The Possibility to Reserve a Public Contract under the New European Public Procurement Legal Framework

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Over the years, and owing to a dramatic change in the social configuration of our continent, the initial arrangement consecrated by the Treaty Establishing the European Economic Community of 1957 has evolved, from an essentially economic structure, to an amazingly complex edifice defined by the 'social market economy'. In this new context, public procurement has been given a central role, as a strategic tool in the implementation of various key social policy objectives. Only this has actually placed it deep in the clash between the traditional internal market rules and those pertaining to EU's social policies. This article tries to spot the concrete place occupied in the described setting by the possibility to reserve a public contract (an institution discriminatory in its very essence) and how this valuable instrument has been transposed into the national legal framework of Member States. It also aims at showing how, in spite of the fact that, by the adoption of Articles 20 and 77 of Directive 2014/24, the general competition rules haven't been annihilated but just adapted so to better correspond to the new EU landscape, the solution chosen by several Member States for transposition has in fact perverted their original purpose just to offer sufficient leeway for discrimination based on nationality grounds.

Keywords: Public contract reserve; Discrimination; Social policy; Strategic public procurement.

I. Introduction

Article 20 (Reserved contracts)[1] of the new Directive 2014/24[2] allows — without compelling[3] — Member States to reserve the right to participate in public procurement procedures to, limitedly, two special categories of bidders (ie, sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons) or, upon the case, to provide for such contracts to be performed in the context of 'sheltered employment programmes' (that is, in the implementation of certain public policies crafted at either the central, or the regional or otherwise the local level,

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1 Placed in Chapter II – 'General rules' of Title I (Scope, Definitions and General Principles) of Directive 2014/24, together with the provisions listing the fundamental principles that govern public procurement, those clarifying which economic operators may participate in a bid, those setting the rules applicable to communications as well as with those defining the conflicts of interest. This placement is, in our opinion, not fortuitous as it underscores the fact that, in the eyes of the EU legislature, reserved contracts is not a particular feature or public procurement but a general rule thereof, or even a principle.

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

3 This observation is important in the context where there are some Member States which, as we will detail further below, have chosen to set an *obligation* upon contracting authorities to reserve at least a minimum proportion of the total number of public contracts that they award during one year to such entities.

and consisting in specific measures aimed at delivering support for the integration into the labour market of some particularly disadvantaged categories of persons — such as people with disabilities, or in economic distress, or unemployed people, or the elder ones, or migrants or, *en fin*, members of a minority eg an ethnical group, etc.). According to the mentioned article:

> 1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.
> 2. The call for competition shall make reference to this Article.

In a similar manner, Article 77[4] of the same Directive 2014/24 stipulates that:

> 1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes[5] 75121000-0,[6] 75122000-7,[7] 75123000-4,[8] 79622000-0,[9] 79624000-4,[10] 79625000-1,[11] 80110000-8,[12] 80300000-7,[13] 80420000-4,[14] 80430000-7,[15] 80511000-9,[16] 80520000-5,[17] 80590000-6,[18] from 85000000-9[19] to 85323000-9,[20] 92500000-6,[21] 92600000-7,[22] 98133000-4,[23] 98133110-8.[24]
> 2. An organisation referred to in paragraph 1 shall fulfil all of the following conditions:
> (a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;
> (b) profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;
> (c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
> (d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.
> 3. The maximum duration of the contract shall not be longer than three years.
> 4. The call for competition shall make reference to this Article. (...)

It is unquestionable that both Articles cited above discriminate: in favour of the entities falling within one or the other of the two categories mentioned in Article 20 or, upon the case, that meet the conditions listed in Article 77, and against all the other undertakings which may, potentially, have an interest in

4 Placed in Chapter I (Social and other specific services) of Title III (Particular Procurement Regimes).

5 Initially adopted in 2002, these codes are now regulated by Regulation (EC) No 213/2008 of 28 November 2007 amending Regulation (EC) No 2195/2002 of the European Parliament and of the Council on the Common Procurement Vocabulary (CPV) and Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council on public procurement procedures, as regards the revision of the CPV (Text with EEA relevance) -OJ L 74, 15.3.2008, p. 1–375.

6 Administrative educational services.

7 Administrative healthcare services.

8 Administrative housing services.

9 Supply services of domestic help personnel (the erstwhile 74522000-4 in the CPV 2002 classification).

10 Supply services of nursing personnel (the erstwhile 74524000-8 in the 2002 classification).

11 Supply services of medical personnel (the erstwhile 74525000-5 in the 2002 classification).

12 Pre-school education services.

13 Higher education services.

14 E-learning services (without correspondence in the 2002 classification).

15 Adult-education services at university level.

16 Staff training services (ex. 80421100-2 in the 2002 classification).

17 Training facilities (ex. 80422000-8 CPV 2002).

18 Tutorial services (with no correspondent in the 2002 classification).

19 Health and social work services.

20 A whole range of health and medical-related services, including surgery, orthopaedic, psychiatric, oxygen-therapy etc. services.

21 Library, archives, museums and other cultural services.

22 Sporting services.

23 Services furnished by social membership organisations (the erstwhile 91330000-6 in the 2002 classification).

24 Services provided by youth associations (ex 91331100-4 in the 2002 classification).

the contract put out to tender. This makes them, in terms of competition, restrictive in their very essence.

This aspect is even more problematic as it creates serious tensions between the traditionally economic dimension of the internal market (dominated by the principles of free movement and free competition) and the social dimension thereof (which gained traction only at a later stage of its evolution). It is in fact this tension that raises a question of conformity of the cited provisions with the EU's primary law, especially because the hierarchy of principles has remained, at that level, still unsettled.[25]

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

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

These institutions have, to this purpose, been armed with several efficient tools meant to secure it and make it effective. The close monitoring, the coordination and the harmonization of the relevant national legislations adopted in the areas left in the competence of the Member States is just one of these valuable mechanisms. Another one is the complex bundle of financing mechanisms which the Union puts (directly or indirectly — by for example encouraging private financing) at the disposal of various actors involved in the delivery of various social objectives,[26] which only verifies the importance ascribed to these entities in the economy of the Union. Additionally, but maybe even more importantly, according to several explicit provisions of the Treaties, fundamental social values and concrete social objectives *must* be integrated into the definition and implementation of all Union's policies and activities[27] (in line with, of course, the principle of conferral).

This actually justifies the so many — and occasionally mandatory — references to social aspects contained in the latest package of Directives on public procurement, but also explains the importance of the mechanisms dedicated to the pursuit of values stemming from current social policies, such as the possibility to reserve a contract for enterprises deeply involved in the delivery of the social element comprised in the social market economy postulated by the Treaties.

Having established that, we will further move to show how the Member States took advantage of this opportunity when transposing these provisions into their internal legal framework. We will thus explain how some of them actually missed the chance and instead created unnecessary restrictions, incompatible with the fundamental rules of the internal market (still applicable).

Finally, we will touch upon a few inadvertences that, in our opinion, may make the application of Ar-

25 For an in-depth analysis of the concept of 'general principles' in the meaning offered by the EU Treaties and a possible theory thereof see, eg, X Groussot, *General Principles of Community Law* (European Law Publishing 2006); T Tridimas, *General Principles of EU Law*, (2nd ed., Oxford University Press 2006); U Bernitz, J Nergelius, C Cardner (eds), *General principles of EC law in a Process of Development* (European Monograph 62, Kluwer, 2008) or V Holderbach-Martin, *Les principes généraux non-écrits du droit communautaire,* (Atelier National de Reproduction des Thèses, 2004); A Ianniello-Saliceti, *Către sursa principiilor generale ale dreptului: de la Codul Regatului Sardiniei din 1837 la Tratatul de la Lisabona din 2007* (Working Paper CSDE 2010-2011, Wolters Kluwer România 2011).

26 For a comprehensive presentation of the opportunities and instruments promoted or made available at the EU level with purpose to facilitate social enterprises' access to social finance markets, see the EC's guide 'A recipe book for social finance - A practical guide on designing and implementing initiatives to develop social finance instruments and markets' released in January 2016, <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7878> accessed 27 November 2018.

27 See, for example, Articles 7, 8, 9, 10, 11, 12 and 13 from the Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/1.

ticle 77 problematic while discussing, *en passant* (as this is not the main concern of this article), the specific forms which the conflict between the internal market and competition rules and the pursuit of the objectives stemming from social policy takes in the procurement of services of general interest and, in particular, of social services of general interest.

