

## Shaping the Social Market Economy After the Lisbon Treaty: How ‘Social’ is Public Economic Law?

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### 1. Introduction

This Special Issue aims to discuss the meaning and impact of the social market economy concept in the Lisbon Treaty, introduced in 2009, by considering its interpretation and application in several legal sub-systems. This contribution delves into public economic law, more specifically EU public procurement law, EU state aid law and EU competition law.<sup>1</sup> Given the pre-Lisbon era that focussed on ‘an open market economy with free competition’, it questions how ‘social’ these fields of law are and if the conclusion can be drawn that – after nearly ten years – public economic law has also embraced this ‘highly competitive’ socioeconomic model of the European Union (EU).<sup>2</sup>

The European social market economy inherently and simultaneously pursues economic and social objectives.<sup>3</sup> On the one hand, the EU aims to predominantly fulfil its economic objectives through the creation of the internal market and the prevention of unfair competition on this market. On the other hand, its social objectives aim more broadly to promote peace, values and the well-being of the peoples in the EU.<sup>4</sup> Amongst other things, the latter is further demonstrated by the reference to a social market economy that aims to achieve full employment and social progress, and a high level of protection and improvement of the quality of the environment. This mixture of opposing, yet sometimes also overlapping, objectives poses a challenge for legal sub-systems to accommodate all these objectives in a suitable manner.

Spurred by the European Commission (EU Commission) and the Member States, the achievement of social objectives has been prominently placed on the EU’s policy agenda.<sup>5</sup> However, ultimately, its effectiveness will depend on the willingness and ability of public authorities in the Member States to put

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1 Public economic law is defined by the *Utrechtse School* (Utrecht School) as a body of public law in which a safeguard and instrumental role of the law can be identified. The instrumental role of the law refers to the practice of using the law to achieve policy objectives. Needless to say, this area of law has a broad scope which not only includes public procurement law, state aid law and competition law, but also includes, for example, the regulation of utilities markets, intellectual property law or regulation of industry and agriculture. We predominantly consider the EU context. K. Hellingman & K.J.M. Mortelmans, *Economisch Publiekrecht: rechtswaarborgen en rechtsinstrumenten* (1989). Also see J. Baquero Cruz, *Between competition and free movement. The economic constitutional law of the European Union* (2002), p. 85.

2 Art. 3(3) of the Treaty on the European Union (TEU) and Art. 4 of the Treaty establishing the European Community (TEC).

3 J. Mulder, *Social Legitimacy in the Internal Market: A Dialogue of Mutual Responsiveness* (2018); F. de Witte, ‘The Architecture of a Social Market Economy’, (2015) *LSE Law, Society and Economy Working Papers 13/2015*; A. Müller-Armack, ‘The Social Market Economy as an Economic and Social Order’, (1978) *36 Review of Social Economy*, 3, p. 325.

4 Art. 3(3) of the TEU. More explicitly, these objectives include, *inter alia*, the combat against social exclusion and discrimination, the promotion of social justice and protection, equality between women and men, and solidarity between generations.

5 See European Commission, ‘Communication to the Spring European Council – Working together for growth and jobs: A new start for the Lisbon Strategy’, COM(2005) 24 final; European Commission, ‘Communication from the Commission – Europe 2020: A strategy for smart, sustainable and inclusive growth’, COM(2010) 2020 final.

them into practice.<sup>6</sup> Consequently, the suitability of the instruments, such as public contracts or subsidies, granted to them by public economic law, is of great importance. For instance, this field of law provides the boundaries of the ability of Dutch *gemeenten* (municipalities) to contract out the collection of household waste and require sustainability concerns to play a role in the selection of an economic operator, or their ability to subsidise swimming pools to foster integration of minorities in underdeveloped neighbourhoods. Whether these authorities are responsible for a local, regional or national level in the Member States, they are in charge of shaping the social market economy through their use of public economic law's instruments.

The prominent question that arises due to this role of public authorities is if and what tensions can currently arise between the pursuit of social objectives and the legal framework of public economic law. As a consequence, tensions can exist when the pursuit of social objectives is limited or even hindered altogether by this body of law. Despite the inherent existence of tensions, this contribution argues in favour of a predominantly positive conclusion for the potential role of public authorities. This is contrary to the criticism that the economic rules of the EU Treaty are too market-centred, as opposed to (also) incorporating social objectives.<sup>7</sup> Public economic law would allegedly cause 'the destabilization of the Member States' social policies, as the process of negative integration is primarily built on open market rules, and thus primarily also follows an open market rationale'.<sup>8</sup> Consequently, it discusses that public economic law, even though indeed initially created in light of the internal market and to overcome competitive concerns on this market, provides public authorities with a varied pallet of instruments to achieve social objectives and, therefore, tempers some of the 'social deficit' concerns.<sup>9</sup> Nevertheless, differences between public procurement law, state aid law and competition law do exist, which appears to make some of its instruments more useful than others for public authorities.

The structure of this contribution is as follows. Section 2 provides a brief discussion of the objectives that are perceived to be pertinent within EU public procurement law, EU state aid law and EU competition law. It considers what this means for the integration of social objectives by public authorities and if the market-orientation of these rules on the objectives level is still predominantly present. Section 3 considers if the 'social' can indeed be accommodated within the current legal framework. This is discussed by highlighting two areas of social objectives, namely sustainability and employment. Public authorities are historically and currently most active in these two fields and are also prominently placed on the EU policy agenda, making it fertile soil for assessment.<sup>10</sup> Section 4 provides some final concluding thoughts.

## 2. The objectives of public economic law

This section considers the roots, the general understanding and the most prominent critique that has been put forward in recent times of the objectives of public procurement law, state aid law and competition law. For the purpose of this contribution, it is a prerequisite to discuss the objectives of these three consecutively discussed legal sub-systems in order to gain a deeper understanding of how 'social' these fields of law currently are.

### 2.1. Regulating public procurement: the completion of the internal market

The roots of EU public procurement law lie in the attempt to establish an EU-wide internal market, thereby serving a predominantly economic objective.<sup>11</sup> Since the 1970s, one of this market's major focal points has been public procurement, which is inherently prone to contain trade barriers that hinder the coming

6 The rest of this contribution will refer to 'public authorities'.

7 For a brief discussion of this debate and the raised arguments, see D. Damjanovic, 'The EU market rules as social market rules: why the EU can be a social market economy', (2013) 50 *C.M.L.R.*, p. 1685.

8 *Ibid* p. 1686.

9 C. Joerges & F. Rödl, 'Social Market Economy' as Europe's Social Model?', (2004) 8 *EUI Working Paper*, p. 2.

10 See European Commission, 'Communication to the Spring European Council', *supra* note 5; European Commission, 'Communication from the Commission – Europe 2020', *supra* note 5.

11 See for instance, C-380/98, *University of Cambridge*, [2000] ECR I-8035, ECLI:EU:C:2000:529, para. 16.

about of this market. Indeed, public authorities often tend to prefer to contract with national, regional or local economic operators rather than their foreign EU counterparts. Consequently, foreign economic operators often have not always had full access to public procurement markets in other Member States.<sup>12</sup> Hence, the main objective of EU public procurement law through the introduction of various directives is the creation of an internal market for public contracts and concession contracts through the application of the principles of equality, transparency and proportionality.<sup>13</sup> These directives, which are based on the free movement rules, contain fleshed out articles of these principles by providing the structure of various public procurement procedures, standards for the drafting of criteria, exclusion grounds and various other relevant aspects of the public procurement process.

