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**Evaluating Social Value in Social Clauses:
Tensions in Public Procurement Regulation and
Horizontal Considerations**

Candidate: Deirdre Halloran LL.M

Supervisor: Dr Padraic Kenna

Institution: School of Law, National University of
Ireland, Galway

Head of School: Dr Charles O'Mahony

Submission: January 2020

Declaration: I declare that the enclosed work is my own original research.

Signed: 

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A Dissertation Presented

by

DEIRDRE HALLORAN

DEDICATION

To my parents, my husband Tom and children Bernadette, Bridget and John, for always loving and supporting me.

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Many debts were incurred in the course of researching and writing this thesis. I would like to thank the Irish Research Council for funding my research; my supervisor, Dr Padraic Kenna for suggesting the topic in the first place, for his belief that I was capable of undertaking such a task and for his calm advice and support. And finally, I would like to thank my long-suffering family and friends for their understanding and patience.

ABSTRACT

EVALUATING SOCIAL VALUE IN SOCIAL CLAUSES: TENSIONS IN PUBLIC PROCUREMENT REGULATION AND HORIZONTAL CONSIDERATIONS

2020

Public procurement and how it is regulated is an area of great economic interest. In the European Union, total public expenditure on goods, works and services amounted to over € 2,015 billion in 2015. The primary objective of EU public procurement regulation is market access and the abolition of barriers and obstacles to trade. This thesis focuses on another objective, the harnessing of public procurement's economic power to promote social objectives and create social value. This objective is situated at the nexus of a number of politically divisive topics within the EU: the role of the state vis-à-vis the market; the concepts of competition, efficiency and value for money within regulation and policy; the position of social considerations within Europe's internal market and the limits on the discretion of Member States in implementing social policy. The thesis examines the conflicting economic objectives of value for money, competitiveness and efficiency versus policy objectives of added social value, embedded within neoliberal state-endorsed norms of market-based principles and techniques of evaluation linked to a single economic concept of value. Using the social clause as an example of a horizontal policy mechanism, a comparative analysis is conducted on the use of social clauses within the national, legal and policy frameworks of the UK, Scotland, Wales, Northern Ireland, Ireland and the Netherlands. Employing a political economy perspective, the myriad factors at play are classified and evaluated. In so doing, the research aims to make visible the contextual influences on the stakeholders in the public procurement process when attempting to both grow the economy and effect social change within an EU regulatory framework. This makes clear that while social procurement is, on the one hand, a set of identifiable empirical practices, it is also, on the other, the expression of specific ideas related to the nature of value creation in complex systems.

Glossary of Terms

CBA	Cost-benefit analysis
CBC	Community benefit clauses
CJEU	Court of Justice of the European Union
ECJ	European Court of Justice
EEC	European Economic Community
HACT	Housing Association Charitable Trust
LCC	Life-cycle costing
MEAT	Most Economical Advantageous Tender
NET	New entrant trainees
NPM	New public management
SEA	Single European Act
SME	Small and medium enterprise
SR	Social return
SROI	Social Return on Investment
SWB	Subjective well-being
SWV	Subjective Well-Being Valuation
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
TOM	Themes, outcomes and measures
WBA	Well-being analysis

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ORIGINS OF THE RESEARCH

The origins of this thesis lie in a question posed to me in 2013: were the use of social clauses in public procurement contracts in Ireland legal? At that time, I did not know what a social clause was, knew very little about public procurement and less about the rules that surrounded it, and so was unaware of the complex area I had to navigate to provide an answer. I was to discover that Ireland had no history of using social clauses in public procurement contracts, and in collaboration with Dr Padraic Kenna and Community Action Network (CAN), I set about creating a legal and practical Primer for the use of such clauses in Ireland. After doing so, I could state affirmatively that yes, a public body can use social clauses in Ireland, with certain restrictions. However, in the process of writing the Primer, I realised that the confusion surrounding their legality was only one of a number of barriers preventing their use as a tool to further social policy. In the interviews and meetings I held with various stakeholders in the procurement process, the perceived cost of implementing social clauses, together with concerns about ‘value for money’ and inefficiency, were seen as major obstacles to their use. Stakeholders felt that the ‘social value’ created by the intervention would need to be balanced against the cost to justify their use.