II. Possibility to Reserve a Public Contract for Social Enterprises and other Social Actors

The mechanism consecrated by Articles 20 and 77 represents, in sooth, the only[28] form of positive discrimination explicitly permitted by Directive 2014/24 in an area where fundamental public interests of a social nature prevail over the economic ones which, as a matter of principle, demand free competition as a guarantee needed to secure the four freedoms enshrined in the EU Treaties and which constitute the foundation of the Single Market. However, given the explicitly restrictive nature of these provisions, many hastened to challenge their conformity with the Treaties and, in particular, with the specific rules that govern the internal market and competition within it, accusing the European legislature of putting unnecessary (unlawful?) pressure on the functional structure of the single market.

Nevertheless, the possibility to reserve a contract to a specific category of bidders is not brand new to public procurement. Directive 2004/18[29] foresaw, in its Article 19, in a similar manner, that

> Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions. The contract notice shall make reference to this provision.

Additionally, Recital (28) from the Preamble to the same Directive 2004/18 clarified that

> Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute to integration in society. In this context, sheltered workshops and sheltered employment programmes contribute efficiently towards the integration or reintegration of people with disabilities in the labour market. However, such workshops might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States may reserve the right to participate in award procedures for public contracts to such workshops or reserve performance of contracts to the context of sheltered employment programmes.

Regardless of these ambitious arguments, the 2004 rules on reserved contracts had a barely limited application, mainly given the lack of courage among contracting authorities and practitioners (since it was quite a revolutionary change in the very strict way that the internal market and competition rules were applied hitherto and many were still afraid to test its resistance to the pressure exercised by the traditional internal market rules). In fact, some Member States, where this mechanism functioned acceptably and where the institution of reserved contracts gained some traction — see for example Romania's case as we will discuss it below, owed this practice not to the provisions contained in their national laws transposing the procurement Directives but to a complementary legislation concerned with, specifically, social policies, social economy and social enterprises. Such specific norms (which usually ignored the economic dimension and the pressure brought about by the need to secure free competition in the market and instead focused exclusively on the crafting and the implementation of various social policies) put actually a strong burden on contracting authorities to go that way, which only shows that coercion is often more effective than a mere door left open just in case.[30]

On the other hand, Directive 2004/18 comprised no provisions similar to that contained in Article 77

28 The two Articles share a common goal, aiming at the same social values. A necessary distinction must nevertheless be made between the exception regulated by Article 20 and that making the object of Article 77 as the first applies, in general, to all public procurement contracts, without distinction, whereas the latter targets merely *services* contracts, and not even all services contracts, but only to those having as their object one of the services corresponding to the CPV codes listed thereunder (ie, social, health and cultural services of an obvious general public interest).

29 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L 134/114.

30 For details, see below.

of Directive 2014/24. This is actually true for the entire Chapter I of Title III from Directive 24 which have set up a lighter regime for the procurement of social and other specific services (the majority of which were initially excluded as such from the application of Directive 18).

Even more noteworthy, neither Articles 20 and 77 from Directive 24, nor Article 19 from Directive 18 had any correspondence in the former Directives 93/36 and 93/37[31] — still tributary to the paradigm consecrated by the Treaty establishing the European Economic Community of 1957. This only underlines the dramatic transformation that took place at this level since the dawn of the European integration, and how social values became, in a piecemeal fashion, an essential part of the EU's economy, oozing from the Treaties, through the relevant EU hard and soft law, down to the legal environment of each Member State.

To be honest, the cited Article 19 wasn't even the first choice of the Commission. In reality, the idea to make room to such a restrictive instrument in the context of public procurement appeared only later, during the debates that took place in the European Parliament, and it took a long legislative process to finally become reality in the form quoted above.

Later on, through the thorough reform of 2014, the European legislature stretched even more the scope of this derogation, extending both the sphere of entities to which a contracting authority may now reserve a public contract (by including, beside sheltered workshops, also *economic operators whose main aim is the social and professional integration* of disabled or disadvantaged persons), but also that of the persons which may be included in such schemes (ie, not only 'handicapped persons' but also *disadvantaged* persons). In addition to all that, Directive 2014/24 has also lowered the bar with regard to the number of people which a sheltered workshop or an entity involved in the social or professional integration thereof must hire in order to qualify for the awarding of a reserved public contract (from 'most of the employees' to a much functional 30%).

Anyway, scuffles and contradictory debates took place also in connection with the contents of Article 20 of the current Directive 24, especially with regard to the categories of persons targeted by this measure (ie, only those with disabilities versus them but also disadvantaged persons) and the concrete forms of protection, the adopted version embracing, in the end (and after a powerful lobby from some very active European social organizations[32]), the form initially proposed by the Commission.

However, Articles 20 and 77 from Directive 24 are now ordained to respond, with more vigour (as compared with the mechanisms similar in nature yet far weaker in effect embedded in the previous set of EU laws on public procurement), to the *current* social challenges which have been haunting the European continent in the last years (such as the disturbingly high number of long-term unemployed and a poverty that has proliferated in the aftermath of the recent economic crisis, mass migration and more and more radical nationalist movements, a diversification of the forms of exploitation, by employers, of their own employees based for example on nationality grounds, etc).

In fact, the possibility to use specific public procurement mechanisms with the explicit purpose to boost the integration of certain categories of disadvantaged or otherwise impaired or debilitated persons into the labour market or with the other members of the community is now, due to the decisive political shift that left an unmistakable footprint in the Treaty of Lisbon, part of the larger strategy[33] assumed at the Union's level and which purports to transform

31 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ 1993 L 199 / 1, and Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ 1993 L 199 / 54.

32 See for example <http://www.easpd.eu/en/content/reserved-contracts-public-procurement>, or <http://www.socialplatform.org/news/why-reserved-contracts-in-public-procurement-are-important/>, accessed 27 November 2018.

33 Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' (the 'Europe 2020 Strategy), COM/2010/2020 final. To this very purpose, Recital (2) of the Preamble to Directive 2014/24 states in explicit terms that '*Public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council (4) and Directive 2004/18/EC of the European Parliament and of the Council (5) should be revised and modernised in order to (…) enable procurers to make better use of public procurement in support of common societal goals.*' Along the same lines of action, Recital (3) goes even further and clarifies that '*When implementing this Directive, the United Nations Convention on the Rights of Persons with Disabilities should be taken into account, in particular in connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions.*' (emphasis added).

public procurement into a powerful, strategic tool for the implementation of various public policies not directly connected with this field (which, traditionally, has more to do with the efficient spending of public funds and the promotion of a free competition among traders) but aiming at enhancing the general wellbeing and, in particular, at generating social benefits and bolstering the integration of the disadvantaged. Although frail at the outset, this approach gained enough traction of late, especially based on a constant case law coming from the European Court of Justice (ECJ) and, later, the Court of Justice of the European Union (CJEU)[34] and, more importantly, the substantive changes brought about by the Treaty of Lisbon.[35]

Transposed into the more limited field of public procurement,[36] the conclusions drawn above must mean that, in the social market economy which defines the Union's landscape since 2007, contracting authorities are not only allowed, but somewhat obliged to pursue social objectives when awarding public contracts, in a compound of scopes gathered from several — interconnected — public policies. At the EU level, these policies are the result of the EC's intense travail to determine the new place for public procurement in the new political context. Thus, taking advantage of the opportunities brought forth by the Treaty of Lisbon and the policies crafted based on it, in particular the Europe 2020 Strategy, the European Commission intensified its efforts to adapt the Single Market to the new realities so, in 2015 (after long consultations with the Member States, public authorities and stakeholders), it came out with a comprehensive Single Market Strategy — 'Upgrading the Single Market: more opportunities for people and business'.[37] This document was soon followed up by many other related actions and legislative packages, such as the recent Action Plan on Public Procurement and the thick package of initiatives released in October 2017 (among which the Communication 'Making Public Procurement work in and for Europe' - COM(2017) 572 where the Commission explained that it has identified 'six priority areas, where clear and concrete action can transform public procurement into a powerful instrument in each Member State's economic policy toolbox' (p 7), and acknowledged that

> Strategic public procurement should play a bigger role for central and local governments to respond to societal, environmental and economic objectives, such as the circular economy. Mainstreaming innovative, green, and social criteria, a more extensive use of pre-market consultation or qualitative assessments (MEAT) as well as procurement of innovative solutions at the pre-commercial stage requires not only a highly competent pool of public procurers but above all policy vision and political ownership.(emphasis added, p 8)

... or those on the Circular Economy, the European Pillar of Social Rights, the Labour Mobility and the more recent proposal to review the Posted Workers Directive. The Commission accompanied all these measures with a new Investment Plan for Europe[38] which took the Cohesion Policy beyond its initial scope while changing the focus on a number of sensitive social objectives. At the launching of the 2017 package, Mrs Elżbieta Bieńkowska, Commissioner for Internal Market, Industry, Entrepreneurship and SMEs, stressed that:

> We encourage public authorities to use public procurement strategically as a tool to obtain better value for taxpayers money and to contribute to a more innovative, sustainable, inclusive and competitive economy. The Commission will continue to assist Member States in doing so, and invites public authorities at all levels of government and other stakeholders to work in a broad partnership.

