Fostering the Social Market Economy Through Public Procurement? Legal Impediments for New Types of Economy Actors

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Introduction: a rise in new types of (economic) operators

Nowadays governments struggle, often unsatisfactorily, to deal with society's most pressing problems such as those related to health care, refugee crises, climate change, water shortages and urban problems. Problems abound but solutions are limited. In the Netherlands and other EU Member States, various classic state tasks are not only provided by traditional "economic operators" as we are used to, mostly including for-profit undertakings, voluntary organisations, charities and religious institutions, but increasingly by citizens' initiatives and social enterprises. A rise in bottom-up initiatives and new forms of collectives which strive to solve societal problems has become more and more apparent. The welfare state appears willing to create space for citizens to take the lead in addressing political issues and in demanding to be involved in the set-up and execution of public procurement. In this rapidly evolving world there is a growing need for a new concept of entrepreneurship, seen as a way to identify and to tackle societal challenges. Some of these new, socially oriented undertakings do not primarily aim to maximise profits but to pursue a social mission that contributes to societal challenges relating to sustainability and social inclusion. In the Netherlands, undertakings such as *Tony Chocolonely*,[1] aimed at making chocolate "slave free" and *Triodos Bank*,[2] aimed at only investing in projects seeking to resolve societal issues such as sustainability, are examples which illustrate this phenomenon. Hence, social entrepreneurship, social enterprises and citizens' initiatives are of growing importance to society, thereby changing the relationship between state and market.

As a consequence, the role of all actors involved in today's public contracts is changing along with the role of citizens in society. With their broad social engagement these new actors create new opportunities to realise the social market economy as pursued by the EU in art.3(3) of the Treaty on the European Union (TEU), which emphasises the EU's ambition for the internal market to be transformed into a "social" market economy. However, collaborations between these socially oriented providers and contracting authorities can often be considered as public contracts and can therefore fall under the scope of public procurement law, meaning that a tender would be required before bringing these new forms of collaboration into being.

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[1] *https://tonyschocolonely.com/uk/en/our-story* [Accessed 1 September 2020].

[2] *https://www.triodos.nl/over-triodos-bank* [Accessed 1 September 2020].

From a public procurement law perspective, the topic of achieving social and sustainable goals through public contracts is not new, and has been the subject of much discussion in recent years.[3] This was the case under the former EU public procurement Directives, but in the 2014 Directives the options were increased and expanded. Creating more opportunities for socially oriented operators in the largest economic segment within the EU internal market, the public procurement market,[4] can foster the achievement of the social market economy. To avoid unfair competition between the "regular" for-profit operators and the socially oriented ones, art.77 has been introduced into the public procurement Directive 2014/24/EU (Directive 2014/24/EU). This provision creates the possibility for contracting authorities to reserve the right to participate in public procurement procedures to enterprises with a public service mission in which any profits are reinvested and with a participatory management or ownership structure. However, much of the conduct aiming at such a social service mission takes place within other organisational structures as well. Giving priority to such social entrepreneurship in a local setting—not involving a social enterprise as required by art.77 Directive 2014/24/EU—inherently conflicts with the principle of non-discrimination based on nationality as laid down in art.18 of the Treaty on the Functioning of the European Union (TFEU). On top of that, directly awarding such a contract without prior competitive tender can be in conflict with public procurement law. After all, according to art.2(1)(5) of Directive 2014/24/EU, public procurement law applies when a (public) contract for pecuniary interest is concluded, in writing, between one or more contracting authorities and one or more economic operators, regardless of the type of "economic operator". Consequently, legal tensions arise between the foundations of the internal market, public procurement law and policies aiming to foster the access to public contracts for these new social actors.

In the Netherlands, contracting authorities argue that public contracts can be awarded directly to the new socially oriented providers since they cannot be considered economic operators "which offer the execution of works, the supply of products or the provision of services on the market" as art.2(1)(10) of Directive 2014/24/EU states.[5] They support this argument by explaining that the requirement "on the market" must be understood as being present on the market "on a regular basis". Based on this reasoning they often avoid the application of public procurement regulation. This explains the rise in national policies aimed at favouring local suppliers, such as the *right to challenge* in the Netherlands. It has been codified in the Wet Maatschappelijke Ondersteuning 2015 (Social Support Act 2015), facilitating the inclusion of citizens' initiatives in the provision of social care services.[6] The policy was launched in the last coalition agreement and it is considered one of the most important tools for reducing social exclusion and for combating unemployment at the local level. Dutch contracting authorities make good use of this new policy instrument by involving citizens in the set up and execution of public contracts, for example to maintain the green spaces in the neighbourhood where they live. Individual members of the public do not always perform better and more cheaply than a specialised for-profit company but, according to Dutch contracting authorities, the benefits to society can be dramatic: by involving local children and the elderly, it has been shown—in the Netherlands—that the outcome is more respected by the public. However,

[3] See F. Pennings and E.R. Manunza, "The room for social policy conditions in public procurement law", in A. van den Brink, M.J.J.P. Luchtman and M. Scholten (eds), *Sovereignty in the shared legal order of the EU* (Antwerp: Intersentia, 2015), pp.173–196 and E.R. Manunza and W.J. Berends, "Social Services of General Interest and the Public Procurement Rules", in U. Neergaard, M. Krajewski, E.M. Szyszczak and J.W. van de Gronden (eds), Social Services of General Interest in the EU: New Challenges and Tensions (The Hague, The Netherlands, T.M.C. Asser, 2013), pp.347–384. See also D. Damjanovic, "The EU Market Rules as Social Market Rules: Why the EU can be a Social Market Economy" (2013) *Common Market Law Review* 1698–1703, P. Kunzlik, "Neoliberalism and the European Public Procurement Regime" (2012–2013) *Cambridge Yearbook of European Legal Studies* 283–356; S. Arrowsmith, "The Purpose of the EU Procurement Directives; Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies" (2011–2012) *Cambridge Yearbook of European Legal Studies* 1–47; S. Arrowsmith, "Horizontal policies in public procurement: a taxonomy" (2010) *Journal of Public Procurement* 149–186.

[4] The public procurement market plays a key role in the functioning and completion of the internal market. In recent European studies the volume of the public procurement market (excluding utilities) was stated to be 14% of the GDP of the EU, see for instance: COM(2017) 572 final, Making Public Procurement work in and for Europe, 3 October 2017.

[5] Article 1(10) reads: "'economic operator' means any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market".

[6] Wet maatschappelijke ondersteuning 2015 (in English: Social Support Act), art.2.6.7.

choosing such a preferential policy and avoiding the application of public procurement regulation can be in conflict with the principle of non-discrimination, the four treaty freedoms and the general legal principles of public procurement law derived from these.

Possibilities for contracting authorities—within or outside the EU's public procurement regime—to appreciate and measure this different kind of profit created by these "new" types of operators, constituting "social value", are limited.[7] Appreciating such social value aligns with the EU's ambition for the internal market to be a social market economy, but the applicable legal principles are still mainly derived from the rules aiming for the economic integration of the internal market which require such value to be determined by financial or other quantifiable and thus objective data.