In reviewing the literature in this area, I found most research is concerned with sustainable procurement as a whole, with a focus on environmental and not social aspects, and comes from a management theoretical framework. Walker and Jones¹ in an international study on sustainable procurement in the public sector found that the perceived clash with value for money imperatives and the objective of efficiency was the primary barrier identified by stakeholders in implementing sustainable procurement considerations. Min and Galle², Rao and Holt³, Walker and Brammer⁴ and Gormly supported this find.⁵ This led me to question the influences behind these concepts and to shed light on the origin and meaning of the concepts themselves. Were efficiency and value for money central objectives of public procurement regulation? How could public bodies evaluate ‘social value’ in terms of value for money to justify its use? But behind these two questions was a broader one—what were the latent influences behind the economic concept of efficiency that required a public body to justify implementing a social policy in economic terms when using public procurement in the EU? And even more fundamentally, what exactly was the role of ‘social value’ within the EU? Much of the literature on the objectives of public procurement within the EU adopts an uncritical ‘welfarist approach’ to the analysis of the law⁶ and takes a ‘free market’/law and economics approach to the concepts of ‘efficiency’ and ‘value for money’.⁷ A notable exception to this was the writing of Peter Kunzlik. Building on his paper, ‘Neo-liberalism

¹ Helen Walker and Neil Jones, 'Sustainable Supply Chain Management Across The UK Private Sector' (2012) 17 *Supply Chain Management: An International Journal* 169.

² Hokey Min and William P. Galle, 'Green Purchasing Practices Of US Firms' (2001) 21 (1) *International Journal of Operations & Production Management* 222.

³ Purba Rao and Diane Holt, 'Do Green Supply Chains Lead To Competitiveness And Economic Performance?' (2005) 25 *International Journal of Operations & Production Management* 898.

⁴ Walker and Brammer (n 1).

⁵ Joey Gormly, 'What Are The Challenges To Sustainable Procurement In Commercial Semi-State Bodies In Ireland?' (2014) 14 *Journal of Public Procurement* 23.

⁶ For a critique of the use of efficiency as the main criterion of analysis, see Robin Paul Malloy, *Law And Market Economy* (Cambridge University Press 2000) and Daniel M Hausman and others, *Economic Analysis, Moral Philosophy, And Public Policy* (Cambridge University Press 2006).

⁷ For a good example of this approach see Albert Sanchez Graells, *Public Procurement And The EU Competition Rules* (Hart 2015) 15.

and the European public procurement regime⁸, I took a critical approach to the requirements of the free market and the normative assumption that social value should be linked to economic efficiency and value for money. By exploring the economic and political influences on EU public procurement regulation, its relationship to social value creation, what social value represents and how it is evaluated, this research aims to make visible the contextual influences on the stakeholders in the public procurement process when attempting to grow the economy and effect social change within an EU regulatory framework.

⁸Peter Kunzlik, 'Neo-liberalism and the European public procurement regime' in Catherine Barnard et al (eds), *Cambridge Yearbook of European Legal Studies 2012–2013* (Oxford, Hart Publishing, 2013) 283.

Chapter 1: Introduction

This thesis examines the creation and evaluation of added social value in the context of public procurement in the EU. This issue is at the nexus of a number of politically divisive topics within the EU. The first concerns the role of the state vis-à-vis the market, and the concepts of competition and efficiency within regulation and policy. The second is the role of social considerations within Europe's internal market, and their interaction with the free movement principles set out in the Treaties. The third is the limitations of the discretion of Member States in implementing social policy as well as the role of the EU in promoting societal objectives. Public procurement involves the state's purchasing of needed goods and services from the private sector, usually on the basis of competitive bidding. Whatever public bodies buy, from office supplies to the commissioning of billion-euro projects for the construction of hospitals, schools or roads, the authorities in question are participating in the public procurement market. While the state can fulfil these requirements directly, it has become increasingly the norm to obtain these from the private marketplace. Public expenditure on goods, services, and works represents an average of 13% of gross domestic product (GDP) in OECD countries and amounts to some €2.5 trillion annually or 19% of GDP in the European Union.⁹

When the state spends public funds, the manner in which it does so constitutes public policy. For example, when the state procures the construction of a school for its constituents, the state is fulfilling its obligation to provide educational facilities. But the state can include other policy objectives in the procurement contract as well—for example, creating employment opportunities for early school leavers. By expanding the central policy objective of the procurement contract, the state can add social value in the form of a social clause in the contract mandating that the successful bidder provide training to this group while carrying out the work. Thus, the social value is sought as an additional benefit, above and beyond the core requirement of the contract, that maximises the benefits of the public spending.