All these show that the instrumentality of public procurement is now given a dense substance, beyond the limited purpose of the relevant Directives (which is explicable in the light of Articles 2 to 6 TFEU which prevent the Commission from intervening directly on the core aspects of social policies, but only via soft law or indirect hard law).

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34 See in this regard, for example, the cases C-31/87 *Beentjes* [1988] ECR - 04635, C-225/98 *Nord–Pas de Calais* [2000] ECR I-07445, C-513/99 *Concordia Bus* [2002] ECR I-07213, C-368/10 *Max Havelaar* [2012] ECLI:EU:C:2012:284 or, more recently (but of crucial import for this discussion), C-346/06 *Ruffert* [2008] ECR I-01989 and C-115/14 *Regio Post* [2015] ECLI:EU:C:2015:760.

35 OJ 2007 C 306/1.

36 The Treaty rules on competition are doubled by the obligation (for the Union) to promote social values and the core elements of the social policy provided at the primary law level throughout its actions and measures (ie, including in the area of competition and the functioning of the internal market which, inevitably, encompasses public procurement).

37 COM(2015) 550 final.

38 COM/2014/0903 (<https://ec.europa.eu/commission/priorities/jobs-growth-and-investment/investment-plan-europe-juncker-plan_en> accessed 27 November 2018).

This does not mean that contracting authorities may forgo or circumvent the free competition rules. To the contrary, they are still compelled to observe such rules, only they are now permitted to confine the playing field to include only those bidders who meet the minimum social requirements set through the relevant tender files. Or, in short, the free competition may now be restrained to only those players that qualify for it in a socially-oriented arrangement.[39]

To this extent, the rather weak instruments offered by the Directives adopted in 2004 were replaced with a set of new one, more robust and dynamic, hence fitter for the social market economy scenario. Not only that, under the new rules, a contracting authority must eliminate from the competition any bidder that fails to meet the requirements set in various social legal norms[40] (in fact it must do so in any stage of the procedure, not just in the qualification one, and this rule is as well applicable to subcontractors), but it is also allowed to set, through the relevant tender file, various social criteria (in either the form of technical specifications — including by resorting to the use of labels, or selection or award criteria or, finally, as conditions for the performance of that contract or a constituent part of its management, etc) which bidders must meet — or promise to meet — in order to be awarded that contract. It may, alternatively, reserve that contract to a special category of undertaking involved in the delivery of social value.[41]

Of course, such restrictions are, in the essence, likely to upset the balance in the market, and to redress this balance is actually one of the most problematic issues and toughest challenges prompted by the shift from a totally open economy to a social one. It is thus clear why for the framers of the 2014 package of laws on public procurement the real wager was to find a fine balance between the main scope thereof[42] (which, since the very first set of Directives adopted in this area, remained, generally speaking, the same, ie, the ensuring of a competitive environment among bidders and the harmonization of the relevant national legislations) and the evidently restrictive character of the measure offered by Articles 20 and 77.

The challenge was even greater as the need for a good balance between these forces must necessarily have had a proper reflection in practice, in an infinite variety of cases which no law can anticipate and cover in depth. Translated into practice, this means that, by setting forth the general principles — which should have defined and explained the change in the original paradigm — the law has actually transferred the responsibility for testing that balance and applying those principles on each and every contracting authority. More concretely, since the interspersing of certain minimum social requirements in the procedural equation entails higher costs for at least some of the players, contracting authorities must necessarily redress this inequity by compensating on other levels (eg, they should never, in such a scenario, choose the 'lowest price' as the only, or at least the main, award criterion but rather a set of quality-based criteria, or a combination of factors where the price is given a reduced weight).

Vice-versa, the right (and sometimes the obligation) to use various restrictive mechanisms offered by the public procurement law doesn't mean that contracting authorities are permitted to exploit them for other purposes than those for which they have been set up in the first place although — provided that it is based on objective grounds — such a restriction may in effect bring the number of those who qualify to two or even one bidder.[43]

On the other hand, at a closer look, and having regard to the specific national legislations regulating their setup and functioning (which converge to a series of similar criteria that will be discussed below) there may be spotted some similarities between the

39 A good example in this regard is the Social Public Procurement Guide recently issued by the City of Barcelona and available at <https://bcnroc.ajuntament.barcelona.cat/jspui/bitstream/11703/99016/1/Guia%20contractaci%C3%B3%20p%C3%BAblica_eng.pdf> according to which '*Social public procurement must not prejudice business competition or equal treatment in invitations to tender. None of the measures in included in this guide implies unequal treatment of tendering companies or candidates in the public procurement procedures promoted by Barcelona City Council and the organisations with a majority municipal stake that make up the municipal group. However, they are intended as a positive action in favour of businesses that demonstrate a social conscience and good practices, so these values are included in the performance of public contracts and increase the social, economic and innovative efficiency of investment in municipal public procurement*.' (emphasis added).

40 The failure to observe the relevant obligations stemming from the relevant collective labour agreements may also constitute a relevant criterion for exclusion, or a breach of contract – Article 18(2) of Directive 2014/24.

41 See Recital (36) of the Preamble to Directive 2014/24.

42 As laid down in Recital (1) of the Preamble to Directive 2014/24.

43 See for example the conclusions of the CJEU in case C-513/99 *Concordia Bus* (n 34), especially paragraph 85 of the judgment where the Court maintained that '(…) the fact that one of the criteria adopted by the contracting entity to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting entity, is not in itself such as to constitute a breach of the principle of equal treatment.'

mechanism of reserving a contract to a specific category of entities and that of labels: in the first scenario, contracting authorities may for example choose to reserve a contract to social entities which, in accordance with the national laws that govern their setup and functioning, prove their status by presenting a valid certificate or authorization. Such certificates, issued by competent national authorities, usually attest that such entities have been verified in advance and officially acknowledged as meeting a set of criteria which further qualify them as having a social character as required under Article 20 etc. This is why it is essential that, inasmuch as a contracting authority reserves a contract to social enterprises and such enterprises enjoy a regime which makes the object of a national legislation according to which their setup and functioning is subject to a prior assessment and authorization, that contracting authority must, when referring to that specific national law as the minimum required standard, necessarily add 'or equivalent'.[44]

It should be however noted that social enterprises[45] lay at the core of both social economy and social market economy. The place of these vehicles in the Union's economy has evolved enormously. EESC's[46] recent recommendations on social enterprises[47] capture the gist of this evolution, and the key policy recommendations comprised therein show the determination of the EU institutions to create a both institutional and policy environment which to give thick substance to the to the social (market) economy promoted in and through the Treaties.[48] As the EESC itself acknowledged throughout its afore-cited recommendations, the EU citizens and social enterprises 'must be at the heart of European Strategies aimed at promoting social cohesion, social inclusion and well-being'.[49] This assertion just underscores the extraordinary role which social enterprises must have in the delivery of the strategic goals set through the Treaties and hence shed a little light on their place in the public procurement equation.

Social enterprises are ordained to pursue objectives with a barely marginal economic input but with a great added social value,[50] so it has only become normal to be, in the framework marked out by the Treaty of Lisbon, given a central place in the delivery of various public contracts,[51] in spite of the fear of some scholars who expressed their concerns on the effects of such measures on the overall economic balance of the internal market and the substance of the free competition principle.[52]

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44 This observation will prove its merits a few pages below, when we will discuss the way in which Member States transposed Articles 20 and 77 cited above into their national legal framework.

45 Although there is no clear definition for social enterprises, it is common ground that one of their main characteristics and purposes is the pursuing of various social goals. However, what differentiates them from traditional social economy organisations, is the fact that social enterprises are predominantly oriented '*towards addressing not only the needs of their owners or members, but also of the entire community (including the needs of the most fragile segments of society), as they put more emphasis on the dimension of general interest rather than on purely mutualistic goals*' emphasis added (Social Europe Guide, Vol 4, ISSN 1977-2343, 32, available at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7523> accessed 27 November 2018). Also, for a general presentation of the EU policies crafter around this concept, see <https://ec.europa.eu/growth/sectors/social-economy/enterprises_en> accessed 27 November 2018.