In this contribution, the legal impediments to the fostering of a social market economy through public procurement are evaluated from two angles. First, the tensions between the different relevant objectives in the EU treaties are examined from the perspective of contracting authorities to understand the ambiguity of the recently enlarged discretionary room[8] which they gained within the EU public procurement Directives (Section 1). Second, the focus shifts to the concept of economic operator to reach an understanding about the potential role for the previously mentioned socially oriented operators in public procurement (Section 2). For our analysis, the existing possibilities within Directive 2014/24/EU to reserve contracts to social enterprises, as defined by arts 20 and 77 of this Directive, are not of interest. The key issue is the legal analysis of other types of operators which do not (fully) fall under those provisions, but nonetheless engage in social entrepreneurship. The main implication of the concept of economic operator lies in the legal principle of equal treatment, excluding preferential treatment. Building on this, the potential impact of the *Spezzino* justification from the jurisprudence of the Court of Justice of the EU (the Court) will be evaluated to assess the possible instrumental use for including socially oriented operators in public procurement, other than those falling under arts 20 and 77 of Directive 2014/24/EU.

1. Towards a social market economy: new legal tensions generated by the Lisbon reforms to the EU Treaties

With the creation of the internal market by the Treaty of Rome (1957), which reduced the autonomy of the Member States in regulating and pursuing economic activity, economic integration was constitutionalised through the adoption of legally enforceable principles,[9] aiming to ban all obstacles to the optimal functioning of the market. Since then, it took the EU a long time to fundamentally reform its constitutional framework, which was done through the Treaty of Lisbon.[10] This Treaty (2007) introduced several major legal reforms to further develop and achieve a sustainable and just society in the EU, including within the legal frameworks on the internal market such as the EU's rules on public procurement.[11] It had become clear

[7] See J. Lepoutre, R. Justo, S. Terjesen and N. Bosma, "Designing a global standardized methodology for measuring social entrepreneurship activity: the Global Entrepreneurship Monitor social entrepreneurship study" (2013) *Small Business Economics* 694–695. In the Netherlands, systems have been introduced which are able to measure social enterprises as defined by Directive 2014/24/EU on reserved contracts (Prestatieladder socialer ondernemen—PSO) or to measure CO2 Emission (CO2-Prestatieladder). There is, however, much uncertainty about the objectivity of such measurements and the possibilities for legal review for affected parties who disagree with the measurement, the latter being essential for its legal status in public procurement procedures. See, more generally: J. Lepoutre, R. Justo, S. Terjesen and N. Bosma, "Designing a global standardized methodology for measuring social entrepreneurship activity: the Global Entrepreneurship Monitor social entrepreneurship study" (2013) *Small Business Economics* 694–695.

[8] In a different context, this was previously addressed in 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 and F. Schotanus, *The Art of Public Procurement—Liber Amicorum Jan Telgen* (ISBN: 978-90-365-4561-7) 2018, pp.139–158.

[9] W. Sauter, "The Economic Constitution of the European Union" (1998) *Columbia Journal of European Law* 47.

[10] The consolidated versions of the Treaty on European Union (OJ 2008 C115/13) and the Treaty on the Functioning of the European Union (OJ 2008 C115/47) constitute the current legal basis of the EU.

[11] In the preambles to the public procurement directives, the regulation is linked to the achievement of the Europe 2020 strategy for smart, sustainable and inclusive growth. See Directive 2014/24/EU, preamble 2 and COM(2010) 2020, Communication from the Commission—Europe 2020—A strategy for smart, sustainable and inclusive growth, Brussels, 3 March 2010.

that the EU wanted to show more of a social face to its citizens,[12] being one way to reduce the dissatisfaction concerning the pursuit of the EU's hard economic objectives. The first important change concerned the "internal market" concept. Under the former EC Treaty the internal market had to be accomplished through the guiding principle of an open market economy with free competition (art.4 EC). Departing from a purely market-oriented integration process towards a broader concept of the common market, the Lisbon Treaty replaced this guiding principle by art.3(3) of the TEU promoting a "highly competitive social market economy", aimed at full employment and social progress. An accompanying development of the entry into force of these changes, is that it has been questioned how far the EU is really willing to take these policies and to what extent the economic aspects weigh up against the other objectives in order to create a sustainable and just society, and how these considerations can be resolved in public procurement law.[13]

The strengthening of the principle of subsidiarity[14] and the recognition of regional and local self-government[15] envision a more decentralised EU. Most of all, these changes were intended to clarify that the EU is not only focusing on the free market, but it is also aware of its social dimensions,[16] which are often best effectuated at the national, local and regional level. For example: how to reconcile the need to ensure the freedom of EU citizens to drink the very best water (potentially coming from abroad) with the need to reduce the amount of CO_2 emissions and thus preferably to drink only local water as the most effective solution in terms of striving for sustainability? It is unavoidable that, for realising some social (and environmental) purposes, local and regional candidates are more suitable. However, it is not easy to reconcile this with the fundamental principles of transparency and of non-discrimination. Taking into account the fulfilment of the EU internal market, the legal question is which of these two objectives takes precedence over the other: the implementation of the internal market allowing the bottles of water to travel back and forth all over the world, with all the environmental impact that this entails, or the preservation of the environment by requiring everyone to drink their own local water? Or should suppliers be triggered to develop smart solutions to achieve both objectives at the same time?

Coming up with sustainable solutions fitting a coherent legal system is not easily done. This explains why regulating public procurement is a challenge for both the national and the EU legislators: it is necessary to carefully and continually weigh all involved interests as well as EU and national interests, central and local interests and public and private interests,[17] whilst trying to achieve an acceptable balance of the resulting tensions.[18]

The specific Treaty articles on the internal market, such as the freedom to provide services (art.56 of the TFEU), of which the EU public procurement rules are a specification, were not changed during the Lisbon reforms. All these provisions must, however, be considered against their—varying—constitutional settings. Moreover, art.114 of the TFEU, the legal basis for the public procurement Directives, requires such directives, now, to take as a base a high level of protection concerning health, safety, environmental and consumer protection. This is not surprising, considering that the EU, according to art.7 of the TFEU, should ensure consistency throughout its different policies. Environmental protection, for instance, should be ensured in all EU policies anyway, following art.11 of the TFEU. It was therefore, perhaps, inevitable

[12] Somewhere the awareness grew (both bottom-up but certainly also top-down) that wealth is not the same as well-being; that being wealthy does not mean that there must be continuous economic growth based on competition.

[13] See, e.g. Damjanovic 2013 and Kunzlik 2012–2013 (fn.3 above).

[14] Article 5 and Protocol No.2 on the application of the principles of subsidiarity and proportionality, Treaty on the Functioning of the European Union (TFEU).

[15] Article 4, para.2 of the TEU.

[16] Manunza and Berends (fn 3 above), p.352.

[17] Private actors, in this context, also include volunteers, citizens, social undertakings, religious institutions and other non-profit actors, as well as "regular" commercial undertakings.

[18] See also Pennings and Manunza (fn.3 above), p.173, section 1 "Introduction".

for the 2014 public procurement Directives to incorporate these "renewed"[19] social policies within their legal frameworks. In that regard, it is no coincidence that the first consideration of Directive 2014/24/EU entails the fundamental (economically based) principles and points of departure, while the second concerns this strategy for growth, in particular efficiency and societal goals.[20] The latter necessitates the instrumental use of public procurement which will be discussed in the next section.