It is clear, furthermore, that stopping at the internal market objective for public procurement would, however, not paint the entire picture. The EU Commission's influence on the EU level and the additional objectives on the national level are similarly important to comprehend the objectives that a public authority faces when aiming to pursue a social agenda through public procurement. The EU Commission has been at the forefront of ensuring that EU public procurement law entails more than simply an integration method for the internal market. Reference is then usually made to the size of the public procurement market, which amounts to 76 billion Euro each year in the Netherlands and is estimated at 2000 billion Euro EU-wide, on the one hand, and the potential of killing two birds with one stone, on the other hand.<sup>14</sup> In its recent Communication, it claimed that 'public procurement is a strategic instrument in each Member State's economic policy toolbox', thereby aiming to spur its strategic use to achieve the best value for money. Other than to fulfil the immediate needs of a public authority, public procurement is then often employed to achieve policy objectives relating to sustainability and social aspects, which are discussed further in Section 3.<sup>15</sup> These policy objectives of the EU Commission, however, more often than not overlap with either the objectives of implemented public procurement laws or with the internal policy objectives of public authorities, making it a multi-faceted pallet of objectives. Several objectives of public procurement laws can, as a consequence, be identified on the Member State level. In addition, national public procurement laws are often a major contributor to the fight against corruption and conflict of interests by ensuring that illicit practices are prevented and, if present, brought into the light. Also, these laws are increasingly focusing on enabling access to public procurement procedures for specific groups, such as small and medium-sized enterprises including start-ups or social enterprises.<sup>16</sup> And most importantly, because public procurement concerns spending taxpayers' money, a duty for the Member States arises to spend it efficiently and effectively. Hence, public procurement is surrounded by a plethora of objectives, including social objectives, but EU public procurement law's most prominent objective lies in the creation of the internal market for public contracts and concession contracts. As such, the 'social' of Lisbon's social market economy must be assessed in light of this economic endeavour.<sup>17</sup>

12 W.A. Janssen, *EU Public Procurement Law & Self-organisation: A Nexus of Tensions & Reconciliations* (2018), pp. 15-30.

13 Most prominently, Directives 2014/24/EU, OJ L 94/64, 26.02.2014, 2014/23/EU, OJ L 94/1, 26.02.2014 and 2014/25/EU, OJ L 94/243, 26.02.2014. S. Arrowsmith, 'The purposes of the EU procurement directives: ends, means and the implications for national regulatory space for commercial and horizontal procurement policies', (2012) 14 *Cambridge Yearbook of European Legal Studies*, p. 34.

14 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making Public Procurement Work in and for Europe', COM(2017) 572 final, p.1. Significant, *Inkoopvolume van de Nederlandse overheid: Een macroanalyse* (2016).

15 See regarding social aspects, F.J.L. Pennings & E.R. Manunza, 'The Room for Social Policy Conditions in Public Procurement Law', in T. Van den Brink et al. (eds.), *Sovereignty in the Shared Legal Order of the EU – Core Values of Regulation and Enforcement* (2014), pp. 173-196; W.A. Janssen, 'Maatschappelijk verantwoord aanbesteden; van een procedurele naar een instrumentele benadering van het aanbestedingsrecht', (2012) *Tijdschrift Aanbestedingsrecht*, pp. 7-17; S. Arrowsmith & P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009).

16 See Preamble no. 59 of Directive 2014/24/EU, OJ L 94, 26.02.2014.

17 Nonetheless, this conclusion has been contested in recent years. It has been argued that 'competition' as such, as opposed to only being a means to an end, is an additional objective of EU public procurement law. Sánchez-Graells argues that individual weight must be given to competition as a principle, which must lead to a competition-oriented interpretation of EU public procurement law. A. Sánchez-Graells, *Public Procurement and the EU Competition rules* (2015). Arrowsmith asserts, contrarily, that these references to competition must be interpreted in a limited manner and therefore only in the light of transparency and equality, which aim to ensure the creation of the internal market for public procurement. Other commercial goals, such as best value for money, would then be a Member State competence. Arrowsmith (2014), supra note 13.

## 2.2. Regulating state aid: preventing distortion of competition and completing the internal market

Contrary to the EU public procurement rules, the origin of the EU state aid law dates back to the 1950s.<sup>18</sup> The founding Member States acknowledged early on that the EEC Treaty required rules on aid granted by these states. This reason behind these rules is that a Member State can attract investments and economic activities to its territory by granting state aid. This could result in a distortion of competition between the Member States and between enterprises (undertakings) and, consequently, hinder that enterprises freely relocate in the EU.<sup>19</sup> As such, the nature of the state aid rules is often debated, questioning whether they have more in common with the free movement rules or with the competition rules.<sup>20</sup> However, the purpose of the state aid rules is to contribute to the creation and functioning of the internal market. Therefore, these rules have two principal objectives, namely avoiding wasteful subsidy races between the Member States and avoiding distortions of competition on the internal market.<sup>21</sup>

Public authorities often grant state aid to pursue their policy objectives, requiring them to operate within the EU state aid framework. Following the clear EU state aid objectives, Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits aid, in any form whatsoever, granted by a Member State which favours certain enterprises and, therefore, distorts or threatens to distort competition and trade between the Member States.<sup>22</sup> It is important to note that the notion of state aid is an objective concept and Article 107(1) does not distinguish between the aid measures concerned by reference to their causes or objectives but defines them in relation to their effects.<sup>23</sup> The causes and objectives of the state intervention are irrelevant for the assessment of this prohibition. Consequently, the social objective of a national aid measure is not taken into consideration. This logic did not change with the introduction of the social market economy in the Lisbon Treaty.<sup>24</sup>

The firm prohibition on state aid in Article 107(1) of the TFEU is not absolute. This provision is complemented by an elaborated catalogue of compatibility grounds listed in Articles 106(2) and 107(2-3) of the TFEU. The founding Member States considered that some forms of state aid could in fact induce positive effects on the internal market.<sup>25</sup> Therefore, the EU Commission is the only authority that can assess whether an aid measure is compatible with the internal market.<sup>26</sup> In this context, the EU Commission has a margin of discretion in the application of the compatibility grounds under Article 107(3) of the TFEU, which involves an economic and social assessment that must be made in an EU context.<sup>27</sup> This opened the door for the EU Commission to develop state aid policy and the creation of an expansive set of instruments detailing the specific requirements for an aid measure to be compatible with the internal market. The state aid rules were modernised on two occasions, with the State Aid Action Plan (SAAP) of 2005 and the State Aid

18 The state aid rules were introduced in the Treaty Establishing the European Coal and Steel Community and the Treaty Establishing the European Economic Community (EEC Treaty). See for a historical overview: J.J. Piernas López, *The Concept of State Aid Under EU Law: From internal market to competition and beyond* (2016), pp. 21 ff.

19 Art. 107 of the TFEU uses the notion of 'undertaking' and has a specific interpretation in state aid law see: European Commission, 'Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union', OJ C 262, 19.7.2016, p. 1.

20 See J.L. Buendía Sierra & B. Smulders, 'The Limited Role of the "Refined Economic Approach" in Achieving the Objectives of State Aid Control: Time for Some Realism', in M. Kekelekis et al. (eds.), *EC State Aid Law: Liber Amicorum Francisco Santaolalla* (2008); L.Y.M. Parret, 'Wat, voor wie en? Rol en identiteit van de staatssteunregels', (2017) *Tijdschrift voor Staatssteun*, pp. 5-16; A. Biondi, 'The rationale of State aid control: a return to orthodoxy', (2009-2010) *12 Cambridge Year Book of European Legal Studies*, pp. 35-52; F. de Cecco, *State Aid and the European Economic Constitution* (2012), pp. 31 ff.