46 The European Economic and Social Committee, an European consultative body created pursuant to Article 193 of the TEEC 1957.

47 EESC recommendations on Social Enterprise (2014), available at <https://www.eesc.europa.eu/resources/docs/qe-04-14-860-en-n.pdf> accessed 23 November 2018.

48 The efficiency of social enterprises in the delivery of their social mission is periodically assessed at the EU level, in order to fine-tune the future evolution of the European social policies for an as deep an impact as possible. For a deeper understanding of this assessment mechanism and its importance in the economy of the evolution of social enterprises and of the entire social market economy that depends on their fine functioning, see the European Commission's 'Proposed Approaches to Social Impact Measurement' (2015) available at <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7735> accessed 23 November 2018.

49 EESC's Recommendations (n 47) 2.

50 More on the sensitive role played by social enterprises in the social (market) economy, see <https://www.rreuse.org/the-social-economy/> accessed 27 November 2018. According to this latter material, one of the most important features that define social enterprises is that '*Often (…) [they] operate in economic niches which might not, at first, seem profitable. [But], [i]f this changes, (…) the competition from different actors can push them out of the market and destroy their social value*).' (emphasis added). In fact, what confers social sector great value in a public procurement equation is the fact that it opens a wide door for public commissioners 'to build a supply chain that actually shares [their] essential purpose and values' as such values may stem from various public policies (F Villeneuve-Smith and J Blake, *The art of the possible in public procurement* (2016) available at <https://www.bwbllp.com/file/the-art-of-the-possible-in-public-procurement-pdf> accessed 27 November 2018.

51 As a reminder, Article 20 is placed in Chapter II ('General Rules') of Title I ('Scope, Definitions and General Principles') of Directive 2014/24! In spite of their importance for the social (market) economy, the creation and functioning of social enterprises still encounters significant barriers. For more on this, see the 2013 OEDC Policy Brief on Social Entrepreneurship (<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7552> accessed 27 November 2018).

52 See for ex A Sanchez Graells (at <http://www.howtocrackanut.com/blog/2015/03/reserved-contracts-under-reg20-public.html> accessed 27 November 2018) or P Telles (at <http://pcr2015.uk/regulations/regulation-77-reserved-contracts-for-certain-services/> accessed at 27 November 2018).

Anyway, what is important to note is that, in the context of reserving a contract to a specific category of enterprises, the competition rules are not annihilated. At least not completely. In sooth, such reservation operates in rapport with a *specific category* of enterprises, but not with a *specific entity* falling into that category. It follows that, where a contract has indeed been reserved to sheltered workshops or social enterprises, there are allowed to participate in the awarding procedure *all* entities authorized to function as sheltered units or social enterprises in accordance with the relevant law governing their setup and functioning, contracting authorities being forbidden to set criteria which to favour one entity or another in either of the two groups.

Of course, once it took the decision to reserve the contract for authorised sheltered units and/or social enterprises for insertion, the contracting authority must necessarily refer in explicit terms to Article 20 (or Article 77, as the case may be) or, concretely, to the corresponding provision contained in the national laws, as the basis for this restriction, under the sanction of seeing the entire procedure annulled for an *unjustified* exclusion of those entities that do not fall into one or the other of the two categories listed in the law and, thus, an unlawful restriction of competition, on that market, between *all* potential bidders.

However, the transposition of Article 20 from Directive 2014/24 into the national legal framework of the Member States took place, if not contrary to its main purpose,[53] at least in spite of the EU competition rules since the restriction imposed by such national laws was taken beyond the purpose claimed in Directive 24, to favour national companies that fall into that category — ie, discrimination based on nationality grounds.[54]

For example, the Romanian Law no. 98/2016[55] stipulates, in Article 56, that

> the contracting authority may reserve the right to participate in a procurement procedure to only the sheltered units authorized in accordance with Law no.448/2006 on the protection and the promotion of the rights of the persons with disabilities, recast, as subsequently amended and completed, and to the social enterprises for insertion[56] regulated by Law no.219/2015 on social economy.[57]

Unfortunately, the Romanian lawmakers refused to transpose also the second part of the first paragraph of Article 20 from Directive 24, depriving the Romanian contracting authorities from the possibility to let the bidding open to *all* interested entities but instead to set an obligation on the winning bidder to deliver it under a sheltered employment programme. It may be thus concluded that, inasmuch as the Romanian contracting authorities are concerned, they may use the instrument of reserved contracts only based on the *quality* of bidders (sheltered units and/or social enterprises) but not on also their effective *capacity* to carry out a specific social programme (in this case, a sheltered employment programme — which, as a matter of principle, could be delivered not only by social enterprises *per se*, but also by other organisations engaged in the materialisation of the larger concept of social market economy). Transposed into practice, this means that a Romanian contracting authority may reserve a public contract to, exclusively, a sheltered unit authorized according to the Romanian Law 448/2006 or, upon the case, social enterprises for insertion set up and authorized according to the Romanian Law no.219/2015, but not to also other entities which, without being a sheltered unit or a social enterprise for insertion, are constantly involved in the implementation of various sheltered employment programmes.

On the other hand, neither the European law nor the Romanian one transposing it clarify whether the reserve operates on an exclusive basis, ie, for either one or the other of the two categories of undertakings referred therein, or contracting authorities may reserve their contracts for both categories, simulta-

53 As indicated in Recital (36).

54 For details, see the discussion below.

55 Law No.98/2016 on public procurement, Official Gazette (OG) 390 of 23.05.2016.

56 Of all forms of social enterprises that may exist and act on the Romanian market, the Romanian law on public procurement referred to one single category, that of social enterprises *for insertion*, having the meaning and embracing the features described in the national law regulating their existence and functioning, ie Law No.219/2015 (n 56). Anyway, having regard to the definitions offered by Article 6 from the Romanian Law No.219/2015 (according to which *social enterprise* is any private undertaking which activates in the field of social economy, holds a certificate in this regard which to attest its quality and observes the principles that, according to Article 4 of the same law, govern the social economy, whereas *social enterprises for insertion* are only those social enterprises that meet, cumulatively, the conditions listed in Article 10 of Law 219 – see below), it is clear that only social enterprises for insertion could have been included in Article 56 of Law 98, as only they, of all social enterprises, have the characteristics described under Article 20 of Directive 24.

57 OG 561 of 28.07.2015.

neously. In the lack of an explicit provision which to clarify this issue (as some Member States have adopted), we opine that the reserve may be set, at the convenience of the authority at hand and depending on the concrete circumstances, on either one of the two categories or on both (although there are Member States, as we will detail a bit further, who decided to forbid a simultaneous reservation of a contract to entities from both categories).

Anyway, by making direct reference to, exclusively, the sheltered units 'authorized in accordance with Law 448/2006'[58] and the social enterprises of insertion 'regulated by Law 219/2015', the Romanian law appears to be in fact restricting the access to the other entities which, although meeting the same standards as the Romanian ones and pursuing a similar objective, have not been authorized under, specifically, the Romanian law but in accordance with the laws applicable in their respective countries of residence — an infringement of the principle of mutual recognition[59] and a discrimination on grounds of nationality forbidden by Articles 49 and 56 TFEU.[60] Thus, according to Article 81(3) of Law 448, any sheltered unit must, for the purpose of validly functioning on the Romanian territory, be *authorized by the Romanian competent authority*.[61] Similarly, pursuant to Article 8 from Law 219/2015, all social enterprises (in general, including social enterprises for insertion) must be certified by the competent regional employment authorities. More to the point, in order to attest that an enterprise is a 'social enterprise', the Romanian competent authority will issue a 'certificate' confirming that it has included in its setup deeds (and thus undertook) at least the following requirements / obligations: (a) to act for an exclusive social purpose and/or in the general interest of the community; (b) to allocate at least 90% of its net profit to that social purpose; (c) to disperse, following its winding-up, all its assets to one or several other social enterprises; and (d) to apply the principle of social fairness to all its employees, while ensuring fair levels of wages so that the highest not to be more than 8 times bigger than the lowest. The validity of such a certificate is usually limited to 5 years.

By these provisions, the Romanian legislature has in fact created an unjust restriction of competition (at least beyond the limits foreseen by the European lawmakers) between the Romanian sheltered units or social enterprises and those authorized — in similar conditions — in another Member State and which therefore cannot present a document issued by the Romanian Ministry of Labour, Family and Social Protection or, in the case of social enterprises for insertion, the regional employment authorities, or which, in order to obtain it, must undergo some costly and time-consuming formalities in Romania.