1.1. Risks deriving from the renewed approach to instrumental use of public contracts

The changes made to the EU Treaties through the Lisbon Treaty inevitably have consequences for the public procurement market since they laid the foundation for the 2014 Public Procurement Directives to *formally* enhance the instrumental use of public contracts.[21] Instead of focusing on banning discriminatory practices through procedural rules as was the case under the former directives, public procurement in the current framework is seen as a powerful tool for designing a sustainable and just society.[22] The instrumental use of public contracts is, however, not a new phenomenon. Taking into account *secondary policy objectives*, meaning those not directly connected to the actual purchase, was a common goal pursued by governments and other national contracting authorities when awarding public contracts before the adoption of the first directives in the early 1970s.[23] Secondary policy objectives have in common that they often prefer domestic suppliers and products over those from other EU Member States. For these reasons and in order to prevent these negative consequences, the European legislature introduced rules in the early 1970s to obligate public contracting authorities to take steps to identify and to remove all forms of discrimination in procurement procedures by introducing common transparent, objective, proportionate and non-discriminatory rules. An integrated EU market could not exist if such an important market segment remained local. In the Directive—as it stands today—the legal scepticism towards secondary policy objectives is most striking in the requirement that award criteria should relate to the "subject-matter of the contract".[24] They must, furthermore, be objective and clear in the sense that they do not grant the contracting authority "unrestricted freedom of choice".[25]

Despite the need for safeguarding fundamental principles and the four Treaty freedoms, the 2014 Directives have given more discretionary power to public authorities. EU citizens are frequently told what a major influence the EU has on national policy and regulation. This claim is no doubt correct, but requires some explanation. Next to the previously mentioned subsidiarity principle and recognition of regional and local self-government, institutional and material changes to the EU Treaties have created a "bottom-up" influence from the Member States. The same bottom-up influence is becoming more and more visible in the outcomes of the post-Lisbon regulation processes concerning internal market affairs. The field of public procurement law is an excellent example of this. The obligation for the European Commission to organise consultations introduced by the Lisbon Treaty, empowered the lobby of regional and local authorities to have an influence during the legislative process and on the final wording of the three 2014 Directives, introducing an even wider discretionary power in setting up public procurement procedures

[19] By indicating these social policies as "renewed" we want to draw attention to the fact that they have always existed. Governments and local authorities designed such policies to protect domestic industry or to have this as a result; to create jobs for the local workforce; and to support employment in declining industries or in areas suffering from underemployment or lack of development.

[20] Incidentally, the former Directives and certainly the Dutch Public Procurement Act already contained ample legal opportunities for pursuing the Europe 2020 strategy, see: E.R. Manunza, W. Lohmann and G. Bouwman, *Juridisch leaflet Maatschappelijk Aanbesteden. Juridische mogelijkheden om de kracht van de samenleving te benutten bij aanbestedingen* (English translation: Legal Leaflet Societal public procurement Contracting), research by the Public Procurement Research Centre (PPRC); at present UUCePP commissioned by the Dutch Ministry of Interior in 2015. In this Legal Leaflet the authors discussed 14 possibilities laid down in the "old" public procurement Directives 2004/18/EC which enabled public authorities to achieve social and sustainability policies.

[21] See particularly, Directive 2014/24/EU, preamble consideration 2.

[22] See Manunza (fn.8 above). The Commission clarified its approach by encouraging Member States to use procurement as a strategic tool, it being "a crucial instrument of policy delivery", COM(2017) 572 final, Making Public Procurement work in and for Europe, para.5.

[23] See Pennings and Manunza (fn.3 above).

[24] Directive 2014/24/EU, art.67 (2), (3) and (4).

[25] *Concordia Bus Finland* (C-513/99) [2002], para.61 and *Commission v Netherlands* (C-368/10) [2012], para.87.

than initially proposed by the Commission. The Commission has, in recent years, underlined the importance of the free market and therefore the use of public procurement to approach that market, which it presented as an instrument to get out of the economic crisis, thus as a crucial economic instrument. The final versions of the Directives, therefore, impose a wider discretionary power in the setting up of public procurement procedures than initially proposed by the Commission.

1.2. Wider room for manoeuvre for contracting authorities and its inherent risks for abuse

An example of wider discretionary power for contracting authorities can be found in art.67 of Directive 2014/24/EU, providing a more flexible use of award criteria. Very significant is the new provision which clarifies that competition conducted under fixed-price conditions must be exclusively based on quality. This provision also contains options that enable contractors to assess the entire life-cycle of a product, a service, or a work within the price-costs analysis, and which even make it possible to review the employment conditions of those who make the product and to internalise external environmental costs. This brings options not only for environmental protection but for *social* protection as well. Furthermore, new grounds for the exclusion of economic operators have been introduced in the event that they do not comply with employment regulations, violate human rights, expose themselves to conflicts of interests, etc.[26] A broader range of different procedures has been introduced which give contracting authorities more options for negotiations between contracting authorities and contractors[27] and a wider applicability of the exemptions for public contracts between entities within the public sector, known as the "in-house exceptions".[28] In the Netherlands, the legislature did not make extensive use of the broad discretionary power in implementing the Directive. There is, for instance, no specific procedure for the awarding of social service contracts and no explicit requirement for objective award methods which enable contracting authorities to appropriately attach weight to price and quality.

It is clear that this wider room for manoeuvre has been increased to better achieve social and sustainability goals. However, achieving these noble-minded goals in the context of public procurement is not free of risks for violations of the EU Treaty freedoms and of the principles of public procurement law, as we will discuss below. The many competing goals—economic and non-economic—and the wide legal room for manoeuvre for contracting authorities, both as introduced in the 2014 public procurement Directives, create new opportunities but also introduce the potential for new conflicting objectives and values, and thus for negative effects. In the Netherlands, the legislature had already introduced in 2013 a decree to guide contracting authorities in appropriately handling their discretionary power: the *Gids Proportionaliteit* (proportionality guide), entailing guidelines for contracting authorities to ensure that their procurement practices are proportionate.[29]

As mentioned, the instrumental use of public procurement is not a new phenomenon. The novelty lies, however, in the difference between the former and the current types of secondary policy objectives. Before the 1970s these policies were oriented towards the protection of national industry or at least had this as a result. Simply put, the goal was to create jobs for the local workforce: to support employment in declining industries or in areas suffering from underemployment or lack of development. These domestic policies were applied for strategic reasons, e.g. in purchases of defence goods or aerospace systems. In the absence of concrete rules limiting the wide discretion which contracting authorities had in applying the domestic

[26] Article 57 of Directive 2014/24/EU.

[27] The Competitive dialogue as set out in art.30 of Directive 2014/24/EU and the Innovation partnership as set out in art.31 of Directive 2014/24/EU. The latter procedure was introduced to facilitate the development of innovative products, services and works that do not yet exist.

[28] Article 12 of Directive 2014/24/EU.

