. Those instances were not met in the examined programmatic agreements.

Additionally, the Court ruled that Koinsep undertakings are engaged in economic activities within the meaning of Articles 101, 102, 106, 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). As such, they are subject to EU rules on competition and State aid (regardless of their for-profit or not-for-profit character) and they may not conclude direct programmatic agreements with municipal authorities and public law entities without breaching EU and national public procurement law on the award of public contracts.¹⁰⁰ However, the Court admitted, that following the case *Paint Graphos*¹⁰¹ the Koinsep cannot be considered as being in a ‘comparable factual and legal situation with that of commercial companies’.¹⁰² According to the Court, Koinsep are thereby able to enjoy special benefits that should be in proportion to their purpose of establishment and operation, in a way that does not lead to unfair competition with other commercial undertakings that may choose to operate in the same economic sectors.¹⁰³

95 The inter-municipal collaboration of public authorities for the performance of services of general interest is exempted from public procurement law subject to criteria mentioned in Case 480/06 *Commission of the European Communities v Federal Republic of Germany (Landkreise)* [2009] ECR-4747 [34-35, 47]; See also W Janssen, ‘Public Procurement Law and In-house Delivery of Public Services: Improving a Paradox’, in A McCann, AE van Rooij, A Hallo de Wolf and AR Neerhof (eds), *When Private Actors Contribute to Public Interests: A Law and Governance Perspective*, (Eleven Publishing 2014), 11.

96 Law 3852/2010 concerning the New Architecture of Government Administration and Decentralization (Kallikratis Law), Nat. Gov. Gaz. (ΦΕΚ 87/τ. Α’/07-06-2010), Article 100(1); Greek Court of Audit, A Handbook for the Review by the Greek Court of Audit of the Public Procurement Processes undertaken by the municipal and regional contracting authorities and by their legal persons (The pre-contractual review stage) (Greek National Printing Bureau 2011), 48 and 102; Greek Court of Audit, 6th Division, Decisions, No 3/2014, para III; 2/ 2014, para III(B); 557/2014, para II; 4141, 26/2013, 1380, 289, 28/2012; Article 100(2) stipulates the legal requirements for the legitimate and valid conclusion of programmatic agreements, and their subject, content and scope. The legality of programmatic agreements is pre-contractu-

ally reviewed by the Greek Court of Audit when the agreed monetary value of the contract exceeds statutory thresholds. See also Kallikratis Law, Articles 100(1)(α) and 278(1).

97 Social Entrepreneurship Law of 2011, Article 12(5) and in Article 6 in the Law 4430/2016 concerning social and inclusive economy and development of its institutions and other provisions.

98 *Tsekos/Triantafyllopoulou* (n 94), 145. Limitations among others for the valid conclusion of programmatic agreements are: the purpose of the agreements cannot be achieved by any other lawful manner or the purpose of the required services should be relevant to the social purpose of the Koinsep. Greek Court of Audit, 6th Division, Decisions, No 3/2014, para III; 2/ 2014, para III(B); 557/2014, para II; 4141, 26/2013, 1380, 289, 28/2012.

99 *Ibid*, No 2/2014, para III(B)(2); 557/2014, para IV.

100 *Ibid*, No 2/2014, para III(B), IV(2), 557/2014, para II and VI(B).

101 *Ibid*. Cases C-78/08 to C-80/08, *Paint Graphos* [2011] ECR I-7611, [61-63].

102 *Ibid*. No 2/2014, para IV(2); 557/2014, para VI(B).

103 *Ibid*.

The Court clarified that the contracts in dispute, i.e. directly concluded programmatic agreements between Koinsep and municipal authorities, did not constitute programmatic agreements as part of the inter-municipal cooperation. Instead they constituted public service contracts that involved nominal consideration in return for the services provided. The analysis of the contracts was based on the significant difference between the programmatic agreements and public service contracts in terms of purpose and cause. The purpose of the programmatic agreements, stipulated in law, is the carrying out of a common public task from a common starting point. As such, the parties involved should aim to implement special programmes or services pursuing a joint public purpose that is assigned to them by law. Consequently, the notion of consideration in return for the provided services does not exist.¹⁰⁴ On the contrary, public service contracts are, according to the Greek Presidential Decree, pecuniary contracts that are designed to satisfy distinct interests of a pecuniary character,¹⁰⁵ i.e. they are designed to provide consideration in return for the services provided.¹⁰⁶ With regards to the public contracts in dispute, it was concluded that the involved parties were designed to achieve different objectives and serve distinct interests on the basis of nominal consideration.