It is nonetheless worth noting that, independently, Article 78 (2) and (3) from Law 448 compels all employers (public authorities and institutions or public or private enterprises) with at least 50 employees to ensure that at least 4% of them are persons with disabilities, under the pain of paying, monthly, to the state budget, a penalty equal to the minimum basic gross salary guaranteed by law multiplied with the number of positions not effectively occupied by persons with disabilities. In fact, before August 2017 — when it was amended following a political debate, paragraph (3) of the cited Article 78 allowed all contracting authorities which refused to hire persons with disabilities in the conditions stated under paragraph (2) to opt between: (i) paying, monthly, to the state budget, 50% of the same minimum basic gross

58 According to the Romanian Law No.448/2006 (Article 5 paragraphs 9 and 29), a sheltered workshop is 'a space adapted to the needs of the persons with disabilities where they carry out training and other activities aimed at the development and the improvement of their skills (…)', whereas an authorized sheltered unit is an either public or private self-administered economic operator where at least 30% of the total number of employees hired by an individual labour agreement are persons with disabilities.

59 Mutual recognition is central to market integration and, since Cassis de Dijon - Case C-120/78 *Cassis de Dijon* [1979] ECR 649, the European Commission has been continuously stressing its importance. This endeavour ended up in the adoption of the mutual recognition Regulation No.764/2008 - OJ L 218, 13.8.2008, p. 21–29 – focused, it is true, on, limitedly, the free movement of goods. More on this, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al21001b>.

60 We may adduce in this regard a reach case law coming from the CJEU — see for ex joined Cases C-570/07 and C-571/07 *Blanco Pérez and Chao Gómez* [2010] ECR I-4629 or Case C-217/09 *Polisseni* [2010] ECR I-175 etc — where it has been concluded that, as a matter of principle, the requirement to present a *certain* authorization as a pre-condition to establishing a business in a Member State or to providing services on its territory *is* (unless reasonable alternatives are accepted) infringing the free movement law.

61 Article 81(3) states that 'the procedure for the authorization of sheltered units shall be adopted by an order of the Ministry of Labour and Social Justice'. Based on this provision, the mentioned Ministry adopted, on 29.09.2010, the Procedure for the authorization of sheltered units, OG 676 of 5 October 2010. According to this Procedure, such an 'authorization is an administrative act which entitles an entity to function as a sheltered unit'. All authorizations referred to in the cited Procedure are issued by the Ministry of Labour, Family and Social Protection, through an order of the incumbent minister following the proposal coming from the General Directorate for the protection of persons with disabilities within the same Ministry.

salary multiplied with the number of positions not occupied by persons with disabilities and (ii) purchasing goods or services manufactured or delivered directly by such persons with disabilities, through authorised sheltered units, on a partnership basis, of a value equal to the amount defined above. In practice, most contracting authorities falling within the ambit of this text went for the second choice. This latter alternative has unfortunately been eliminated from Article 78, a solution which, in our opinion, has the upsetting potential to discourage both the hiring of persons with disabilities and the procurement of goods and services from authorised sheltered units, in a context where, given various national or, upon the case, regional economic but mostly social dysfunctionalities, the right (and not the obligation, as stipulated for example in the Spanish law — see below) of contracting authorities to reserve at least part of their contracts to such entities is not sufficient to stimulate this form of social protection, in the lack of some strong concrete mechanisms which to give it the needed efficiency, if not coerce contracting authorities to walk this path. This way, it is more likely that, given its permissive character, Article 56 from the Romanian law will end up dud.

But Romania is not the only bad example in this regard. There are also other Member States which embraced the same solution, whereas the majority have taken the surer (and, in our opinion, much closer to the spirit of the EU law) path of adopting a general text, without making any reference to the relevant national legislation. And similarly, while some Member States have transposed also the text allowing contracting authorities to reserve a contract to only those entities which have the capacity and undertake to deliver it under a sheltered employment programme, others simply ignored this opportunity.

For example, according to Article 112 (Contracts and reserved concessions) from the Italian Code of Public Contracts (Decree No.50/2016, subsequently amended), contracting authorities may reserve the right to participate in procurement and concession procedures, or otherwise may reserve the execution of the relevant contracts in the context of protected work programs, to economic operators and social cooperatives, or to consortia comprising such entities, whose main purpose is the social and professional integration of people with disabilities or disadvantaged, provided that at least 30% of the workers of the aforementioned operators are persons with disabilities or disadvantaged.[62] The cited article further clarifies that, for the purposes envisaged therein, persons with disabilities are considered to be those referred to in Article 1 of the Law No.68 of 12 March 1999 while disadvantaged people, those provided for in Article 4 of the Law No. 381 of 8 November 1991. The same article makes also reference to Article 21 of the Law No. 354 of 26 July 1975 where other specific categories or people in difficulty are defined.

The Polish law contains similar provisions. According to Article 22 (2) from the Polish Public Procurement Act of 2018, contracting authority may reserve a contract for sheltered workshops and other economic operators provided that their activity (or that of the separate operational units charged with the effective delivery of the contract) is *inter alia* focused on the social and professional integration of persons belonging to socially marginalised groups such as disabled, unemployed, homeless, refugees minorities or other categories of people, each of these categories being clearly defined by a concrete pieces of national legislation. According to Article 22 (2a) from the same law, contracting authorities are free to establish, in connection with each contract, the minimum percentage of people (belonging to one or more categories referred to in paragraph (2) cited above) which they intend to see hired for the relevant job, provided however that this percentage is not lower than 30%.

Of course that, inasmuch as the definitions (of those marginalized categories of people) offered by the Italian and/or Polish laws contain certain restrictions which may in fact hinder the EU internal market rules by making the access of foreign entities to public contracts more difficult than that of the domestic ones, this would render the cited paragraphs from the relevant national laws on public procurement unlawfully restrictive.

In turn, Article 36 from the Ordinance No.2015-899 of 23 July 2015 which regulates public procurement in France foresees that public contracts may be reserved to the enterprises defined under Ar-

62 More on the Italian state of play in this area, G Bartoli and C Ranieri, 'Appalti riservati e laboratory protetti nell'ottica dell'inclusione lavorativa di soggeti svantaggiati: rilievi critici' in Rivista ellettronica di diritto pubblico, di diritto dell'economia e di scienza dell'amministrazione a cura del Centro di ricerca sulle amministrazioni publiche 'Vittorio Bachelet'' (2010), available at <http://amministrazioneincammino.luiss.it/app/uploads/2010/04/Bartoli.pdf> accessed 27 November 2018.

ticle L.5213-13 of the French Labour Code or to the establishments referred to under Article L.344-2 from the French Code on Social Action and Families, but also to *equivalent structures* (this particular clarification should probably be read to mean that entities authorized under the national law of another Member State, yet in identical conditions, etc., may be granted access to the relevant procedures, which may ultimately ensure the conformity of the French law with the EU law), inasmuch as such entities hire a minimum number of persons with disabilities who, by reason of the nature of the seriousness of their impairment, cannot exercise a professional activity in normal conditions. The same possibility is confirmed for the 'integration structures' mentioned in Article L.5132-4 of the French Labour Code (or to *equivalent structures*), provided that a minimum percentage of their employees (to be established by a separate law) are disadvantaged persons. Weirdly though (but perhaps for reasons to do with the need to avoid the overlapping of discrete social missions which may entail some incompatible arrangements), the third paragraph of the afore-cited Article 36 stipulates that a contracting authority cannot, at the same time, reserve a public contract to both the entities that satisfy the conditions laid down in the first paragraph (ie, dedicated to the employment of the people with disabilities) and those that meet the conditions laid down in the second paragraph thereof (referring to disadvantaged people).

A very interesting solution — even if similar to the Romanian one in terms of discrimination — comes from the Spanish legislature. According to the Spanish Law No.9/2017 on public contracts, the national Council of Ministers or, upon the case, the competent institutions at the level of each autonomous community or local authority are due (within no more than one year as of the date when Law 9 came into force) to set the *minimum* percentage (of the total number of contracts having as object one of the services listed in Annex VI to Law 9, or lots thereof, awarded during a year) in which contracting authorities *will have to* (that is an obligation, and not a mere right!) either (i) reserve the participation in the relevant procedures for the 'centres of initiative for employment' and the 'social enterprises for insertion' defined by respectively the general law on people with disabilities and their social insertion (approved by the Royal Decree No.1 of 29 November 2013) and Law No.44 of 13 December 2007 on the social enterprises for insertion and which meet the specific qualification requirements detailed in the relevant tender files, or (ii) require that the delivery thereof be done under a sheltered employment programme. In either case, at least 30% of the total number of employees — hired by those entities or involved in the delivery of those contracts — must be people with disabilities or disadvantaged. According to the same Law 9, in case the mentioned institutions fail to set the minimum percentage as explained above, all contracting authorities shall, after the effluxion of the 1-year term, be *obliged ex officio* to reserve at least 7% of their contracts to either one of the categories of entities mentioned above (or for a sheltered employment programme), this threshold following to raise up to 10% in the next three years as of the adoption of the said Law.