21 Rapport Des Chefs De Delegation Aux Ministres Des Affaires Etrangères (Spaak Report) (1956), p. 53.

22 It is important to note that the concepts of an 'aid in any form whatsoever' is a broad notion, making it possible for a wide variety of state measures (i.e., subsidies, loans, guarantees, tax exemptions etc.) and organisations could be confronted with the applicability of the state aid rules, see: European Commission, 'Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union', OJ C 262, 19.7.2016, p. 1.

23 Case 173/73, *Italy v European Commission*, [1974] ECLI:EU:C:1974:71, para. 13.

24 The wording of Art. 107 of the TFEU did not substantially change since its first introduction in the EEC Treaty. See Piernas López, supra note 18; European Commission, 'Notice on the notion of State aid', supra note 22; Case C-39/14, *BVVG*, [2015] ECLI:EU:C:2015:470, para. 52.

25 Spaak Report, supra note 21, pp. 16-17.

26 The compatibility assessment cannot be executed by the national authorities or national courts, see Case C-284/12, *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH*, [2013] ECLI:EU:C:2013:755, paras. 27-28. This requires that the Member State notifies the proposed aid measures to the Commission and does not put them into effect before the Commission authorises the aid measures, Art. 108(3) of the TFEU.

27 Case 730/79, *Philip Morris Holland BV v European Commission*, [1980] ECLI:EU:C:1980:209, para. 24.

Modernisation (SAM) of 2012.<sup>28</sup> These two modernisation initiatives were used to bring the state aid policy and instruments in line with the general EU policy objectives outlined in the Lisbon Strategy and the Europe 2020 Strategy.<sup>29</sup> For example, the objective of the SAM was to create a smart, sustainable and inclusive economy for the EU. Those three mutually reinforcing objectives had to help the EU and the Member States deliver high levels of employment, productivity and social cohesion.

Public authorities must operate within this complex state aid framework developed by the EU Commission. In addition, the EU Commission translated the state aid objectives to three principles for public authorities, namely (i) public spending of the Member States should serve general (EU) policy objectives, (ii) public spending should fill a gap and not crowd-out or replace private investment and (iii) public spending should not exceed what is needed to reach (EU) policy objectives.<sup>30</sup> Consequently, the national policy objectives pursued could overlap with the EU policy objectives where public authorities seek to clear state aid. To conclude, state aid law's most important objective lies in the creation and functioning of the internal market. In addition to this objective, it could be possible to pursue other objectives, including social objectives, with state aid measures.

### 2.3. Regulating competition: preventing distortions of competition in the internal market

EU competition law completes the tryptic of public economic law. It must be noted from the start that a discussion on the 'proper' objectives of competition law – the 'why' of competition law – has been fairly consistently persistent since its inclusion in the EEC Treaty.<sup>31</sup> The competition law provisions include a prohibition on cartels, on abusing a dominant economic position, the monitoring of mergers and acquisitions that was added by way of Regulation<sup>32</sup> and a provision on the relationship between enterprises charged with public service obligations and competition law. At its origin, competition law was predominantly seen as forming a corollary to the free movement provisions. Where the latter is aimed at measures by the Member States, the competition provisions were contrarily aimed at enterprises ('undertakings') – an important difference also with both state aid law and public procurement law. Both the free movement provisions and the competition law provisions stood in service of creating the common (later: internal) market.<sup>33</sup> Obviously, because the market was understood as the domain of competing enterprises, competition law served this market mechanism.<sup>34</sup> The notion of 'competition' was, however, not clearly articulated. The case law of the Court of Justice of the EU (CJEU) mentions 'workable' competition, 'the structure of the market', 'effective competition' and 'the process of competition'.<sup>35</sup> In the original setting, the concept of individual economic

28 European Commission, 'State aid action plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009', COM(2005) 107 final; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU - State Aid Modernisation (SAM)', COM(2012) 209 final.

29 Lisbon Strategy, supra note 5; Europe 2020 Strategy, supra note 5.

30 European Commission, 'Proposal for a Council Regulation amending Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid', COM(2018) 398 final.

31 See amongst others T. Prosser, *The Limits of Competition Law. Markets and Public Services* (2005); D. Zimmer (ed.), *The Goals of Competition Law* (2012); W. Kerber, 'Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law', in J. Drex et al. (eds.), *Economic Theory and Competition Law* (2009); O. Budzinski, 'Monoculture versus Diversity in Competition Economics', (2008) 32(2) *Cambridge Journal of Economics*, p. 295; C. Townley, 'Is Anything More Important than Consumer Welfare (in Art. 81 ERC)? Reflections of a Community Lawyer', (2008) 10 *Cambridge Yearbook of European Legal Studies*, p. 345; I. Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law', in I. Lianos & D. Geradin (eds.), *Handbook in EU Competition Law: Substantive Aspects* (2013); O. Andriychuck, 'Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process', (2010) 6(3) *European Competition Journal*, p. 575; O. Black, *Conceptual Foundations of Antitrust* (2005); Hellingman & Mortelmans, supra note 2; S.A.C.M. Lavrijssen, 'The Protection of Non-competition Interests: What Role for Competition Authorities after Lisbon', (2010) 35(5) *European Law Review*, p. 634; R. Claassen & A. Gerbrandy, 'Rethinking European competition law: from a consumer welfare to a capability approach', (2016) 12 *Utrecht Law Review*, p. 1.

32 Council Regulation (EC) No 139/2004, OJ L24, 20.01.2004.

33 K. Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?', (2001) 38(3) *Common Market Law Review*, p. 613.

34 Spaak Report, supra note 21, para. 16.

35 For a definition of workable and effective competition see Case 26-76 *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, [1977] ECR 1977-01875, ECLI:EU:C:1977:167, para. 20; and for the structure of a market see Case 85/76 *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, [1979] ECR 1979-00461, ECLI:EU:C:1979:36, para. 6. For an overview on the debate of how the term 'competition' is defined in the EU context, see: T. Baskoy, *The political economy of European competition policy: a case study of the telecommunications industry* (2008), pp. 7-9.

freedom was also of importance, meaning that restrictions of this freedom were seen as anti-competitive.<sup>36</sup> Competition law enforcement at the time, at least from a current day perspective, thus rested on (more or less) vague principles and notions of fairness and freedom.<sup>37</sup> This changed in the 1990s when the EU Commission turned to a more 'rational' basis of competition law by making use of the growing field of (competition) economics.<sup>38</sup> According to the EU Commission, competition law would be aimed at protecting the market mechanism, because this mechanism delivers the greatest efficiencies and, thus, provides for maximised economic welfare. The focus came to rest on the protection of consumer welfare as part of total welfare in competition law. Efficiencies are seen in this light: in a shorthand version of economic theory it can be said might say its focus is on high quality, innovation and choice, for a low price.<sup>39</sup> If one was to imagine a linear line, on whose extremes lie an economics-based market theory, and a focus on free movement of goods and services respectively, then competition law has now decisively moved towards the first extreme. Thus, the 'internal market' motive and the 'competition' motive are often contrasted in the competition law literature.<sup>40</sup> Though the internal market motive has not disappeared entirely – and might make a come-back with the rise of e-commerce – some argue that should there be a tension between the two, the latter should prevail.<sup>41</sup> What is clear, in this move towards economisation, is that *other* objectives – as part of multi-aimed competition law, or as single imperative other than an economics-informed focus on efficiencies – are not easily encompassed within the scope of competition law's goals. This means that 'the social' unless it is perceived as part of the (aggregate) notion of consumer welfare – which would be a stretch – is not easily included in competition law analysis of practice or policy.<sup>42</sup> As the EU Commission is the main driver of European competition law and policy, its enforcement priorities are predominant in shaping the interpretation of these provisions, even though the CJEU, ultimately, has the final say here. It is in the EU Commission's practice where this lessened room for weighing non-economic interests, such as social policy interests or sustainability interests, *unless* these can be subsumed under the notions of efficiencies and consumer welfare is most visible. The weighing of these goals is, however, not totally excluded, and in the margins of the enforcement of competition law some room for these 'non-economic' goals has been provided, as will be shown below in Section 3. Public authorities that shape the social market economy must take into account these boundaries. It is difficult, however, to point to where exactly these boundaries lie. In the day to day practice of national competition authorities seem to follow the EU Commission's lead and, in many cases, the 'boundaries' of the 'goals' discussion does not come up. Clearly anticompetitive agreements are then caught in any interpretation of the TFEU's competition provisions. The same is true for national policymakers abiding by the competition rules shaping their regulatory action. However, it is at the fringes where this question pops up. Where the 'social' and the 'market' interests collide the precise