[29] For the English translation, see: Instituut voor Bouwrecht, *Proportionality guide*, 1st revision 2016. The proportionality guide is a unique example within the EU of national (binding) guidelines on organising public procurement procedures proportionally. Therefore, it has recently been translated into English by the Dutch association of construction law.

preference policies ("buy national"), the consequences in the long term for the integration of the common market economy were disastrous. Identifying and removing all kinds of discrimination in the award of public contracts by limiting the discretion of national public contracting authorities to foster the fulfilment of the internal market, was thus seen to be necessary by the EEC and resulted in the adoption of the first public procurement Directives in the 1970s.[30] The wider contractual discretion granted again to public contracting authorities in the 2014 Directives was meant in the first place to include secondary policy objectives related to solving global (and European) problems such as sustainability and making the internal market more socially oriented. Contrary to the former policy objectives aimed at giving priority to domestic suppliers above those from other Member States, secondary policy objectives nowadays can result in giving priority to domestic suppliers, but only when execution by local suppliers is more suitable for realising social and sustainable goals. Preferential treatment for local suppliers or the stimulation of domestic industries to combat unemployment may never be a goal in itself. Legally drawing the line between objectively aiming for the achievement of a local goal and discriminatory conduct is complex, particularly for small municipalities where this issue is especially relevant.

Familiar examples of new "custom made" policy instruments applied in the Dutch procurement world, where these types of tensions emerge in practice, include *circular procurement, societal contracting*,[31] the previously mentioned *right to challenge*, *social return on investments*,[32] and *performance-based contracting* (in the Netherlands better known as functional contracting).[33] The discretionary power can be abused and it leaves open the option for arbitrary decisions, as a result of which the best tender may not always win. This makes it clear that limitation by transparent, objective, non-discriminatory rules is necessary, otherwise we will still fail to achieve the noble-minded goals through public contracts.

This limitation on the expanded discretionary power is—to a great extent—still predicated on the fact that award criteria should relate to the subject-matter of the contract. This subject-matter was interpreted quite broadly by the Court in 2010, way beyond the (theoretical) purely cost-effectiveness rationales of an average commercial actor. In the *Max Havelaar* judgment it was decided that an award criterion does not need to relate to the "intrinsic character" of a product (meaning its material substance), but instead may relate to the whole production process.[34] A fair trade requirement is therefore allowed in principle.[35] Only those award criteria which focus on the general policies or business model of an economic operator fall outside the scope of the subject-matter and are therefore not allowed, as a consequence of art.67(3) of Directive 2014/24/EU. So the management form or organisational structure of (socially oriented) operators cannot be taken into consideration.

Equal treatment then involves rewarding the best performance, regardless of the way in which—and reason why—the performer is organised. This can be illustrated by the Court's judgment in *Frigerio Luigi* where it decided that the legal form in which an economic operator is established must not have any negative implication for access to a public procurement procedure.[36] Procedures should, in that regard, be open to "as wide as possible" competition.[37]

[30] Directive 71/305/EEC on works and Directive 77/62/EEC on goods. E. Manunza, *EG-aanbestedingsrechtelijke problemen bij privatiseringen en bij de bestrijding van corruptie en georganiseerde criminaliteit* (English translation: "Problems of EC Public Procurement Law in case of privatisation and the fight against corruption and organised crime") (Kluwer, 2001), pp.1–4.

[31] *Maatschappelijk aanbesteden* is a type of public procurement in which citizens are given the opportunity to be involved in the set up and/or the performance of the project. See: *Juridisch leaflet Maatschappelijk Aanbesteden. Juridische mogelijkheden om de kracht van de samenleving te benutten bij* (fn.22 above), p.26.

[32] *Social return on investments* is a longstanding contracting system used in the Netherlands since the 1980s in which the contractor is required to invest a certain percentage of the contract amount in long-term unemployed people or in traineeships or study opportunities, etc.

[33] In the context of *performance-based contracting* the contracting authority asks for a certain result to be achieved without prescribing how the contractor must bring about that result. For example, in order to promote innovation, the public authority will not prescribe the use of specific insulation material in constructing a building but it will require the inside temperature to be maintained at 20°C all year round.

[34] *Commission v Netherlands* (C-368/10) [2012], para.91.

[35] For this reasoning, see Pennings and Manunza (fn.3 above) 185–186.

[36] *Frigerio Luigi* (357/06) [2007] ECLI:EU:C:2007:818, para.29. See also: *CoNISMa* (C-305/08) [2009] ECLI:EU:C:2009:807, para.39.

[37] *Bayerischer Rundfunk* (C-337/06) [2007], para.39.

1.3. Evidence of the corruption-risks of discretionary power

Public procurement procedures worldwide have received a lot of negative attention in the media and politics. In the Netherlands we have seen, during the last decade, public procurement procedures frequently being the subject of negative media coverage. They were described as disasters or near-disasters in which the contracting public authority broke the public procurement rules. This is particularly surprising, considering that, according to the rankings of Transparency International,[38] the Netherlands is one of the least corrupt countries in the world, and has even improved in recent years, albeit slightly, climbing from 9th to 8th place on the list. However, the 2014 *EU anti-corruption report* shows another picture: 64% of Dutch respondents believe that there is widespread corruption among officials in public procurement projects, a percentage much higher than in countries like Greece (55%), Slovenia (60%), Croatia (58%), and Italy (55%). This raises the question as to how to interpret this data.[39] A more in-depth observation shows that the report identifies forms of corruption like specifications tailor-made for specific companies (57%), conflict of interest in bid evaluation (54%), unclear selection or evaluation criteria (51%), involvement of bidders in the design of specifications (48%), abuse of emergency grounds to justify the use of non-competitive or fast-track procedure (46%), amendments to the contract terms after conclusion of the contract (44%). These numbers still reflect the situation under the former 2004 Directives. On 24 March 2016, Rand Europe published a report for the European Parliament entitled *The Cost of Non-Europe in the area of Organised Crime and Corruption*.[40] This report also shows that the risk of this type of corruption occurring in the Netherlands is not being effectively addressed. This risk of arbitrariness or (in non-Dutch eyes) corruption is one of the biggest potential impediments to achieving a just and sustainable society, because the conduct of the contracting authority is fundamental for a good outcome for public contracts and it impacts on the conduct of the bidders, including aspects such as bid-rigging, strategic or manipulative bids, and much more.[41]

Clearly, some of these issues arise because of a lack of compliance with the public procurement rules. Member States are, for instance, obliged to prevent conflicts of interests—defined by the regulation since 2014—from occurring within public procurement.[42] In promoting and requiring clear selection and evaluation criteria, the regulation is more ambiguous. Award criteria must not have the effect of granting the contracting authorities unrestricted freedom of choice.[43] However, the many different competing goals, previously mentioned, make it difficult for contracting authorities to prioritise, and hence to clarify the criteria to the tenderers. Other issues relate more closely to a lack of professionalism, which was addressed by the European Commission in a soft law recommendation in 2017.[44]

2. "New" actors in public procurement procedures and the social market economy

There is—potentially—much overlap between the activities of social enterprises and citizens' initiatives. There is no absolute characterisation of citizens' initiatives, except for the fact that the activities are organised by citizens. On the other hand, in literature, law and policy, social enterprises and social entrepreneurship are extensively characterised.