On the other hand, the Dutch law on public procurement as adopted on the 1st of April 2013 (and further amended in 2016 to have its provisions aligned with the text of Directive 24) stipulates, in its Article 2.82, that

> The contracting authority may reserve the right to participate in a procedure organized for the award of a public contract to social workshops and entrepreneurs whose main objective is the integration, both socially and professionally, of disabled or otherwise disadvantaged persons, or the execution thereof within the framework of a sheltered employment program, provided that at least 30% of the employees of these workshops, companies or programmes are persons with disabilities or disadvantaged workers. (our translation)

Article 20 from the corresponding UK law (adopted in 2015) contains identical provisions.[63] The same goes for respectively Article 18 of the law on public procurement adopted in 2018 in Iceland and Article 18 of the similar Swedish law, adopted in the same year.

Nor Article 15 of the new Belgian law on public procurement (which came into effect on 17 June 2016) makes any reference to the national law which might define and regulate the social entities for which con-

63 It is worth noting that, both the Dutch and the UK law have dealt with the issue of reserved contracts much more pragmatically, gathering the rules on the possibility to reserve a contract to sheltered workshops and social enterprises and on that of reserving contracts for social services to which Article 77 from Directive 2014/24 refers under the umbrella of the same article.

tracting authorities may reserve a contract. *Au contraire*, after the first paragraph sets forth the general rule, according to which

> A commissioner may, in accordance with the principles of the Treaty on the Functioning of the European Union, reserve access to a procurement procedure to sheltered workshops and to economic operators whose objective is the social integration of disabled or disadvantaged persons, or reserve the execution of that contract within the framework of a sheltered employment program, provided that at least 30% of the staff of these workshops, economic operators or involved in that programme are disabled or disadvantaged workers. (our translation)

... the last two paragraphs bring several useful clarifications (especially as compared with the cited article of the Romanian law), routing any doubts on the restrictive character of this measure:

> The commissioner may refer to a workshop, an operator or a programme in accordance with the terminology used and the conditions set out in a [distinct national] decree or ordinance. However, the commissioner must accept workshops, operators and programs that meet equivalent conditions. (our translation)

To conclude, we see it is opportune to clarify that, apart from the right to restrain the competition to a limited circle of bidders, the common rules that govern the internal market and which are also reinstated, at a particular level, by the law on public procurement remain to apply in full. So, depending on the concrete estimated value of a contract reserved for a category or other of enterprises and businesses and, beyond that, on the existence or the non-existence of a concrete cross-border interest (as repeatedly underscored throughout the relevant CJEU case law and Commission's dedicated materials), the contracting authority may choose to apply one of the procedures provide for in the national law, whichever suites best its interest.

For contracts of a smaller value, electronic catalogues are a great source of information. Unfortunately, even if some national laws compel contracting authorities to have recourse to electronic catalogues for small-value purchases (see for ex the Romanian Law No.98/2016), there are no concrete mechanisms which to encourage small entities like SMEs and NGOs involved in the delivery of social value to create and maintain such catalogues. This, in the end, will discourage once more the use of reserved contracts, especially in those areas where the mandatory search through the available catalogues will return zero, or too few, results from the social sector.

Alternatively, before taking the decision to reserve a contract, contracting authorities may also make use of another great instrument put at their disposal by Directive 24 (and the national laws transposing it), ie, the market consultation, in order to establish whether or not supported factories and businesses will be able to meet their requirements and provide value for money. In fact, given the complexity of this instrument, market consultations are quite advisable before reserving a contract for a specific category of social enterprises, especially where the number of such potential suppliers is negligible and a 'reserved' contract may in fact jeopardize the quality of the acquired services or may not deliver the best value for money.

III. The Reserve for Social Services under Article 77 of Directive 2014/24 and in the Context of the Light Touch Regime

Since Article 20 of Directive 24 is applicable only to 'regular' contracts, but not to also those which either fall outside the scope thereof[64] or for which a special regime has been reserved, the European legislature considered it necessary to give contracting authorities access to this useful instrument as well under the light touch regime consecrated for social and other specific services. Such services are, as a matter of principle, social, health and cultural services of general interest, the delivery of which made the object of a broad academic research and of many studies, debates, administrative and/or legal initiatives.

Unfortunately, neither the services of general interest, in general, nor the two principal categories

64 Member States may decide to make the rules contained in Directive 24 applicable to also the contracts placed under the EU thresholds. However, this is a decision to be taken by each Member State and, if implemented, the reservation of 'small-value' contracts to specific categories of bidders will be done not based on Article 20 from Directive 24 but based on the national rules governing this kind of contracts.

thereof, ie, the services of general economic interest and the social services of general interest respectively, have so far been defined by the Treaties or any secondary piece of EU legislation.[65] However, the Commission issued from time to time several valuable guidelines[66] which pointed to a possible taxonomy.[67] Moreover, it continuously insisted on the fact that these services are crucial to citizens as they represent a constitutional element of the current European social model and form a set of core values for both the Member States and the Community, but also that, despite their huge role and purport, their provision sometime impinge on the very fundamentals of free markets and unrestricted competition, therefore require a specific, discrete regulatory approach.[68]

As a matter of principle, Member States are free to determine which services are of general interest and regulate them — and their delivery — as such with, of course, the observance of the minimum requirements and, upon the case, the harmonization rules adopted at the EU level or, where necessary, the measures taken by the Commission or, finally, decided by the CJEU — usually following a manifest error of assessment in the definition of such services by a Member State since, as the CJEU itself admitted in two breakthrough cases, ie, *Rewe-Zentralfinanz*[69] and *Comet*,[70] any national legal provision (be it substantive or merely procedural) may be challenged — hence rendered void — in case it is proven to constitute a sufficiently serious impediment to the exercise of an EU right. Furthermore, in a subsequent series of cases, the same Court translated this rule to any national laws which may infringe the rights and benefits generated by the mere fact of holding EU citizenship (including, or particularly in relation to, SSGIs).[71]

This regulatory process is even more complicated as SGEIs are, *in concreto*, subject to the free movement rules and competition rules (yet, *nota bene*, with the possibility set forth in Article 106(2) TFEU to depart in specific circumstances from the common path) but also to public procurement rules, consumer protection rules and State aid rules etc. On top of that, specific derogatory regimes apply in the case of some particular forms of SGEIs (such as postal services, telecommunications, gas and electricity or transport). And it is the 'fragmented nature' of the regulatory framework applicable to these services that has actually made room for EC interventions but also to a significant discretion for the CJEU in applying these rules to specific situations.[72] Additionally, the application of free movement rules to public services funded by the state (such as health services) has created challenges to national systems as both recipients and service providers have been customarily seeking to rely on the rights placed under the free movement umbrella.[73]

In fact, as Article 36 from the Charter of the Fundamental Rights of the European Union[74] makes it clear, SGIs are a constituent part of the EU citizenship and one of the key objectives of social and territorial cohesion of the Union. Some authors go even further and infer (from a systemic and teleological interpretation of the provisions of the Treaties) that in fact the dichotomy between the competences of

65 For the history of EC's attempts to integrate SGIs and SSGIs into EU's legal framework and policy, see U Neergaard, 'The Commission's Soft Law in the Area of Services of General Economic Interest' in E Szyszczak, J Davies, M Andenæs et al (eds), *Developments in Services of General Interest* (T.M.C. Asser Press 2011).

66 See for ex the Communication 'Implementing the Community Lisbon programme: Social services of general interest in the European Union' – COM(2006) 177 final and the 'Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest' - SEC(2010) 1545 final, in particular sections 2.4, 2.5, 2.6 and 2.7 (17-18).

67 According to CE's documents, social services of general interest are (i) social security services and (ii) 'essential' services directly provided to the person. But, 'Although, under Community law, social services do not constitute a legally distinct category of service within services of general interest, the list above demonstrates their special role as pillars of the European society and economy, primarily as a result of their contribution to several essential values and objectives of the Community, such as achieving a high level of employment and social protection, a high level of human health protection, equality between men and women, and economic, social and territorial cohesion. Their value is also a function of the vital nature of the needs they are intended to cover, thus guaranteeing the application of fundamental rights such as the dignity and integrity of the person.' – COM(2006) 177 final (n 66) 4.