36 D.J. Gerber, 'Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe', (1994) 42 *American Journal of Comparative Law*, p. 25.

37 P. Akman, 'The role of 'freedom' in EU competition law', (2014) 34(2) *Legal Studies*, p. 183; J. Karagiannis, (2013) 'The origins of European competition policy: redistributive versus ideational explanations', (2013) 20(5) *Journal of European Public Policy*, p. 777.

38 On the modernisation of competition law see F. Vogelaar, 'Modernisation of EC competition law, economy and horizontal cooperation between undertakings', (2002) 37 *Intereconomics*, p. 19; M. Monti, 'European Competition for the 21st Century', (2000) 24 *Fordham International Law Journal*, p. 1602.

39 Relating to price, quality, innovation and consumer choice see European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101, 27.4.2004, pp. 97-118, para. 16; European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance [2011] OJ C11/1; European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] OJ C31/03.

40 See Cruz, *supra* note 1; Mortelmans, *supra* note 33.

41 See, for instance, C.M.H.M. Kneepkens, *Competition Law and Public Interests. Principles for resolving conflicts and an application to the banking sector* (2018).

42 For a recent debate on fairness in European competition law see D. Gerard, 'Fairness in EU Competition Policy: Significance and Implications', (2018) *European Competition Journal*, pp. 211-212; M. Dolmans & W. Lin, 'Fairness and competition law: a fairness paradox', (2017) 4 *Concurrences*, p. 1-20; A. Lamadrid de Pablo, 'Competition Law as Fairness', (2017) 8(3) *Journal of European Competition Law & Practice*, p. 147. On fairness in competition law generally, see T.J. Horton, 'Fairness and Antitrust Reconsidered: An Evolutionary Perspective', (2013) 44(4) *McGeorge Law Review*, p. 823; E.J. Hughes, 'The Left Side of Antitrust: What Fairness Means and Why it Matters', (1994) 77(2) *Marquette Law Review*, p. 265; D.J. Gerber, 'Fairness in Competition Law: European and U.S. Experience', Conference on Fairness and Asian Competition Laws, Kyoto (5 March 2004); G. Amato, *Antitrust and the Bounds of Power. The dilemma of liberal democracy in the history of the market* (1997); C. Ahlborn & A.J. Padilla, 'From Fairness to Welfare', in C. Ehlerman & M. Marquis (eds.), *European Competition Law Annual 2007* (2008); M.E. Stucke, 'Should Competition Policy Promote Happiness?', (2013) 81(5) *Fordham Law Review*, p. 2575.

delineation of what is caught or not by competition rules – and thus, the perhaps diverging interpretations by the European institutions – becomes relevant. As discussed below in Section 3, this complex legal and political situation requires public authorities to find the acceptable balance between, on the one hand the non-economic interests enshrined in social objectives and on the other hand the economic interests as embodied within competition law.

#### 2.4. Preliminary observations – economic or social?

The objectives described above provide the context in which public authorities function, whilst aiming to use the instruments to pursue social objectives granted by public procurement law, state aid law and competition law. Overlooking the three fields of public economic law, it can be concluded that their objectives are distinct, but also tend to coincide in light of a broader EU internal market context. Even though complemented by national objectives, EU public procurement law ultimately finds its roots in free movement, being the creation of an internal market for public contracts and concession contracts. EU state aid law can be placed right in the middle of the three legal sub-systems. It aims to avoid wasteful subsidy races between the Member States and to avoid distortions of competition on the internal market, thereby clearly including an internal market and competition objective. This picture is not as clear for EU competition law. Even though the initial goal of competition law was to be a corollary to the free movement provisions by aiming itself at enterprises that could create obstacles to trade in the internal market, it is clear that the current focus on consumer protection has caused a slight shift away from this objective. Even though the ‘economic’ echoes strongly in the objectives of all of these fields of law, it is clear that competition law contains the strongest economic focus. Hence, it is clear that the alleged economic nature of public economic law is still very much present in light of the social market economy, thereby feeding into the conclusion that it *seems* there is not much potential for public authorities to achieve social objectives. The next section will, however, argue that this preliminary observation needs nuancing when looking more closely at specific connections between the social domain and these sub-systems of public economic law.

### 3. Achieving the ‘social’ through the legal framework of public economic law

The subsequent question is if the economic nature of public economic law is also visible in the rules of public economic law in addition to their objectives, thereby creating possibilities or limitations in the form of tensions for public authorities that aim to pursue social objectives. The following paragraphs discuss them consecutively by considering two prominent social objectives, namely employment and sustainability. The purpose of these paragraphs is to provide a general picture of the potential instruments at hand for public authorities but does not aim to be exhaustive.

#### 3.1. Achieving employment objectives

##### 3.1.1. Public procurement’s tool box approach

Since the coming about of EU public procurement law, achieving employment objectives through public purchasing have gone hand in hand. Following the development in the CJEU’s case-law in *Beentjes* and *Max Havelaar*, it is clear that public authorities in their role as contracting authorities can integrate employment criteria in a public procurement procedure in a lawful manner.<sup>43</sup> This discretion is, however, limited by the principles of equality, transparency and proportionality in light of the internal market objective of these rules. Consequentially, if tensions exist, it occurs between these principles and social objectives. The starting-point of integrating the ‘social’ appears, however, not initially problematic. This is confirmed by the 2014 Directives on public procurement in which the EU legislature’s desire to emphasise a stronger role for public procurement in achieving employment and sustainability objectives materialised

<sup>43</sup> C-31/87, *Beentjes*, [1988] ECLI:EU:C:1988:422; C-368/10, *Max Havelaar*, [2012] ECLI:EU:C:2012:284. For a detailed discussion, see Pennings & Manunza, *supra* note 15.

even though it also still stressed the importance of these principles.<sup>44</sup> As a consequence, the potential instruments to integrate employment objectives in public procurement have become even more varied under the most recent set of public procurement rules, meaning that a tool-box of instruments can be identified.