[38] Transparency International, "Corruption perception index 2017".
See *https://www.transparency.org/news/feature/corruption_perceptions_index_2017* [Accessed 1 September 2020].
[39] COM(2014) 38 final, "Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report", February 2014.
[40] European Parliamentary Research Service (EPRS) PE 579.319, "The Cost of Non-Europe in the area of Organised Crime and Corruption: Annex II—Corruption", March 2016 (study commissioned by RAND Europe).
[41] NB: incidentally, the bidders in public procurement procedures are not always enterprises; they can also be other public authorities, state enterprises, citizen initiatives or collectives, or individuals.
[42] Article 24 of Directive 2014/24/EU.
[43] Article 67(4) of Directive 2014/24/EU.
[44] Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement—Building an architecture for the professionalisation of public procurement.

Although different definitions of "social enterprise" co-exist, there seems to be common understanding about two requirements.[45] First, such enterprises participate in economic life by offering goods and/or services to the market. Second, these economic activities are employed primarily to have a certain positive social impact, instead of delivering financial profit to the enterprise's shareholders. The latter cannot be just an aspiration, but should rather be an obligation made explicit, for instance in the statutes of the organisation. In addition, the definition of the European Commission requires that such enterprises are managed in an open and responsible manner and involve employees, consumers and stakeholders in their activities.[46] The definition of social enterprise in art.77 of Directive 2014/24/EU also contains these elements.

Entrepreneurial conduct aiming to create social value—hence "social entrepreneurship"—is a broader phenomenon which can occur in all kinds of organisations. Innovation plays a key role, as such entrepreneurship often strives to provide solutions which the traditional economic and social institutions fail to deliver.[47] In that sense, social entrepreneurship occurs in between "traditional" economic activity with the (commercial) aim of making a profit, and public interest activities employed by governments and (non-profit) NGOs for the greater good.[48] Like citizens' initiatives, social entrepreneurship often has a strong local dimension, aiming to solve societal problems closest to citizens. In that regard, the conduct of these different actors at the local level has the potential to substantially overlap.

2.1. The origins of the EU-law concept of "economic operator"

In the early jurisprudence of the Court, in the context of the 1970s' Directives, the issue of how to characterise the tenderer is not addressed. There were separate Directives for works (71/305/EEC), public supply contracts (77/62/EEC) and later on also public service contracts (92/50/EEC). In that regard, the legal frameworks simply spoke of "contractor", "supplier" and "service provider". In this early stage of the process of economic integration, the Court focused (often in the context of infringement procedures brought by the European Commission) on the question of whether Member States had fulfilled their obligation to open up the awarding of public contracts to operators from other Member States.[49] The main issue, in that regard, was whether foreign competition was excluded; not so much whether the contract had been awarded to an "economic operator".

The actual concept of "economic operator" was introduced by Advocate-General Léger in his opinion in the case of *Mannesmann*[50] and later on adopted by the Court in *Arnhem v BFI*.[51] The focus—again—was on the purpose of EU public procurement law to ensure the access of economic operators to public contracts in Member States other than their own. The terminology used in the (original) Dutch version of the *Arnhem*

[45] These are also the criteria used by the national advisory body on socio-economic matters in the Netherlands; the Sociaal-Economische Raad (SER). See SER, *Sociale ondernemingen: een verkennend advies*, The Hague, 2015. See also the research report into the possibilities for legal recognition of social enterprises to enhance the access to public procurement for social entrepreneurship, in the context of the possible introduction of a legal form in the Netherlands, on request of the Dutch Ministry of Economic Affairs and Climate in N. Bosma, H. Hummels, E. Manunza, A. Argyrou, N. Meershoek and R. Helder, "Versnelling en verbreding van sociaal ondernemerschap—Een onderzoek naar de wenselijkheid van nieuwe juridische kaders", *Utrecht University—Social Entrepreneurship Initiative* 2019 (translation: "Accelerating and broadening social entrepreneurship in the Netherlands—An assessment of the relevance and desirability of new legal frameworks"). In the spring of 2020 the Dutch Government announced the plan to legally recognize social entrepreneurship by introducing a new legal form in the Dutch Civil Code, following-up on the findings of the research report (see: *https://www.rijksoverheid.nl/actueel/nieuws/2020/07/10/kabinet-aparte-juridische-erkenning-en-actieve-ondersteuning-voor-maatschappelijk-ondernemerschap*).

[46] See *http://ec.europa.eu/growth/sectors/social-economy/enterprises_en* [Accessed 1 September 2020].

[47] As mentioned in the introduction, the group "traditional" economic operators include predominantly for-profit undertakings, voluntary organisations, charities and religious institutions. See also: Lepoutre et al. (fn.7 above) 694–695.

[48] See E. Manunza, "Social commissioning as a method to create room for social and sustainable considerations in public procurement procedures" (in Dutch: "Sociaal opdrachtgeverschap. Ruimte geven voor sociale en duurzame overwegingen in aanbestedingen en sociale diensten via aanbestedingen inkopen"), in M. Essers, K. Schofaerts and Ph. S. Weijers (eds), *Social commissioning and social entreneurship. Investigating new building blocks in order to increase citizens' participation in society* (in Dutch: Sociaal Opdrachtgeverschap en Sociaal Ondernemen. Op zoek naar bouwstenen voor een menselijke participatiemaatschappij) (Vogelenzang: Centrum van de Sociale Leer van de Kerk, 2015), pp.37–63.

[49] See for instance: *Commission v Italy* (199/85) (1987), para.12.

[50] Opinion of Advocate General Léger, *Mannesmann* (C-44/96) (1997), para.107.

[51] *Gemeente Arnhem, Gemeente Rheden v BFI Holding BV* (C-360/96) (1998), para.41.

v BFI judgment was "*marktdeelnemer*" (literal translation: market-participant), emphasising whether an entity is engaged in activity in a certain market. This approach was adopted by the legislators in the 2004 Directive.[52] Now that the legal regimes for works, goods and services were included in one Directive, there was a need for a common definition of the tenderer. It was stressed by the legislators that the term "economic operator" is used "merely in the interest of simplification".[53] The 2014 Directive defines "economic operator" as any kind of entity or organisation "which offers the execution of works … the supply of products or the provision of services on the market".[54] According to Advocate-General Mazàk in his opinion in *CoNISMa*, it follows from the *travaux préparatoires* of Directive 2014/24/EU that the concept of "economic operator" is similar to the concept of "undertaking" in competition law.[55]

Most importantly, the concept of "economic operator" is only one element in the scope *ratione personae* of the regulation which applies to all "public contracts" with a value exceeding the relevant thresholds.[56] These contracts are defined as contracts for "pecuniary interest between one or more economic operators and one or more contracting authorities".[57] The pecuniary interest nature of these contracts is interpreted broadly by the Court. In *ASL di Lecce*, it ruled that this also includes the mere reimbursement of costs which incur as a consequence of service provision.[58] As Advocate-General Trstenjak mentioned in her opinion in the case (which was taken up), this is the only way to "guarantee the effectiveness of the procurement directives", whereas otherwise the application of public procurement law could be circumvented by alternative forms of remuneration.[59] Consequently, the legal concept of "public contract" is capable of covering all kinds of agreements which could be reached by a contracting authority with socially oriented actors such as non-profit organisations, social enterprises and citizens' initiatives.