3. The *Spezzino* Case and Its Relevance

On the direct award of public contracts to social enterprises of great relevance is a commentary criticising the *Spezzino* case¹⁰⁷ of 2014. This case, according to Caranta, will have a great impact on the implementation of the Public Procurement Directive and the distortion of competition.¹⁰⁸ In the *Spezzino* case, the CJEU was asked to respond to a question from the referring Italian Court. The question asked whether the rules of EU public procurement law and the competition rules in the EU Treaty precluded national legislation, which allowed local authorities to entrust the provision of particular services, on a preferential basis and by direct award, to a particular non-profit voluntary organisation. The entrusted non-profit voluntary organisation would receive for the provision of those services a particular amount of reimbursement for costs. A similar issue was raised before the Greek Court which was examined in the previous Sub-Section IV.2.. In the Greek cases, the entrusted

organisations were social enterprises with the tailor-made legal form of the Koinsep, a hybrid entity. The hybridity was reflected in the Greek Court's ruling which admitted both the entrepreneurial-economic aspect of the Koinsep but also its special social characteristics, which placed Koinsep 'not in a comparable factual and legal situation' with other commercial and for-profit entities.¹⁰⁹ Unlike the CJEU, the Greek Court did not allow the direct award of programmatic agreements to the Greek Koinsep. However, in the case law examined from the Greek Court and from the CJEU the issue of competition between the non-profit, hybrids (not-for-profit) and the for-profit entities was raised. In the *Spezzino* case, the 'competition between entities that cannot be placed on the same footing'¹¹⁰ was also addressed by the referring Italian Court.

In his comment, Caranta emphasises the CJEU's inconsistency in the *Spezzino* reasoning, namely with regards to the direct award of a social service contract to a voluntary organisation,¹¹¹ using the provisions of the Classic Directive, but at the same time without taking into consideration the Public Procurement Directive and particularly Article 77. The latter offers contracting authorities the opportunity to fol-

¹⁰⁴ Ibid. Reference was made by the Greek Court of Audit to the conclusions of the Advocate General Trstenjak in Case C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others* [2012] ECLI-817, [72] regarding the criterion of 'public interest task' as reason that exempts inter-municipal cooperation from the scope of EU procurement law.

¹⁰⁵ Greek Presidential Decree No 60/2007 concerning adapting Greek legislation to the provisions of Directive 2004/18 / EC, Nat. Gov. Gaz. (ΦΕΚ 64/A/16.3.2007), Article 2(1)(α).

¹⁰⁶ Greek Court of Audit, 6th Division, Decisions, No. 3/2014, para. III; 2/2014, para. III(B); 557/2014, para. II.

¹⁰⁷ Case C-113/13 *Spezzino* [2014] ECLI-2440, [32].

¹⁰⁸ R Caranta, 'After *Spezzino* (Case-C-113/13): A Major Loophole Allowing Direct Awards in the Social Sector' (2016) 11(1) European Procurement & Public Private Partnership Law Review, 14; A Aschieri 'Italian Requests for Preliminary Rulings: a Difficult Dialogue between National Courts and the CJEU' (2015) 10(3) European Procurement & Public Private Partnership Law Review, 153; P Telles, 'The Impact of the *Spezzino* Judgment for Third Sector Organisations' (2016) 11(1) European Procurement & Public Private Partnership Law Review, 22-30.

¹⁰⁹ Ibid, Caranta (n 108), 20.

¹¹⁰ Case C-113/13 *Spezzino* [2014] ECLI-2440, [29]; see also Caranta (n 108), 20; Aschieri (n 108), 153.