Without aiming to be exhaustive, the following section considers five instruments in EU public procurement law that can make public procurement work for employment objectives. Firstly, the shift towards an emphasis on award criteria that support social objectives rather than merely the lowest price provides an important indicator of how 'social' public procurement has become.<sup>45</sup> Secondly, a prominent instrument, particularly in the Netherlands, continues to be so-called 'social return' clauses, meaning that – for instance – the contractual clauses of an awarded contract stipulate that a percentage of the value of the contract must be used to employ long-term unemployed personnel. In this respect, tensions can arise in light of the principle of proportionality as vested in Article 18 of Directive 2014/24/EU. For instance, requiring a high percentage of such a workforce to fulfil the promises of a catering contract is not sufficiently 'linked to the subject-matter' of a public contract, which continues to be the proportionality test in public procurement. Thirdly, reserved competitions for sheltered workshops and the more recently included possibility to reserve contracts for social enterprises are both instruments that can aid social objectives. The rationale of these competitions continues to be that those entities would not be able to compete under normal conditions of competition.<sup>46</sup> To qualify as a sheltered workshop, 30% of their workforce must consist of disabled or disadvantaged workers, which was previously 50% under the preceding directives.<sup>47</sup> Member States have struggled, however, to identify how broad the term 'disabled or disadvantaged workers' is. The EU legislature has arguably left this discretion to public authorities and the national legislatures to be able to achieve their own social objectives.<sup>48</sup> Fourthly, it seems, nevertheless, that the reserved competition for social enterprises leaves little room for application in practice. Most social enterprises cannot fulfil the strict requirements of this article.<sup>49</sup> In the Netherlands, it has in fact not been applied since its introduction in 2014, most likely given its reference to the need for a type of 'employee ownership or participatory principles'. Despite these drafting issues, it does show the inclination to leave room for the social in the public procurement context. Finally, social objectives can take shape in exclusion grounds, thereby allowing public authorities, not obliging them, to exclude economic operators from the participation in a tender that violates labour law obligations.<sup>50</sup> Even though the Member States seemingly still have some way to go in actually applying them in practice,<sup>51</sup> these before-mentioned instruments, and others, illustrate the potential of public procurement to achieve employment objectives. Even though more room could always be created, it confirms that EU public procurement law should generally not be perceived as substantially limiting the social agenda of public authorities.

### 3.1.2. State aid's role in financially supporting employment objectives

Public authorities often pursue employment objectives through the use of state aid. In the context of employment aid, it is important to note that not all forms of intervention by public authorities constitute state aid within the meaning of Article 107(1) of the TFEU. For example, where financial support of public authorities is directed to individuals instead of enterprises or is provided through general measures rather than selective measures, there is no state aid.<sup>52</sup> Consequently, where the support of

44 The development of these Directives was initiated by the leading report 'A New Strategy for the Single Market' in 2010. Mario Monti, former EU Commissioner, explicitly encouraged the idea of considering public procurement as an instrument to support innovation, green growth and social inclusion. Monti (2010), supra note 38. See more extensively, Janssen (2018), supra note 12, pp. 21-30.

45 Art. 67 of Directive 2014/24/EU, OJ L 94/65, 20.02.2014.

46 Preamble no. 36 of Directive 2014/24/EU.

47 Art. 20 of Directive 2014/24/EU.

48 For the Dutch legislature's interpretation, see the Explanatory Memorandum, *Aanbestedingswet 2012* (Dutch Public Procurement Act 2012). *Parl. Docs.* 2015–2016, 34 329, nr. 3, p. 64.

49 Art. 77 of Directive 2014/24/EU.

50 Arts. 57(4)(a) and 18(2) of Directive 2014/24/EU.

51 See the recent call of the European Parliament to do more than simply award contracts based on lowest price, European Parliament, 'Press release. Public procurement: Parliament calls for better implementation and use of quality criteria' (4 October 2018).

52 K. Bacon, *European Union Law of State Aid* (2017), p. 214; Case C-75/97, *Belgium v Commission (Maribel bis/ter)* [1999] ECLI:EU:C:1999:311.

public authorities is classified as state aid it is prohibited unless the aid measure with an employment objective is authorised with one of the four available instruments, namely the General Block Exemption Regulation (GBER), the Training Communication, the Employment Communication or directly under Article 107(3) of the TFEU.

The GBER allows public authorities to grant aid for a number of different purposes, such as training aid, aid for the recruitment of disadvantaged workers, aid for the employment of workers with disabilities and aid for compensating the costs of assistance provided to disadvantaged workers.<sup>53</sup> The GBER has a broad and detailed understanding of the concepts of ‘worker with disabilities’ and ‘disadvantaged worker’ making it a suitable instrument for public authorities to pursue employment objectives, despite that Member States cannot clarify these two concepts.<sup>54</sup> The categories of exempted aid under the GBER follow the ‘common assessment principles’, namely to assure that the aid measure serves a purpose of common interest (e.g., the social objective), has a clear incentive effect, is appropriate, necessary and proportionate and does not adversely affect trading conditions to the extent that is contrary to the common interest.<sup>55</sup> In this context, the preambles of the GBER make an explicit reference to the European Disability Strategy 2010-2020 to highlight the objective of common interest.<sup>56</sup> The common assessment principles provide a balancing test to balance the economic and non-economic considerations of an aid measure. The GBER is a successful instrument due to the generous thresholds for aid that may be exempted from the notification obligation. The thresholds for employment aid vary from 5 to 10 million Euro per enterprise. In 2016, the Member States granted 301 million Euro for training aid and 1264 million Euro for employment aid under the GBER.<sup>57</sup>

State aid that cannot be cleared with the use of the GBER requires notification. The EU Commission could authorise the proposed aid measure directly under Article 107(2-3) of the TFEU or through use of the Training and Employment Communications.<sup>58</sup> In such cases, the EU Commission uses the common assessment principles to assess the compatibility of the aid measure with an employment or training objective with the internal market. This assessment could create tensions as it requires that the measure is evaluated under the principles of appropriateness, necessity and proportionality. It is noteworthy that the EU Commission exceptionally deals with these type of notification cases, for instance, over the last ten years the Netherlands notified zero employment and training aid cases.<sup>59</sup> To conclude, EU state aid law does not seem to create significant tensions, nor hinder the use of financial incentives by public authorities to pursue employment or training objectives. As such, the available instruments integrate the ‘social’ within the economic setting of state aid law.

### 3.1.3. Competition law’s complicated relationship to employment

As introduced above in Section 2, EU competition law is predominantly seen as an instrument for obtaining consumer welfare. In the post-economisation supervisory practice of the EU Commission (and national competition authorities), this entails that its prohibitions are applied with that goal in mind.<sup>60</sup> The consumer welfare focus is especially visible in cases on anti-competitive agreements, which will be the focus of this

53 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1, Art. 4(1)(n-r).

54 Commission Regulation (EU) No 651/2014, *ibid.*, Art. 2; L. Tebano, ‘State aid for Employment after the New General Block Exemption Regulation’, (2015) 14 *European State Aid Law Quarterly* 2, pp. 241-249.

55 Commission Regulation (EU) No 651/2014, *supra* note 53, recital 5.

56 Commission Regulation (EU) No 651/2014, *supra* note 53, recitals 52-54.

57 European Commission, ‘State Aid Scoreboard 2017: Results, trends and observations regarding EU28 State Aid expenditure reports for 2016’, COMP.A3, Brussels, 29 November 2017, p. 17.

58 European Commission, ‘Communication from the Commission – Criteria for the compatibility analysis of state aid to disadvantaged and disabled workers subject to individual notification’, OJ C 188, 11.8.2009, p. 6; European Commission, ‘Communication from the Commission – Criteria for the compatibility analysis of training state aid cases subject to individual notification’, OJ C 188, 11.8.2009, p. 1; in addition, measures could be allowed for redundant employees under the European Commission, ‘Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty’, OJ C 249, 31.07.2014, p. 1.