In this way the government as a purchaser is exercising its purchasing power in the same way a private purchaser might, and it places the social policy objective of the state into the market. While the state is often seen as a regulator of the market, it is also a participant in the market itself. The state creates social value when it combines these two functions: participating in the market as purchaser and at the same time regulating the market through the use of its purchasing power. Incorporating added social value is increasingly a policy goal of governments seeking to achieve a more innovative, resilient and inclusive economy.

This thesis focuses on the impact of EU law on this one facet of public procurement: its use to promote social objectives that are not necessarily connected with the procurement's functional objective. The primary objective of EU public procurement regulation is market access and the abolition of barriers and obstacles to trade. The Treaty on the Functioning of the European Union (the Treaty) forms the basis in primary law for EU regulation of public procurement, in particular the Treaty's provisions on free movement of goods and services, freedom of establishment, and the development of the internal market. The application of these principles by the Court of Justice of the European Union (CJEU) has formed the basis for the extension of the procurement rules into areas not explicitly covered by the text of previous directives. Other principles within

⁹ OECD, 'OECD Government At A Glance 2015 (Total Value Of Public Expenditure On Goods And Services);' (2015) <<https://data.oecd.org/gga/general-government-spending.htm>> accessed 1 June 2019. An estimated €425 billion of this expenditure was advertised on Tenders Electronic Daily (TED).

the Treaty also have the potential to influence public procurement—notably the requirements to integrate environmental and social protection into policy and legislation and the principle of subsidiarity. The Lisbon Treaty’s objective of a ‘highly competitive social market economy, aiming at full employment and social progress’ would seem to strengthen social aspects of European integration, and the Charter of Fundamental Rights of the European Union, which came into effect with the Lisbon Treaty in 2009, is another source of obligations which may be directly applicable in the procurement process. To underpin the Treaties principles in the field of public procurement and to provide the necessary guidance to Member States, the Community adopted a series of procurement directives. The directives ensure that companies from across the EU have the opportunity to compete for public contracts (above defined value thresholds)¹⁰. They also serve to enshrine the principles outlined above. The main public procurement directives are as follows: Directive 2014/24/EU on Public Procurement; Directive 2014/25/EU on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services sectors; and Directive 2014/23/EU on the award of concession contracts. These directives predominantly cover procedural rules. There are also two other directives which apply to complaints and review (i.e. to the enforcement of the directives), known as the Remedies Directives. In the public sector, remedies are governed by Directive 89/665/EC. In the utilities sector, remedies are governed by Directive 92/13/EC. The focus of this thesis is on Directive 2014/24/EU on Public Procurement, although the principle and findings from this research can be applied to the other directives as well.

When a procurement contract is of cross-border interest,¹¹ European Union Treaty rules apply which aim to promote the free movement of goods and services across borders. When the contract value is above a certain financial threshold, the directives apply.¹² At the same time, the policies of individual governments require public spending to be constrained by ‘value for money’ principles and, in some cases, the need to champion local or national firms. Thus when public bodies in the EU seek additional social value in their procurement contracts, they are subject to a number of powerful forces, pushing and pulling in different directions, in accordance with its particular objective.

The EU Commission has defined public procurement as a strategic policy instrument to achieve sustainability and as an essential means of contributing to achieving the EU’s goal of smart, sustainable and inclusive growth.¹³ Public procurement is seen as a driver to stimulate innovation¹⁴ and resource efficiency¹⁵ and as an integral part of an industrial policy for a global, low-carbon economy.

¹⁰ As of January 2014: Works Threshold is €5,186,000; Supplies and Services Threshold is €134,000 for Government Departments & Offices and €207,000 for Local and Regional Authorities and public bodies outside the Utilities sector, <<http://etenders.gov.ie/Media/Default/SiteContent/LegislationGuides/3.Thresholds2014.pdf>> accessed 15 September 2019.

¹¹ EU law takes a graduated approach to procurement regulation: procurement that is outside the EU Treaty; procurement that is within the Treaty but outside the procurement directives, and the third procurement within the directives. This is linked to what is of cross-border interest. Above-thresholds, EU rules including the public procurement Directives are fully applicable. Below, national laws rule, and EU Treaty principles are only applicable in case where there is cross-border interest.

¹² Thresholds are revised every two years. Full and up to date thresholds can be checked on the EU public procurement website <http://www.simap.europa.eu/>. Research and Development services are exempt, excepting those listed in Article 14-19 of the 2014 Public Contracts Directive.

¹³ Commission, ‘Europe 2020: a strategy for smart, sustainable and inclusive growth’ COM (2010) 2010 final.