¹¹¹ The CJEU ruled that the selected not-profit organisation 'must actually contribute to the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based' and that it must not: (i) pursue objectives other than those; (ii) make any profit as a result of its services, apart from the reimbursement of the variable, fixed and ongoing expenditure necessary to provide them; and (iii) procure any profit for its members. *Spezzino* (n 107), [3, 60-61].

low an *open* procedure in which participation is reserved for 'organisations' featuring certain characteristics, i.e. a profit distribution constraint and a participatory scheme in their governance structure (see Sub-Section III.1.).¹¹² The fact that the CJEU allowed the direct award of the social service contract to a non-profit voluntary organisation was criticised by Caranta. According to him, more competitive procedures could have been imposed following the opinion of Advocate General Wahl. In his opinion, Advocate General Wahl referred to the respondents of the case, i.e. the two social cooperatives, considering that 'there is clearly scope for opening the award of such services [emergency ambulance services] to a higher degree of competition, even among non-profit-making entities'.¹¹³ Similarly to the provisions of the Public Procurement Directive, these were not considered by the Greek Court, which handed down a different ruling with regards to the Greek Koinsep.

The similarity in the case law examined from the Greek Court and from the CJEU shows the importance of clarifying the role and essence of hybrids and social enterprises in the EU and national public procurement law. The Greek Court and the CJEU attempted to identify the role of hybrid and non-profit entities in the public procurement process, and how they should compete, either among themselves or with other for-profit entities. The hybrid character of social enterprises, especially those using tailor-made legal forms, places them in both a situation which is comparable (i.e. on the 'same footing') but also not comparable with commercial businesses and for-profit entities in terms of competition. At the same time, the analysis in this article demonstrates that hybrid entities should not be equated with non-profit entities. This inconsistency reveals that the jurisprudence, the legislature and legal scholarship on the matter is still far from embedding the hybridity of social enterprises, i.e. the organisations that 'do not fit neatly into the conventional categories of private, public or non-profit organisations' into the legal discussion on social enterprises and public procurement.¹¹⁴ The lack of understanding of the hybrid so-

cial enterprise may inhibit the development of public procurement rules which allow social enterprises to effectively compete with other economic operators in accessing public contracts at the national and EU level. In a like manner it can jeopardise a healthy competition in the internal market by unduly extending a preferential treatment to social enterprises in public procurement against other economic operators.

V. Conclusions

This article examined EU and national legal developments regarding the concept of social enterprises in public procurement. The subject was firstly approached from an EU law perspective in which the eligibility of social enterprise to participate in cross-border public procurement was examined. In that discussion, it was concluded that social enterprises constitute eligible economic operators and social undertakings to participate in cross-border public procurement regarding public contracts which are relevant to the social enterprises' economic activities. Subsequently, a list of barriers of social enterprises in accessing public procurement contracts was discussed. It was concluded that specific rules provided in the Public Procurement Directive may aid social enterprises to have a better access to public tenders. However, the reluctance of social enterprises to showcase formalised professionalism may undermine their role in public procurement.

The issue of social enterprises accessing public procurement was also discussed in its national context. In particular, the article discussed the measures present in Greek tailor-made law for social enterprises that facilitate the award of public contracts to the Greek Koinsep. The article emphasised on the measure of programmatic agreements to Koinsep. It concluded however that Greek contracting authorities unduly concluded programmatic agreements with Koinsep considering case law provided by the Greek Court of Audit. On the issue of direct award of public contracts to social enterprises the Greek case law was then compared with the CJEU's *Spezzino* ruling. The comparison indicated a similar effort from the CJEU to comprehend the concept of social enterprise in the context of public procurement. It also indicated the importance of discussing social enterprises as to whether they should compete among themselves or with other for-profit or non-profit entities. Final-

112 Caranta (n 108), 20.

113 Opinion of AG Wahl of 30 April 2014, in *Spezzino* (n 107), [58]; Caranta (n 108), 20.

114 B Doherty, H Haugh and F Lyon, 'Social enterprises as hybrid organizations: A review and research agenda' (2014) 16 (4) *International Journal of Management Reviews*, 418.

ly, the article showed that the jurisprudence, the legislature and legal scholarship has not considered enough the hybridity of social enterprises. Hence, it was concluded that this omission may inhibit the de-

velopment of public procurement rules which allow social enterprises to effectively compete with other economic operators; and may jeopardise a healthy competition in the internal market.

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