59 Following the European Commission State Aid Cases Database <[http://ec.europa.eu/competition/elojade/iseif/index.cfm?clear=1&policy\\_area\\_id=3](http://ec.europa.eu/competition/elojade/iseif/index.cfm?clear=1&policy_area_id=3)> (last visited 8 October 2018).

60 Claassen & Gerbrandy, *supra* note 31.

section.<sup>61</sup> Cartel(-like) agreements are caught precisely because of their negative effect on consumer welfare. Most often these effects will be expressed in terms of consumer price, though quality and innovation, and consumer-choice may also play a role.<sup>62</sup>

The TFEU provides for important exceptions to the cartel prohibition of Article 101(1) of the TFEU. Article 101(3) of the TFEU provides for a mechanism in which, where an anti-competitive agreement also brings benefits, the agreement can be saved. The wording of this provision is ambiguous and seems to imply that social benefits also 'count' as long as 'a fair share' is forwarded to consumers.<sup>63</sup> In the history of European competition law the exception has been held to encompass, for example, the protection of jobs.<sup>64</sup> However, due to the economics-based interpretation, the requirements for meeting the exception are read to relate, primarily, to market-related efficiencies.<sup>65</sup> Social and other non-economic concerns can sometimes be expressed in the language of efficiencies, and can thus be taken into account to counterbalance the negative effects of the agreement at hand. But often such an appropriation is not possible, or very far-fetched. Thus, even though there is room for some form of balancing, the potential to take into account non-economic benefits, including the protection of workers or jobs, is fairly limited.<sup>66</sup>

However, early in the development of EU competition law, the CJEU was asked to rule on the relationship between workers' collective agreements and competition law. It provided a *categorical* exception for collective labour agreements. These agreements are placed outside the *scope* of competition law and are not touched by the prohibition.<sup>67</sup> The rationale is as follows. Collective labour agreements are not caught by EU competition law, because they are important in light of protection of the 'social dialogue' and protection of workers' rights. This importance is construed by interpreting the TFEU's provisions on social cohesion. However, the protection – in the sense of not being subject to competition law at all – is offered only for collective *labour* agreements. No protection is offered for agreements between self-employed workers, because these are not 'employees' in the sense of the TFEU's provisions. As such, it is important to carefully draw a distinction between collective agreements between those service providers to whom competition law does not apply and those agreements which could be classed as cartels or abuses of a dominant position.<sup>68</sup>

61 In the early days of merger control, the European Commission, in line with the CJEU, would also consider the protection of jobs and other socially beneficial advantages, in deciding whether to give the green light to a merger. This type of consideration takes the shape of the so-called 'failing firm defence', since mergers involving failing firms usually enhance general welfare. To that end, see I. Kokkoris, *Merger Control in Europe. The Gap in the ECMR and National Merger Legislation* (2011) and more specifically G. Hewitt, 'The Failing Firm Defence', (1999) 1(2) *OECD Journal of Competition Law and Policy*, p. 113; I. Kokkoris, 'Failing Firm Defence in the European Union. A Panacea for Mergers?', (2006) 27(9) *ECLR*, p. 494; Case M2314 *BASF/Pantochem/Eurodial* [2002] OJ L 132/45.

62 For example, Case C-67/13 *P Groupement des cartes bancaires (CB) v European Commission*, [2014] ECLI:EU:C:2014:2204, para. 33; Case C-345/14 *SIA Maxima Latvija*, [2015] ECLI:EU:C:2015:784, para. 19. In abuse of dominance cases (a lack of) consumer-choice is also visible, especially in cases which do not concern exploitative abusive behaviour (charging high prices, of which the negative consumer welfare effect is obvious), but exclusionary practices (barring competition from entering, or growing in, the market). See, for example: Case T-201/04 *Microsoft Corp. v Commission of the European Communities*, [2007] ECLI:EU:T:2007:289, paras. 639, 652; European Commission (2017) AT.39740 - Google Search (Shopping) para. 593. Available at: <[http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf)> (last visited 13 June 2018).

63 K.J. Cseres, 'The Controversies of the Consumer Welfare Standard', (2007) 3(2) *The Competition Law Review*, p. 121.

64 Case 26/76 *Metro/Commission*, [1977] ECR 1974-01875, para. 43; Case C-42/84 *Remia BV v Commission*, [1985] ECR 2545, para. 42.

65 European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101, 27.4.2004, para. 33.

66 A.C. Witt, 'Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order', (2012) 8(3) *European Competition Journal*, p. 443.

67 On collective bargaining and its interaction with competition law, see the seminal case of Joined cases C-430/93 and C-431/93 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705. Moreover, as Case C-22/98 *Criminal proceedings against Jean Claude Becu, Annie Verweire, Smeg NV and Adia Interim NV*, [1999] ECR I-5665, para. 25 established, workers that 'incorporated into the undertakings and thus form an economic unit with each of the, do not in themselves constitute "undertakings"' – alluding to the 'single economic unit' doctrine of competition law. The notion of worker was furthermore expanded in Case C-413/13 *FNV Kunsten*, [2014] ECLI:EU:C:2014:2411, para. 32 et seq, where the CJEU refers to the *AG Wahl Opinion* in the same case, para. 51 et seq, holding that 'the essential feature of that relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration', thereby including an element of professional subordination to the employment relationship.

68 The CJEU has also construed an 'exception' for social security schemes, which are based on solidarity-considerations, such as pension funds and healthcare funds: these activities, when conforming to the criteria laid down in the series of judgments of the CJEU, are not 'economic activities' and therefore Art. 101(1) of the TFEU does not apply. To that end, see Case C-67/96 *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751 and also Case C-219/97 *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven*, [1999] ECR I-06121. The former case has come to be known as the 'Albany doctrine' or 'Albany exclusion', paving the way to more CJEU cases with an emphasis on solidarity. This rationale applies, more generally, to all those activities that typically belong to the public sphere of the state (exercise of *imperium*, in the words of Mortelmans, supra note 33), such as air safety protection, as in Case C364/92 *SAT Fluggesellschaft v Eurocontrol*, [1994] ECR I-43. For a discussion on these cases,

The discussion on the reach of this categorical exception for collective labour agreements has recently been revived in light of the rise of the gig-economy. The issue here is that self-employed workers, who have no contract and are not ‘employees’ in the traditional sense of the word, cannot be protected through collective labour agreements. They often work flexible hours without being able to partake in collective social protection arrangements, such as protection against disability to work and being part of a collective pension scheme. This is no, or at least not an immediate, problem for the self-employed at the upper end of the income-scale, but several issues are identified as possible concerns in relation to workers at the lower end of the scale: the concern for a growing ‘precariat’, including a lack of on-site permanent education and under-insurance. On a collective level, this raises concerns as the draw on state-provided social security systems undermines the long term viability of solidarity-based schemes.<sup>69</sup>

The self-employed could, of course, enter into wage-agreements – akin to collective labour agreements. However, as these persons are not employees, but will be considered ‘undertakings’ in the sense of competition law, wage agreements would be seen as price-fixing agreements, against competition law. These agreements cannot benefit from the categorical exemption from competition law, in parallel to collective labour agreements. It will also be difficult to rely on the exception clause of Article 101(3) of the TFEU. First, price-fixing agreements are, generally, considered as part of the group of the most heinous anti-competitive agreements. Secondly, the ‘benefits’ that such wage-agreements might bring and that would need to be balanced against the consumer-welfare loss resulting from such an agreement are not easily construed as efficiencies, of which a fair share accrues to the consumers. Hence, such agreements, when left to the market players, would not easily pass the test of Article 101(3) of the TFEU. This is, primarily of course, an issue relevant for the market-parties – the self-employed in this case – running against the boundaries of competition law. But, in Member States, such as the Netherlands, where forms of self-regulation are often regarded as more suited than legislation, there is also a tension between, on the one hand the public authorities’ wish to have self-regulation provide protection for, at least, the most precarious workers, and that self-regulation being caught by competition law. The tension is not easily solved by a public body, such as the government taking an even more guiding role. To stimulate such wage-agreements through government guidance – for example by encouraging different actors to negotiate a wage-agreement, does not make the legal appraisal any different. Political and societal support for competition law is irrelevant. Only if the government fully legislates, making an agreement between enterprises unnecessary, is this different. In such a case the self-employed and their contractors would merely follow a statutory provision, which, however, does need to be tested against free movement provisions.