68 In particular, on the basis of Article 14 TFEU. More on this, in M Krajewski, J van de Gronden, U Neergaard (eds), *The Changing Legal Framework for Services of General Interest in Europe* (T.M.C. Asser Press 2009).

69 Case C-33/76 *Rewe-Zentralfinanz* [1976] ECR 1989.

70 Case C-45/76 *Comet* [1976] ECR 2043.

71 See for ex. Cases C-135/08 *Rottmann* [2010] ECR I-1449 or C-34/09 *Ruiz Zambrano* [2011] ECR I-01177.

72 M Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press 2011) 4.

73 ibid.

74 OJ 2012 C 326/02.

the Member States and those of the Union is actually only apparent since, even in a traditional subsidiarity rapport, the core values that lie at the foundation of social inclusion and protection, and which fall in the area of interest of most SGIs, are not entirely left on the shoulders of the Member States without any form of control, as it is clear that the effectivity thereof is, owing to the latest changes brought about by the Treaty of Lisbon, an area falling *directly* within the ambit of EU law and policy.[75] Nevertheless, in line with Articles 14 and 106 TFEU, this discretion is limited in the case of those services which are decided to be of a general *economic* interest.[76] This conclusion is reiterated in Annex XIV to Directive 24, more precisely in footnote (1) thereto — where it is clearly stated that '(...) Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest' following that, 'where they are organised as non-economic services of general interest', such services 'are not covered by the (...) Directive'.

As for the options that each contracting authority has for the effective delivery of SGIs, they may either retain the provision thereof (alone, or in cooperation with other authorities or, finally, via an in-house structure) or externalize them via a concession scheme, or through the mechanisms of granting of exclusive or limited rights and authorisations or, as a matter of last resort, purchase them from external sources, in a classic public procurement scheme.[77]

As explained above, *non-economic* services of general interest do not fall into the scope of the internal market and competition rules therefore, should the contracting authority decide to acquire them from external sources, they may be freely procured from the sources of choice, be them public or even private. The law, and before it, a plump case law on this issue[78] made it clear that non-economic services of general interest are not a concern for the exercise of the liberties consecrated in the Treaties and therefore for the internal market rules. Of course that, in case of mixed procurement (ie, involving both non-economic and economic services), Article 3 from Directive 24 shall apply.[79]

As regards services of general *economic* interest (of which many are social services of general interest, including part of those listed under Article 77 from Directive 24), their procurement must be done in close line with the general principles of the Treaties and, where the estimated value thereof goes over the EU thresholds, with the specific rules set forth in the relevant Directives.

In this context it is worth saying that, as opposed to the former rules (consecrated by the Directive 18 of 2004) which excluded many SGIs and especially SSGIs from the application thereof (by including them in the formerly famous Annex IIB), Directive 24 came with a different approach. This is most prob-

75 See for ex M Ross, 'SSGIs and Solidarity: Constitutive Elements of the EU's Social Market Economy?' in U Neergaard, E Szyszczak, J W van de Gronden et al (eds), *Social Services of General Interest in the EU* (T.M.C. Asser Press 2013) 103.

76 This owing to a long and substantial body of decisions coming from the CJEU which extended the application of the internal market rules to all services of general interest 'normally provided for remuneration' (C-157/99 *Smits and Peerbrooms* [2001] ECR I-5473 [58]). The test delivered by the Court in *Altmark* (case C-280/00 *Altmark* [2003] ECR I-7747) is of course vital in this context, as it created a landmark qualification for the compensation which the provision of such services would entail. For an interesting discussion on the CJEU case-law on the scope of the EU internal market law on SSGIs, see J W Gronden, 'Free Movement of Services and the Right of Establishment: Does EU Internal Market Law Transform the Provision of SSGI?' in U Neergaard et al (eds) (n 75). Moreover, for the role of the Directive 2006/123/EC on services in the internal market OJ [2006] L 376/36, see U Stelkens, W Weiß and M Mirschberger (eds), *The Implementation of the EU Services Directive* (T.M.C. Asser Press 2012) but also (especially on the elaboration process and the pressures which the EP put on the EC to take out the SSGIs from its scope) P Craig and G de Búrca, *EU Law – Texts, Cases, and Materials* (5th edition, Oxford University Press 2011) 607-608.

77 E Manunza et al, 'Social Services of General Interest and the EU Public Procurement Rules' in U Neergaard et al (eds) (n 75), 349.

78 See for ex. Cases C-263/86 *Humbel* [1988] ECR 5365, C-109/92 *Wirth* [1993] ECR I-6447, C-345/09 *Van Delft et al* [2011] ECR I-00011, C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, C-355/00 *Freskot* [2003] ECR I-5263 or C-350/07 *Kattner Stahlbau* [2009] ECR I-1513 etc.

79 Very interesting in this context is the discussion on the applicability or non-applicability of the common public procurement rules to contracts that compound a mixture of services proposed by the CJEU in C-113/13 *Spezzino and Others* [2014] ECLI-2440 and C-70/95 *Sodemare* [1997] ECR I-3395 and the contents of the new Article 10(h) from Directive 24 which, although did not make the object of CJEU's assessment, came with valuable clarifications for the context of that case, excluding from the application of that new Directive all 'civil defence, civil protection, and danger prevention services that *are provided by non-profit organisations or associations*, and which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3 *except patient transport ambulance services*' (emphasis added) — which means that the latter do fall within its ambit. In fact, the Spezzino case is important for yet another reason, ie, that of taking into discussion a possible direct award of such service contracts to non-profit organizations as that at hand there, although, without any intention to extend the purpose of this article beyond its original limits, we believe, as opposed to other authors, that the judgment of the Court is far from leading to such a trenchant conclusion.

ably due to a constant case law from the CJEU which saw a possible cross-border interest even in connection with services which, traditionally, are seen as significantly closer to the specific basic (eg, social) needs of local, regional or even national communities and, hence, more prone to seek help among *local* providers, hence to the detriment of those located in other Member States. Directive 24 came thus with an extended scope — encompassing also the formerly excluded services, so that it practically applies — with variations in intensity — to all services (except for those explicitly and limitedly listed in Article 10). Anyway, inasmuch as the services referred to under Chapter I of Title III from Directive 2014/24 are interested, they only fall into the so-called 'light touch regime' regulated by Articles 75 and 76 of Directive 2014/24.

With particular regard to the technique chosen by the authors of Directive 24 to describe, in Article 77, the entities to which contacting entities may reserve a service contract corresponding to one of the CPVs itemized thereunder, it is obvious that they did not resort to a general reference to economic operators involved in a specific area of social protection (as in Article 20) but instead indicated, in detail, the main features which an entity must have in order to be able to compete for a reserved contract. This seems quite a felicitous choice as it actually resolved the problem envisaged under the previous chapter of this article — where many Member States decided, when transposing the provisions of Article 20, to refer to their own internal laws regulating those areas of action. As a result, most Member States took the conditionalities listed in Article 77 as such and just pasted them into their internal legal framework, without any other amendments or in any case without making any references to some complementary national rules. This practically means that, assessed on a macro scale, the instrument offered by Article 77 may become, from the general perspective of the internal market as it is construed today, more efficient than that offered by Article 20 which appears to be marred by a defective transposition.

The CPV codes referred to in Article 77 correspond, in general, as detailed above, to the following categories: (i) administrative social, educational, healthcare and cultural services (75121000-0 and 75122000-7) and (ii) other administrative services and government services (75123000-4), (iii) health, social and related services (79622000-0, 79624000-4, 79625000-1, from 85000000-9 to 85323000-9, and 98133000-4) and (iv) other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services (98133110-8).

It is however worth noting that not all services listed in Annex XIV to Directive 24 (to which Article 74 makes explicit reference) fall within the ambit of Article 77, but only a limited number of *health*, *social* and *cultural* services, corresponding to the CPV codes explicitly and limitedly listed thereunder. The reason for this selection is revealed in Recital (118) of the Preamble to Directive 24. According to the cited paragraph,

> In order to ensure the continuity of public services, this Directive should allow that participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved for organisations which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archive, museum and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Those services should only be covered by the light regime. (emphasis added)

Moving a little further down the text but remaining close to the gist thereof, we cannot help observing that the first three conditions which, pursuant to Article 77, must be fulfilled by the 'organizations' to which a contracting authority may reserve a service contract falling into one or the other of the CPV codes listed thereunder correspond, surprisingly, to the 'social enterprises' defined by the national laws of various Member States, rather than characterizing a distinct category of enterprises.[80] This makes one wonder whether, in those cases where the national legislation that defines such structures makes the func-

80 For ex Article 8 (cited above) from the Romanian Law No.219/2015. For an even closer connection, see the Social Europe Guide (n 45).

tioning thereof contingent upon the prior obtaining of a specific authorization from the competent local authorities, the functionality of the system regulated by Article 77 may in any way be, indirectly, hindered similarly to that of Article 20. We at least deem so.