2.2. The traditional competition-based approach of the Court in Commission v Italy (2007)

The question whether awarding contracts to non-profit organisations falls within the scope of the public procurement regulation—in the sense that such an organisation is an "economic operator"—was first raised in 2007 in *Commission v Italy*. Since 1999, the region of Tuscany had already been awarding medical transport services directly to certain non-profit organisations which operated on the basis of voluntary work. This caused an infringement procedure to be brought by the Commission in 2004 for an alleged breach of Directive 92/50 by not opening these contracts up for competition. When the Italian government was not willing to ban the practice of directly awarding these contracts, the Commission brought the matter before the Court. The main defence of the Italian government was the claim that these contracts did not fall within the scope of public procurement regulation now that the organisations which the contracts were awarded to could not make profits and were only reimbursed for the costs of the activities. According to the Italian government, these contracts were therefore not subject to the Directive, as these organisations did not operate in the "market" and were outside the sphere of "competition".[60]

The Court rejected this argument based on its competition law jurisprudence. It determined that the absence of a profit motive did not preclude that such an organisation could engage in an "economic activity" and be regarded as an "undertaking". Moreover, the Court referred to its judgment in *Ambulanz*

[52] Directive 2004/18/EEC 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 services contracts.
[53] Directive 2004/18/EEC art.1(8).
[54] Directive 2014/24/EU art.2(10).
[55] Opinion of Advocate General Mazàk in *CoNISMa* (C-305/08) [2009], see particularly paras 27–28.
[56] Directive 2014/24/EU art.7.
[57] Directive 2014/24/EU art.2(5).
[58] *Azienda Sanitaria Locale di Lecce* (C-159/11) (2012), para.29. Later confirmed in *Piepenbrock* (C-386/11) [2013], para.31 and *Spezzino* (C-113/13) [2014], para.37.
[59] Opinion of Advocate General Trstenjak in *Azienda Sanitaria Locale di Lecce* (C-159/11) [2012] ECLI:EU:C:2012:303, para.32.
[60] *Commission v Italy* (C-119/06) [2007], paras 27–28.

Glöckner where it had already established that such organisations involved with medical transport services could be regarded as "undertakings" in the context of competition law. [61] The Court found that those services had not always been and were not necessarily carried on by such organisations or public authorities and therefore constituted economic activity.[62] Medical transport services therefore also fall within the scope of public procurement regulation. If the relevant thresholds for contract value are not met—which was not sufficiently proven by the Commission in this case—the obligation to conduct an open tender is based on art.56 of the TFEU (unless there is no cross-border interest). The Italian government did not invoke any grounds for justification of the internal market restriction.

In the context of EU competition law, which applies to "undertakings", the Court decided in *Höfner* (1991) that these are entities which are engaged in "economic activity, regardless of the legal status of the entity and the way in which it is financed".[63] As with the public procurement Directives, economic activity simply entails the offering of goods and services to the market.[64] In the Public Procurement Directive, the term "economic operator" is used, instead of "undertaking". Hence, whether a certain entity is (primarily) seeking to make a profit is not relevant, as long as, in theory, the activity could "be carried on by a private undertaking in order to make profits".[65] For the application of the economic freedoms,[66] the scope is also defined by "economic activity", in the sense of offering goods or services to the market.[67] In concrete cases the scope of the economic freedoms might differ, whereas the focus will be on the question whether a Member State imposed a barrier to trade.[68] Just as with the competition rules, the concept of "economic activity" is approached functionally. If an activity is capable of distorting competition or closing off a certain market it will always be considered "economic".

In several cases, the Court has reconfirmed its wide approach to the scope of the public procurement rules.[69] Although a reference to competition law jurisprudence has not been made again, in *CoNISMa* the Court did mention that the broad understanding of the concept of "economic operator" in public procurement law relates to one of its primary objectives "to attain the widest possible opening-up to competition".[70] Advocate-General Mazàk—in his opinion on this case which was followed by the Court—did however draw a parallel with the competition law jurisprudence on the concept of "undertaking", deeming the two to be similar.[71] In this regard, competition can also take place between commercial and non-profit operators. Entities, subsequently, do not need to have the "organisational structure of an undertaking", neither is it required that they are regularly present in the market.[72]

2.3. The fading line between public and private sector interests

It should be clear that also socially oriented operators can fall within the scope of the internal market rules. For social entrepreneurship, it is actually considered an imperative requirement that they offer goods or services in the market. The ambitions of these actors do not, however, fit perfectly with the idea of an "economic constitution". This idea divides organisations in the EU in two, based on the functioning of

[61] *Commission v Italy* (C-119/06) [2007], paras 37–39.
[62] *Ambulanz Glöckner* (C-475/99) [2001], para.20.
[63] *Höfner* (C-41/09) [1991], para.21. See for a comparison between the economic freedoms, competition and public procurement law: V. Hatzopoulos, "The Economic Constitution of the EU Treaty and the Limits between Economic and Non-Economic Activities" (2012) *European Business Law Review* 973–1007.
[64] *Commission v Italy* (C-35/96) [1998], para.36 and *Pavlov e.a.* (C-180/98-C-184/98) [2000] ECLI:EU:C:2000:428, para.75.
[65] Opinion of A-G Jacobs in *AOK Bundesverband* (C-264/01) [2003], para.27.
[66] In the context of this article only the free movement of goods and the freedom to provide services.
[67] See for instance: *Commission v Italy* (118/85) [1987], para.7.
[68] This is a logical consequence of the *Dassonville* jurisprudence of the Court, see: *Dassonville* (C-8/74) [1973].
[69] *CoNISMa* (C-305/08) [2009], paras 35, 42 and 45; *ASL di Lecce* (C-159/11) [2012], paras 26–28; *Piepenbrock* (C-386/11) [2013], para.29; *Consorzi Sanitari del Maresme* (C-203/14) [2015]; *Data Medical Service* (C-568/13) [2014], paras 33–36; and *Marina del Mediterráneo SL* (C-391/15) [2017], para.16.
[70] *CoNISMa* (C-305/08) [2009], para.37.
[71] Opinion of Advocate General Mazàk in *CoNISMa* (C-305/08) [2009], para.30.
[72] *CoNISMa* (C-305/08) [2009], para.45.

these actors in a particular case. First, there is a public domain in which governments and NGOs only pursue certain objectives of general interest and which falls outside the scope of the internal market. Secondly, there is an economic sphere in which "undertakings" (which can be based on public or private law) pursue private (traditionally seen as "commercial") interests and should compete with each other. Social entrepreneurship always occurs in the economic sphere as its functioning is market-based. It is, however, driven by general interest ambitions. In that sense, it occurs in between the traditional private and public spheres. Social entrepreneurship challenges commercial undertakings providing goods or services to governments. But with innovative solutions for societal problems, it also challenges governments providing services to citizens themselves. Because it is based on economic activity, it is not possible to preclude it beforehand from the application of the EU's internal market rules. Activities based on social entrepreneurship might run parallel to those of citizens' initiatives and NGOs but also to commercial undertakings, whilst these other socially oriented operators potentially also fall within the scope of the public procurement rules.