### 3.2. Achieving sustainability objectives

#### 3.2.1. Sustainable public procurement

Similar to employment objectives, it is clear that sustainability is high on the political agenda of public authorities. It is then often put forward as a way to use the economic value of public spending or to set an example for the market to foster sustainable change. In the Netherlands, for instance, the *Maatschappelijk Verantwoord Inkopen* (Societally Responsible Purchasing) manifest, introduced in 2016, has already been signed by over 100 public authorities.<sup>70</sup> It aims to ensure a minimum level of sustainability that is being procured on the market, thereby departing from earlier 100% sustainability objectives that seemed unachievable – at least before the set deadlines at the time. The instruments of the 2014 Directives on public procurement for the attainment of sustainability objectives are, similar to the discussion on employment objectives, varied and limited by the principles of equality, transparency and proportionality.

see G. Monti, *EC Competition Law* (2008), p. 113. For recent cases concerning the self-employed status under competition law, see Case C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL (Uber)*, [2017] Not Yet Reported.

69 D. Schiek & A. Gideon, ‘Outsmarting the Gig-Economy through Collective Bargaining – EU Competition Law as a Barrier to Smart Cities?’, (2018) 32(2) *International Review of Law, Computers & Technology*, p. 275.

70 *Manifest Maatschappelijk Verantwoord Inkopen*, 2016. Accessible at <<https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen-mvi-duurzaam-inkopen/ontwikkelingen-mvi/manifest-maatschappelijk-verantwoord-inkopen>> (last visited 8 October 2018).

In addition to a focus on quality criteria that specifically refer to environmental characteristics<sup>71</sup>, life-cycle costing was introduced in 2014. Even though common methodologies are still lacking, it seems promising that public authorities are able to take into account the costs of a products entire life-cycle instead of only including production costs.<sup>72</sup> Following the *Max Havelaar* case, much emphasis has furthermore been placed on the use of labels.<sup>73</sup> Interestingly enough, the public procurement principles have been integrated in the required criteria of their application. As such, tensions are prevented by, for instance, requiring that 'label requirements are based on objectively verifiable and non-discriminatory criteria' and that 'label requirements only concern criteria which are linked to the subject-matter of the contract'.<sup>74</sup> Other instruments to achieve sustainability objectives are that technical specifications can require certain environmental demands,<sup>75</sup> that the section on the principles of public procurement explicitly demand that during 'the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law (...)',<sup>76</sup> or to include environmental conditions in the contractual performance clauses.<sup>77</sup>

Similar to the discussion about employment objectives, it is clear that the focus of these instruments is to enable public authorities at least to take into account secondary objectives, rather than at first sight forcing them towards social public procurement.<sup>78</sup> But, again, the 'social' seems to find its place into EU public procurement law's economic setting.

### 3.2.2. State aid's role in financially supporting environmental objectives

The state aid framework provides an essential instrument for public authorities to pursue sustainability objectives, including environmental protection. In this context, the generous categories for environmental protection in the GBER and the Environmental and Energy Aid Guidelines are of relevance.<sup>79</sup> The instruments follow from the Europe 2020 Strategy, which also targets climate change and energy sustainability, here state aid is seen as one of the instruments to contribute to these goals.<sup>80</sup> The general rhetoric to grant this type of state aid is that the area of environmental protection is:

confronted with market failures so that, under normal market conditions, undertakings may not necessarily have an incentive to reduce the pollution caused by them since any such reduction may increase their costs without corresponding benefits. When undertakings are not obliged to internalise the costs of pollution, society as a whole bears these costs.<sup>81</sup>

In 2016, the Member States spent 102.8 billion Euro in total on state aid and the largest share of spending was made under environmental protection, namely 54%.<sup>82</sup> The GBER is the most used instrument for the pursuit of environmental objectives with elaborate categories and generous thresholds.<sup>83</sup> However, in the situation where the aid measure cannot be authorised under the GBER, it needs to be approved by the EU

71 Art. 67(2) of Directive 2014/24/EU.

72 Art. 68 of Directive 2014/24/EU. The next step would be to also consider social costs in this analysis. See D. Versteeg, 'Levenscycluskosten. De sleutel naar circulair werk?', in *Circulair Bouwen, Preadvieses voor de Vereniging voor Bouwrecht nr. 46*, pp. 113-183.

73 Art. 43 of Directive 2014/24/EU.

74 Art. 43(a)(b) of Directive 2014/24/EU.

75 Art. 42 of Directive 2014/24/EU.

76 Art. 18(2) of Directive 2014/24/EU.

77 Also see Arts. 57(3), 57(4a) and 69(2d) of Directive 2014/24/EU.

78 G. Bouwman et al., 'Achieving societal value through public procurement', in F. Schotanus & E.R. Manunza (eds.), *The Art of Public Procurement* (2018). For a discussion on their obligatory nature, see A. Wiesbrock, 'An obligation for sustainable procurement? Gauging the potential impact of Article 11 TFEU on public contracting in the EU', (2013) 40 *Legal Issues of Economic Integration*, p. 105.

M. Andrecka & K. Peterkova, 'Sustainability requirements in EU public and private procurement – a right or an obligation?', (2017) 1 *Nordic Journal of Commercial Law*, pp. 56-89.

79 European Commission, 'Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020', OJ C 200, 28.6.2014, p. 1.

80 COM(2011) 356 final.

81 Commission Regulation (EU) No 651/2014, *supra* note 53, recitals 55.

82 State Aid Scoreboard, *supra* note 57, p. 17.

83 M. Merola & O. Diaz, 'Energy and Environment', in B. Nascimbene & A. Di Pascale (eds.), *The Modernisation of State aid for Economic and Social Development* (2018).

Commission and requires an assessment under the Environmental and Energy Aid Guidelines or directly under Article 107(3) of the TFEU.<sup>84</sup> The EU Commission could authorise the measure of the public authority where it is in line with the previously mentioned common assessment principles (see Section 3.1). Public authorities in the Netherlands make good use of the instruments provided under the state aid framework. A vital aid project the EU Commission approved under the guidelines is the SDE+ scheme. The aid scheme supports investments in renewable energy in the Netherlands.<sup>85</sup>

Comparable to the discussion about employment objectives pursued with the state aid instruments, tensions could arise relating to the common assessment principles as it requires that aid measure has an objective of common interest (e.g., the social objective) and is evaluated under the principles of appropriateness, necessity and proportionality. The CJEU recently clarified that the ‘objective of common interest’ is a public interest and not just a private interest of enterprises. Nor does the objective of common interest condition require that the pursued objective is in the interest of all or the majority of the Member States.<sup>86</sup> While the state aid framework may provide a useful instrument to attain the sustainability objectives some obstacles could be identified. For example, the proportionality requirement could result in a restriction for innovative new projects for renewable energy which have not entered in the stage of a commercial project.<sup>87</sup> To conclude, the state aid instruments, in general, does not seem to significantly hinder the use of financial incentives to pursue environmental objectives by public authorities. These ‘social’ objectives are also placed in the economic setting of EU state aid law.