¹⁴ *ibid* 12.

¹⁵ *ibid* 15.

Sustainable public procurement is defined by the EU as procurement ‘whereby contracting authorities take account of all three pillars of sustainable development (economic, social and environmental), when procuring goods, services or works’.¹⁶ Sustainable public procurement thus encompasses both green and social procurement. The EU further defines social procurement as socially responsible procurement: procurement that take into account social considerations such as employment opportunities, decent work, compliance with social and labour rights, social inclusion, equal opportunities, design for accessibility for all, and sustainability, including ethical trade issues and wider voluntary compliance with corporate social responsibility (CSR) obligations.¹⁷ This use of public procurement to advance state policies that are not necessarily connected with the procurement’s main objective is referred to in the literature as ‘strategic’ procurement, in that it serves broader strategies in addition to obtaining the required goods, services, or works¹⁸. Such policies have been referred to as ‘secondary’ policies, in contrast with procurement’s so-called ‘primary’ objective of obtaining goods, works or services on the best terms¹⁹. However, this implies erroneously that they are hierarchically inferior, and so the term horizontal policies and horizontal considerations are used throughout this thesis as advocated by Arrowsmith and Kunzlik²⁰, to highlight that these policies should in fact be considered equal.²¹ This thesis focuses on the use of social clauses, which are legal requirements within a procurement contract stipulating that the contract must provide added social value (this can also be known as a community benefit clause). These clauses are the most common means of implementing social considerations,²² but there is still legal uncertainty surrounding their inclusion in the competitive stages of the procurement process.²³ McCrudden makes clear that contracting authorities are free to define the subject matter of their contracts, but EU law imposes restrictions on the freedom to enter into contract of parties in a public contract, as both the treaties and the directives impose an obligation that economic operators be accorded ‘equal treatment’. But the treaties and the directives do not limit what can be contracted *for*, allowing for what McCrudden first termed a ‘mixed purpose public contract’, in which the contracting authority wants to achieve two objectives: the purchase of a required good or service and the achievement of a social aim. Kunzlik confirms that the law recognises that when public bodies are acting as

¹⁶ European Commission Website, Environment, Green Public Procurement, Sustainable public procurement, see http://ec.europa.eu/environment/gpp/glossary_en.htm, while the balancing is explicitly mentioned in the definition on the website of the EU Commission's Directorate General for the Environment: ‘Sustainable Public Procurement (SPP) means that public authorities seek to achieve the appropriate balance between the three pillars of sustainable development – economic, social and environmental – when procuring goods, services or works at all stages of the project’, see http://ec.europa.eu/environment/gpp/versus_en.htm accessed 30 December 2019.

¹⁷ Commission, ‘Buying Social, A Guide to Taking Account of Social Considerations in Public Procurement’ October 2010.

¹⁸ Abby Semple and Mark Cook, *A Practical Guide To Public Procurement* (Oxford University Press 2015).

¹⁹ For example in Sue Arrowsmith, *The Law of Public and Utilities Procurement* (1st ed., London, Sweet & Maxwell 1996) and Hans-Joachim Priess and Christian Pitschas, ‘Secondary Criteria and Their Compatibility with EC and WTO Procurement - The Case of the German Scientology Declaration,’ (2000) 9 (4) Public Procurement Law Review 171.

²⁰ See Chapter 1, Section 2 of Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, CUP 2009).

²¹ Sue Arrowsmith and Peter Kunzlik, *The Law Of Public And Utilities Procurement: Regulation In The EU And UK* (3rd edn, Sweet & Maxwell 2014) 10.

²² Walter and others, ‘Strategic Use Of Public Procurement In Europe, Final Report To The European Commission’ (2010) 14.

²³ Semple and Cook (n 17).

participants in the market (as buyers rather than primarily as regulators) they must be allowed a significant degree of freedom to choose for themselves the nature of the things they wish to buy.²⁴ Arrowsmith and Kunzlik have argued that these ‘what to buy’ decisions by public bodies are lawful, as, in the absence of an EU law harmonising public procurement standards, nothing in the EU procurement regime forecloses their freedom to choose for themselves what to buy so long as they do not engage in direct discrimination. In other words the Treaty principles and the Directive are neutral as to the subject matter of the contract. This, they conclude has two consequences. First indistinctly applicable ‘what to buy’ decisions would be lawful even if they indirectly discriminate against goods or service providers from other Member States. Secondly, they would be lawful without proof that they are proportionate.²⁵