Finally, given the delicate nature and structure of social enterprises, in general, and of the entities that deliver (social) services of general interest, in particular (such entities customarily falling into the category of non-profit organizations or at least of into that of small enterprises which reinvest all profit for the pursue of specific social objectives), but also of the markets in which they operate, we must insist once again (as we also did in connection with Article 20) on the importance of preliminary market consultations in the decisional process which may convince a contracting authority to reserve a contract to the category of enterprises described by Article 77. This may give the contracting authority an idea of the real potential of the market, which may further help it determine the alternative that may deliver the best value for money (where 'value' includes *all* pursued benefits).[81]

Otherwise, inasmuch as the procedural aspects are concerned, the competition within the group of companies for which that contract is reserved should be sufficiently ensured by the mere application of Articles 75 and 76 from Directive 24 (or, of course, the corresponding national provisions).

V. Conclusions

Public procurement has long passed the era where it was seen as a mere technical instrument which helped governments find the cheapest solution that fitted their needs, in a continuous struggle to make economies of scale. In recent times, public procurement has evolved to reach the highest degree of complexity, being placed on the seventh (and last) stage of development on a scale where sourcing and delivering goods and services is the roughest way of using public procurement and at the bottom of it while the deliverance of broader government policy objectives is the most refined form thereof.[82]

Public procurement has thus become not only a strategic instrument in the implementation of various policy goals but a policy in itself and by itself.[83]

On the other hand, Europe is witnessing some dramatic changes in the social context, where poverty and unemployment have reached a tipping point whereas migration and the need to integrate and find a form of inclusion for the newcomers, frequently associated — due to the recent attacks — with terrorism, generated a surging waive of nationalism. The swift resolving of these acute problems became thus a factor on which depends the very future existence of the European Union! Against this background, strong policies, innovative solutions and new tools and means of implementation thereof appear to be the right answer.

In this environment, all efforts are now focused on the need to shift from 'the rule of law to the role of law' in the implementation of public policies. There is a *need* to dispense with the traditional way of seeing public procurement and change the standpoint — ie, from making economies of scale by a merely technical disbursing of public funds (where the lowest price and a free competition make for prime objectives) to a thoroughly integrated, strategic, delivery of the public mission (where good governance and the community's needs and benefits stay in the limelight). In this context, it is decisively important to identify the accurate place of public procurement on the map of the relevant (social) public policies crafted at the Union's level as, given its potential, public procurement *must* play a central role in the described context, as a strategic tool.

Given its instrumental nature, public procurement is inevitably caught in the clash between the traditional internal market and competition policy rules,

81 See for ex the study prepared in 2016 for the European Parliament's Committee on Internal Market and Consumer Protection named 'Social Economy' - IP/A/IMCO/2015-08 and available at <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578969/IPOL_STU(2016)578969_EN.pdf> accessed 27 November 2018.

82 L Knight, C Harland, J Telgen et al, *Public procurement: International cases and commentary* (Routledge 2007).

83 For a detailed assessment on the role of public procurement in independently generating policy objectives see P Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2005), S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press 2009), G Piga and T Tatrai (eds), *Public Procurement Policy (The Economics of Legal Relationships)* (Routledge 2016), J Barraket, R Keast and C Furneaux, *Social Procurement and New Public Governance* (Routledge Critical Studies in Public Management, Routledge 2016), C Barnard, S Deakin, 'In search of coherence: social policy, the single market and fundamental rights' (2000) 31 Industrial Relations Journal 4, M A Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Bloomsbury Publishing 2017) or D Ferri and F Cortese (eds), *The EU Social Market Economy and the Law. Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2018) etc.

on the one hand, and those accompanying the new approach set forth in the Treaty of Lisbon, in particular those pertaining to the social policy, on the other hand.[84] But, as many stakeholders have observed, free market is a 'neutral and timeless notion' which rather needs to be construed as 'a means to increase welfare'.[85]

By permitting the reserve of contracts to sheltered workshops and social enterprises (as Articles 20 and 77 do) the competition rules are not annihilated but just adapted so to better correspond to the new EU landscape where the social component must be given a central, active place. To this extent, the competition with all its accompanying rules is still there, under both Article 20 and Article 77, only it has been restricted to a limited circle. The true purport and meaning of these Articles lies practically in the reality that the so strict rules that govern the internal market do not correspond anymore to the challenges of the new era — where acute social problems require at least as much attention and a set of well-balanced measures as a counterweight to the imbalances beget by a too rigid application thereof. Or, as some authors have put it,

> the introduction of a new provision in the form of Article 9 TFEU together with the 'upgrade' of the Charter of Fundamental Rights to primary law status, alter the departure point for analysis by moving it away from any assumptions about the secondary nature of social values (...) [so that], [o]n this view, social concerns are accordingly no longer 'exceptional' in relation to the single market.[86]

To such extent, the TFEU made (after a long but constant evolution) room to social considerations in the traditional arrangement of the internal market. In fact, in the area occupied by the services of general interest, this conflict has already explicitly been settled at the very primary law level, by respectively Article 14 TFEU[87] and Article 2[88] of Protocol 26 thereto.

On the other hand, the fragile balance that now exists (or is about to) between the competition policy rules and principles and those born in connection with the social component of the same internal market cannot be infringed to the detriment of either one of them. In other words, the promotion of social values cannot infringe the traditional, economic rules of the internal market than only where a superior (general) interest is at stake, just like the latter cannot exclude the pursue of other fundamental (external) values deriving from other horizontal policies, like the social ones.

To this end, we are of the opinion that the reserve of contracts for the benefit of a specific category of players cannot or should not be used beyond its real purpose, and in any case not outside a very well defined social policy (crafted at either the national, or a regional or even a local level) which to indicate some palpable objectives that may be transposed into a public procurement equation. Each contracting authority should be able to justify its choice (reserved contracts versus fully open procedures with granted access to all potential bidders) and explain how, by reserving that contract to that category of enterprises, the rapport between value and money — assessed in the social market economy context[89] — is positive. This especially since recent practice revealed that, in response to the new social challenges, the civil society and, in general, the European citizens, have decided to roll their sleeves up and get involved — whence the surging number of social enterprises that has appeared on the market with the purpose to respond to the new social challenges. This inflation

84 C Barnard, 'EU "Social" policy: from employment law to labour market reform' in P Craig and G de Búrca (eds) *The evolution of EU law* (2nd ed, Oxford University Press 2011), 641 and Ross (n 74) 99.

85 Manunza et al (n 77) 380. In fact the authors, along with many others, propose instituting a legal mechanism by which contracting authorities to be obliged to justify the externalization of services, and the social welfare test appears to be, in their opinion, the most suitable instrument, similar to the comparison of prices practiced in the US under the Circular A-76 of the Office of Management and Budget.

86 Ross (n 75) 105. See also Manunza et al (n 77) 351.

87 According to which 'Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by *services of general economic interest* (emphasis added) in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.'

88 Stating that 'The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise *non-economic services of general interest*.' (emphasis added).

89 For details, see D Ferri and F Cortese (n 83).

may, in the end, create a genuine competition which may, in turn, underpin and justify the use — on a wide scale — of reserved contracts.

Until then, it remains to find the proper answer to the question what to do in the case where a preliminary market consultation reveals that that market is not developed enough and in fact there is only one or, *en fin*, a very limited number of sheltered workshops or social enterprises able to deliver as required. Can the contracting authority continue the procedure and organize a mini-competition between the existing companies or even award the contract to the only available bidder or are the common rules (on the minimum number of bidders) still applicable? Because, if the latter scenario is the correct one, it would mean that that authority must first annul the procedure and organize a new one. Can it, alternatively, apply the criterion adduced by the CJEU in the *Concordia Bus* case[90] or not, since in this case it is sure that no other entity may, in objective circumstances, meet the requirements? The law (either the Directive or the national rules transposing it) offers no clues in this regard. However, we think that these answers essentially depend, on the one hand, on how contracting entities succeed in finding the right justifications for their decision to reserve a contract to a limited category of bides and, on the other hand, on the need, when applying this mechanism, to stay as close as possible to the competition policy rules, as they remain determinant in the equation. In a nutshell, all the necessary means are now in the law, but the responsibility for finding the fine balance in each specific case lies with each contracting authority.

90 See (n 34) above.