### 3.2.3. Competition law and sustainability

Above, the relationship between Article 101(1) of the TFEU that contains the prohibition on anti-competitive agreements, and Article 101(3) of the TFEU that provides for a mechanism by which agreement can be saved if an anti-competitive agreement also provides benefits, has been discussed. These provisions are applicable when enterprises join together in ‘sustainability agreements’: cooperation between them for the purpose of a sustainability goal. Often these will be environmental goals, but ‘sustainability’ can, of course, also encompass other issues. As with the protection of jobs, also in the history of EU competition law, the exception of Article 101(3) of the TFEU has been held to be able to cover or take the benefits into account of, environmental-protection type of agreements.<sup>88</sup> However, it is currently difficult to take sustainability benefits that cannot be expressed in terms of consumer welfare or efficiencies, into account: these benefits are uncertain, will occur only in the long term, or – importantly – do not accrue to the consumers paying the (resulting) higher price. In other words, the requirement that a fair share of the benefits that result from the offending agreement of cooperation is passed on to consumers is not met.

This places both enterprises willing to cooperate, sometimes necessarily so because of the first mover disadvantage or the collective action problem, but also governments wanting to stimulate such market-led initiatives, in a difficult position. Elsewhere, it has been set out how this conundrum has become specifically visible in the Netherlands, a country where a historically grown preference for widely supported, sectoral, agreements is strong. Here, in a series of cases, several high profile sustainability-based agreements have been (informally) held by the competition authority to be anticompetitive.<sup>89</sup> This has led the government to try to find other solutions, and a legislative proposal has been drafted which would give market parties the

84 Commission Regulation (EU) No 651/2014, supra note 53, Arts. 36-49; European Commission, ‘Communication from the Commission – Guidelines on State aid for environmental protection and energy 2014-2020’, OJ C 200, 28.6.2014, p. 1.

85 Commission Decision, ‘State Aid SA.39399 (2015/N) – The Netherlands Modification of SDE+ scheme’, C(2015) 2356 final.

86 Case T-356/15, *Austria v Commission*, [2018] ECLI:EU:T:2018:439, paras. 84-86.

87 S. Van Hees, ‘Investment State Aid for Ocean Energy Projects in the EU: A Lack of Integration with the Renewable Energy Directive?’, (2018) 17 *European State Aid Law Quarterly* 2, pp. 222-248.

88 Commission Decision 2000/475/EC of 24 January 1999 (CECED), [2000] OJ L187/47, paras. 51 and 57; Commission Decision 91/38/EEC, IV/32.363 – KSB/Goulds/Lowara/ITT, [1991] OJ L 19/25, para. 27.

89 On the Klimaatakkoord(en) (climate agreements) by the Dutch competition authorities, see A. Gerbrandy, ‘Klimaatakkoord(en) en het mededingingsrecht’, in C.S. Aal et al. (eds.), *Klimaatsbeleid in Wetgeving en Akkorden. Verslag van de Expertbijeenkomst van de Raad van State op 20 maart 2018* (2018). On the ‘Kip van Morgen’ (chicken of tomorrow), which involved an informal assessment to improve chickens’ welfare, and the energy agreement, aimed at increasing sustainable energy consumption by 2020, see: A. Gerbrandy, ‘Solving a Sustainability-Deficit in European Competition Law’ (2017) 40(4) *World Competition*, p. 539.

possibilities to propose to the relevant ministries an initiative that the Minister of Economic Affairs can then make generally applicable to the relevant market parties.<sup>90</sup>

Even though the above has shown that competition law is focused mostly on protecting 'market interests' and that it is difficult for agreements between enterprises, which have social or sustainability aims, to benefit from existing exceptions, it is not true that there is no room at all for taking into account public interests. This balancing is difficult, however, unless a public authority steps in. For example, should a public body grant exclusive rights, Article 106(2) of the TFEU provides for an exception to the general prohibitions of competition law. It holds that the competition rules are only applicable to enterprises entrusted with a service of general economic interest (generally, a universal service obligation type of public service) in so far as the provision of that service is not hindered. Public bodies can, of course, use this provision as it provides a balancing mechanism that is aimed at allowing for the protection of non-economic interests – access to postal services, to energy services, to transport – to the detriment of more competition.<sup>91</sup>

Interestingly, the CJEU has also developed a mechanism, outside of the TFEU's provisions that allow some form of balancing between competition interests and general interests in its 'Wouters-doctrine' in practice.<sup>92</sup> However, this doctrine is of almost no practical use for public authorities as it is notoriously difficult to interpret whether or not this might apply to situations where both the public authority and enterprises both have a shaping role in providing for the 'general interest'. Ultimately both for purely unilateral actions of dominant firms, or for inter-firm agreements that limit competition, with a view to protecting a social objective, there is not much wiggle-room.<sup>93</sup> It follows that where public authorities would want to push for a form of self-regulation between enterprises for sustainability reasons they will find their initiative at odds with competition law provisions, as competition law is predominantly aimed at protecting the market, as the market provides for efficiencies and brings greatest consumer welfare. For governments, therefore, full legislation might be the only 'way out' of the tension that arises from the applicability of competition law, depriving society of the potential innovative forces of market-led sustainability initiatives.

#### 4. Conclusion

The Lisbon Treaty's promise of a social market economy is not an instantaneously fulfilled one and can, as such, be misleading: it requires shaping on the national level. This contribution is grounded on the awareness that each sub-field of public economic law retains a specific identity, with very own idiosyncrasies, and, accordingly, places itself differently to the Treaty developments initiated by Lisbon. Mapping out how these sub-fields caught up with the social dimension of Lisbon, as this contribution attempted to do, was therefore of the essence.

In conclusion, EU state aid law, EU public procurement law and EU competition law showcase varying degrees of responsiveness towards integrating social objectives, particularly in light of employment and sustainability, within their legal framework. The initial discussion of their objectives, which still appear economically oriented, would tend to make one conclude that integration of social objectives is inherently problematic. As a consequence, this would mean that public authorities, whilst shaping the social market economy on the national level, would also *ex ante* struggle to use the instruments provided by these fields of law. The contrary appears, however, true.

Public authorities are granted various instruments to advance their social agenda. However, differences do exist. In a spectrum ranging from least to most responsive, competition law certainly proves to be the most rigid in terms of tensions, whereas state aid law and public procurement law can more smoothly

90 Ibid.

91 See T. Prosser, *The limits of competition law: markets and public services* (2005); C. Wehlander, *Services of General Economic Interest as a Constitutional Concept of EU Law* (2016).

92 Case 309/99 J.C.J. *Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap*, [2002] ECR I-1577.

93 See for example on the assessment of the Dutch Energy Agreement and Chicken of Tomorrow cases, G. Monti & J. Mulder, 'Escaping the clutches of EU competition law', (2017) 42(5) *European Law Review* 635.

accommodate such objectives. At present, it makes the latter two more suitable to advance social objectives on the national level, making them an example of EU regulatory action that also allows for the integration of national policy objectives. If a similar conclusion is to be made for competition law, the current economic interpretation must be loosened in future cases to come. It would, for one, further foster the potential of the 'social' in the EU social market economy. ■