This does not (at least not fully) take away the discretion of Member States to organise public tasks, as the EU does not generally regulate how Member States should organise certain sectors; in other words, whether a sector should be economic or not. The extent to which health care services, for instance, are provided by economic operators differs extensively throughout the EU. It is clear that Member States have kept much more of their discretion in this sector than in other sectors, because the EU does not have the competence to impose regulatory standards.[73]. Similarly, in the context of public procurement, EU law does not touch upon the discretion of national governments to cooperate by directly supplying goods or providing services among themselves.[74] In other words, to a large extent Member States control which domains should be considered public (non-economic) and market-based (economic) falling within the scope of the internal market. The more fundamental question, what type of operator or public body is the most suitable for the provision of certain services (or goods), remains untouched by EU law.[75] The issue of involving socially oriented operators in the provision of public tasks, however, logically occurs in situations in which a Member State already has decided to involve third parties, requiring the set-up of a competitive procedure based on the EU internal market rules. Preferential treatment for socially oriented operators, then, needs to be justified by an overriding reason in the general interest (except for the limited exceptions in the Directive). The only possibility for justifying such preferential treatment has been created by the Court in its judgment in *Spezzino*.

2.4. The greater appreciation of socially oriented providers in the health care sector: the Spezzino case (2014)

The case of *Spezzino* illustrates how the law should appreciate and value these socially oriented providers in public procurement in the health care sector. In this case, the Court had to answer the question whether directly awarding contracts to non-profit organisations can be justified in a situation where several social enterprises were interested in the contract as well.

Shaping social security and health care systems is predominantly a national issue. In *Sodemare* (1997) the Court emphasised that EU law does not take away the powers of the Member States to organise their social security systems.[76] The freedom of establishment,[77] in that sense, allows for national legislation to only grant access to the market for the provision of welfare services to operators which are

[73] *Sodemare Sa* (C-70/95) [1997], para.30. The EU does not have the competence to adopt harmonisation measures in the area of health care, see art.168(5) of the TFEU.

[74] This observation was made by Manunza and Berends 2013 (see fn.3) above). It was elaborated on in W. Janssen, *EU Public Procurement Law & Self-Organisation* (Eleven International Publishers, 2018). Janssen refers to this in chapter 3 as the right of "self-organisation".

[75] This fundamental question was raised and elaborated on in: Manunza and Berends (fn.3 above).

[76] *Sodemare Sa* (C-70/95) [1997], para.27.

[77] Article 49 of the TFEU.

non-profit-making.[78] It should be noted here that the system for awarding of permits was considered non-discriminatory, objective and principally open to all non-profit organisations. Foreign organisations, in that regard, were not put in a less favourable position than domestic organisations. Moreover, the issue was only whether national regulation was in conformity with the internal market, there were no public contracts directly awarded.

In the context of public procurement, the Court had to deal with the scope of the rules in several cases about the awarding of contracts for medical transport services. The Directive now contains an exception for "danger prevention services that are provided by non-profit organisations or associations".[79] In its 2019 judgment in *Falck*, the Court ruled that the care of patients in an emergency situation, as well as the transport of these patients, falls within the scope of this exception.[80] Consequently, the non-profit character of such organisations is also defined by EU law.[81] In the earlier cases on medical transport services, the Court had to adjudicate on situations which did not (only) consist of emergency transport.

2.5. The case of Spezzino (2014) and the exceptional status of voluntary organisations in EU law

In 2014, the Court had to deal with a similar case to the previously discussed *Commission v Italy* (2007), in the context of preliminary questions referred by the Consiglio di Stato (Italian Council of State, the highest administrative court). Just as in *Commission v Italy*, the factual and legal contexts in the case of *Autoritá Sanitaria Locale Spezzino* were fundamentally different from *Sodemare*.[82] At stake in these cases was a national rule which provided a legal basis for directly awarding contracts for urgent and emergency ambulance services to certain voluntary organisations and subsequently a regional framework agreement in which such contracts were directly awarded to such organisations. Before the national court, the national rule and the regional framework agreement were contested by social undertakings[83] which were excluded from these contracts. It would thus appear that the activities of voluntary organisations and social undertakings overlap and, potentially, these different actors compete.

The Court acknowledged that, as far as the value of the regional framework agreement exceeded the threshold for medical services in (the former) Directive 2004/18/EC, the legislation would be incompatible with EU law. There is still no ground today for directly awarding contracts based on social policy in the public procurement Directive 2014/24/EU. The next issue was whether the principles of equal treatment and transparency, as derived from the freedom to provide services,[84] would stand in the way of this national legislation. Directly awarding contracts only to certain voluntary organisations clearly constitutes an obstacle to this freedom and a violation of the principle of equal treatment, as all other (also non-profit) organisations were excluded. So, the question was whether the national legislation and the framework agreement based on this legislation were necessary for the achievement of an overriding reason in the general interest justifying the obstacle.

According to the Court, measures which counter the risk of undermining the "financial balance of a social security system" and measures which have the objective of maintaining a "balanced medical and hospital service open to all" can fall within the derogation ground on public health "in so far as it contributes to the attainment of a high level of health protection".[85] Although restrictions to the fundamental freedoms are also prohibited in the health care sector, the Court clearly grants more discretion in this context to

[78] *Sodemare Sa* (C-70/95) [1997], paras 32–34.
[79] Directive 2014/24/EU art.10(h).
[80] *Falck* (C-465/17) [2019], para.51.
[81] *Falck* (C-465/17) [2019], para.61.
[82] The fundamental nature of the differences between the two cases is also mentioned by A-G Wahl, see Opinion of Advocate-General Wahl, 30 April 2014 in *Spezzino* (C-113/13) [2014], para.71.
[83] Based on Italian law.
[84] Article 56 of the TFEU.
[85] *Spezzino* (C-113/13) [2014], para.57.

national authorities in derogating from the main rule than in other sectors. Moreover, according to the Court, EU law needs to take into consideration that the contested national rule on the organisation of ambulance services was part of the constitutional and legal provisions in Italian law which promote the voluntary activities of citizens.[86] For those reasons, a Member State may take the view that emergency ambulance services should only be granted to voluntary associations considering the "social purpose" of its health care system and to "control the costs".[87] The main requirement is that a framework agreement under which contracts are directly awarded to these associations actually contributes to the functioning of such a system. Subsequently, it must be assessed (by national courts) whether organisations receiving preferential treatment in such a system are sincerely non-profit and their workforce in fact consists of volunteers.[88]

In its judgment in *Casta*, the Court clarified the implications of *Spezzino*. Logically, accepting that a social purpose and cost-effectiveness justify directly awarding contracts to voluntary organisations, there is no requirement to compare the possibilities of different voluntary bodies.[89] In addition, any commercial activity carried out by a voluntary organisation can only be marginal and in support of its voluntary activities.[90] Hence, social entrepreneurs undertaking significant commercial activities are excluded. The question as to what "commercial" means can only be answered *in concreto*, because contracting authorities apparently have the discretion to decide what is not "commercial". Only with regard to these commercial activities does EU law protect other social entrepreneurs from unfair competition from voluntary organisations.[91] When the exception has been used, social entrepreneurs are, however, still denied access to certain health care markets.

2.6. Reconciling cost-effectiveness and social value within the broader context of the EU Treaties

Most striking about these judgments, at first sight, seems to be the unwillingness of the Court to elaborate on the strictness of the proportionality test in such cases.[92] As Advocate-General Wahl mentioned in his Opinion on this case, it is questionable whether excluding any form of competition, even among non-profit-making entities, would benefit public finances, whereas competition usually stimulates economic efficiency.[93] In other words, other means which are non-discriminatory and less restrictive to the internal market would have contributed to the "social purpose" and "controlling the costs" as well or even better than the measure chosen on the basis of Italian legislation. The Court, to the contrary, decided to leave this choice of means within the discretion of the Member States. The great value that is attached to voluntary activities in the Italian legal system then opens the way for directly awarding contracts. Social entrepreneurship, on the other hand, would be fostered through competition, as economic activity and innovation are at its core. Directly awarding contracts to voluntary organisations potentially excludes innovative solutions which could be offered by (social) entrepreneurs, as in the case of *Spezzino* which was triggered by submissions by social enterprises. It was considered important by the Court that the contract only included the reimbursement of costs incurred, not involving employment costs, now that the work carried out had to be voluntary work only. The actual amount of costs was, however, not assessed.

[86] Article 118 of the Italian Constitution and Legge-quadro nr. 266 sul volontariato. See *Spezzino* (C-113/13) [2014], paras 53–54.
[87] See *Spezzino* (C-113/13) [2014], para.59.
[88] See *Spezzino* (C-113/13) [2014], paras 61–62.
[89] *CASTA* (C-50/14) [2016], paras 70–72.
[90] *CASTA* (C-50/14) [2016], paras 78–79.
[91] See in this regard, A. Brown, "The direct award of ambulance services to voluntary organisations in Italy, revisited: case C-50/14 CASTA" (2016) *Public Procurement Law Review* 72–76.
[92] This is also mentioned in R. Caranta, "After Spezzino (Case C-113/13): A Major Loophole Allowing Direct Awards in the Social Sector" (2016) *European Procurement & Public Private Partnership Law Review* 19.
[93] Opinion of Advocate General Wahl, 30 April 2014 in *Spezzino* (C-113/13) [2014], paras 55–61.

The judgment, in that regard, did not address the premises of the so-called *Altmark* test (or a similar test).[94] This test was created by the Court to ensure that the financing of general interest services is in compliance with the prohibition on state aid. This is not as strange as it might at first sound. The *Altmark* test—as part of the competition rules of the EU Treaties—because of its focus on "effective economic assessment" is not suitable for appreciating non-economic value, such as the constitutional identity of a Member State, like the free movement provisions. The issue raises, therefore, fundamental questions about the coherency between the different sets of rules of the EU's social market economy (the four Treaty freedoms and the rules on competition).

More importantly, the Court emphasised that the importance of voluntary activities of citizens is part of the Italian constitution and that this is taken into consideration by EU law.[95] The judgment of the Court, in that light, seems to link perhaps more closely with art.4(2) of the TEU on the respect for national identity and constitutions than the social market economy. In Italy, including citizens in public services through voluntary work is a constitutional right and thus a duty for contracting authorities.[96] The voluntary nature of this engagement—meaning that work is free of charge and the organisation is purely non-profit—is strictly regulated.[97] It is defined by the law as "voluntarily and without charge through the organisation to which the volunteer belongs on a non-profit-making basis, even indirectly, and exclusively for the good of the community".[98] The relevance of the constitutional identities and traditions of the Member States in internal market law is not new. The Court accepted in several cases—in the context of national authorities exercising regulatory competences—that fundamental rights derived from national constitutions may form the basis of exceptions to the economic freedoms.[99] There is no completely consistent approach towards the proportionality requirement in that regard.[100] It has been stressed that national authorities usually enjoy a greater "margin of appreciation" in their regulatory capacity when it comes to these constitutional rights. Often it seems, however, when an exception potentially has the effect of fully closing markets off from operators or workers in other Member States—instead of merely imposing a different regulatory standard—that the Court should take a stricter approach towards the proportionality test.[101] The *Spezzino* jurisprudence shows that this does not always indicate the obligation of equal treatment.

3. Concluding remarks

The ambition of EU public procurement law to contribute to the fostering of a social market economy as set out by the EU Treaties raises many fundamental questions. The focus of the rules is on equal treatment of all types of economic operators. Consequently, the awarding of contracts should be based on objective criteria which relate to the subject-matter of a given contract, instead of to the type of provider. Fostering a social economy then requires objectifying and measuring social value in public contracts. Even if this complex task can be executed, a tension between the internal market principles and social economy remains. Certain providers, such as citizens' initiatives, social enterprises and voluntary organisations, will, in certain cases, be more suitable for contracting authorities to cooperate with as their operational (public interest) objectives align.

In the Italian context, the Court found a way to overcome this tension in its judgment in *Spezzino*. The justification ground it created, however, can only be used for voluntary activities in a legal system which

[94] *Altmark Trans GmbH* (C-280/00) [2003]. For a critical review of the *Altmark* test, see N. Saanen, *Wegen door Brussel. Staatssteun en publieke belangen in de vervoersector* (English translation: "State Aid and Public Values in the Transport Sector") (Gildeprint, 2013).
[95] *Spezzino* (C-113/13) [2014], paras 54–55.
[96] Article 118 of the Italian Constitution.
[97] Legge-quadro nr. 266 sul volontariato. See *Spezzino* (C-113/13) [2014], paras 9–18.
[98] Legge-quadro nr. 266 sul volontariato, art.2.
[99] See for instance: *Sayn-Wittgenstein* (C-208/09) [2010], paras 93–95 and *Omega Spielhallen* (C-36/02) [2004], para.33.
[100] For an analysis of the case law of the Court on this topic, leading to this statement, see S. de Vries, "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice" (2013) *Utrecht Law Review* 169–192.
[101] De Vries uses the example of the *Viking* and *Laval* cases, see: De Vries (fn.101 above).

attaches particular value thereto. It does not fundamentally change the scope of application of the internal market rules, as the Court still focuses on the question whether a certain activity is "economic" in nature in the sense that it could be conducted by a commercial actor.

To overcome these tensions, guidance and choices need to be made by the legislators, at EU level as well as on the national level.

On the EU level, more guidance is needed on the concept of "social market economy" as the characterisation of the internal market. Particularly, it should be considered what its consequences are for the scope of application of the internal market rules and how certain incoherencies between the free movement rules and the rules on competition can be overcome. With the 2014 public procurement Directives, the EU legislators have already incorporated many possibilities into the regulations for pursuing secondary policy objectives in public procurement, such as the possibility of reserving contracts to certain social enterprises as specified in art.77 of Directive 2014/24/EU.

At the national level, legislators need to make certain choices, now that the current Directives grant much legislative as well as executive discretion. Particularly where the discretion is left to the contracting authority, Member States need to ensure effective judicial protection. This requires the adoption of objective frameworks enabling the judicial review of the broad discretionary powers.