Therefore we can confidently state that social clauses are permitted in the EU, but only within a restricted regulatory space: they must be connected to the ‘performance of the contract’ being awarded and be ‘linked to the subject matter of the contract’, and they are treated differently depending on whether they are classified as a ‘special condition’ of the contract or a ‘technical requirement’ of the contract.²⁶ Additionally, the relevant criteria must be expressly mentioned in the contract documents or tender notice, and these criteria must comply with all the fundamental principles of Community law, in particular the principle of non-discrimination. If the social consideration is classified as a hindrance to trade, it must be *justified* under a Treaty exception or an objective justification recognised by the CJEU.²⁷

1.1 Research Questions

The arena within which these research questions are asked is that of the EU, amid the tensions of market integration, the imperatives of competition and free movement and the idea of a ‘social market economy’. Is the subservience of social policy to the economic rationale of the internal market unavoidable? Are economic and social objectives, at least to some extent, reconcilable? And what are the parameters that Member States must navigate to implement social policy using public procurement within the internal market project? To answer these questions, this research aims to clarify the framework within which Member States engage with the market in the public procurement process in the EU in two steps.

First, I break down the concepts contained in the public procurement rules to identify the influence of assumption and ideology. Efficiency is an objective in the public

²⁴ P. Kunzlik, “The 2014 Public Procurement Package – One step forward and two back for Green and Social Procurement” in Marique and Wauters (eds.) *EU Directive 2014/24 On Public Procurement. A new turn for competition in public markets? (Larcier, 2016)*; P Kunzlik, ‘Green Public Procurement European Law, Environmental Standards and “What To Buy” Decisions’ (2013) 25 *Journal of Environmental Law* 173

²⁵ For future debate on this point see Sue Arrowsmith and Peter Kunzlik (eds), (n. 20) 198 and Peter Trepte, ‘The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate What We Buy?’ in Ølykke, Risvig and Tvarnø (eds), *EU Procurement Directives: Modernisation, Growth and Innovation (Djøf 2012)* ch 3. This is expanded in Chapter 9, 196.

²⁶ Art 58 (1) of the 2014 Directive. As technical requirements can be rejected for anticipated non compliance while ‘special conditions’ can not. However Recital 99 suggest this may only be the case when such a condition concerns compliance with external legal requirements on health and safety: this illustrates the difficulties of making this distinction.

²⁷ See, for example, Case C-384/93, *Alpine Investments BV v Minister van Financien* [1995] ECR I-1141. 540 Case C-31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635, (‘Beentjes’), para. 30. See also Case C-225/98, *Commission v France* [2000] ECR I-7445, (‘Nord Pas De Calais’).

procurement process. What exactly is meant by *efficiency* and what is its connection to *value for money*? Related to this is whether *efficiency* and/or *value for money* is an objective of the EU. This is important to clarify: if the EU were to impose this concept as a mandatory objective to be pursued by national purchasers, it would remove from the state's discretion the power to decide what is to be valued, thus removing the state's ability to dictate their own public spending and policies. Following on from the question of value for money are the questions of what is social value and what are the economic and political influences on how social value is conceptualised and evaluated?

Second, I define the space given to Member States to pursue social policies in their procurement decision-making and the *factors* that set the parameters of this space, after which I compare how selected Member States (UK, Scotland, Wales, Northern Ireland, Ireland and the Netherlands) implement social clauses within this space.

The thesis relies on a critical interpretation of Trepte's abstract models of the public procurement objectives (political, economic and international) to provide a framework for examining the role of the state in the free market, the role of the EU's 'social' and 'economic' objectives, the inclusion of horizontal considerations in EU public procurement contracts and the conceptualisation of social value in the public procurement process. The construction and measurement of social value in relation to the use of social clauses in England, Scotland, Wales, Northern Ireland, Ireland and the Netherlands provides a case study for examining the legal, political, economic and practical factors at play when implementing, defining, measuring and evaluating social value. There are few legal academic writings on social clauses²⁸ and little published academic research concerned specifically with the barriers and facilitators to how social clauses may be enacted through public procurement. Much of the work that deals with social clauses is to be found within the grey literature²⁹ produced for government bodies focusing on the legal parameters of their use and containing various case studies. To answer the research questions, I needed to incorporate this source of data within my research. Adams et al.³⁰ point to the importance of the currency of grey literature, which can run ahead of academic research. The difficulties in utilising this category of materials include the lack of reference to specific theories, the bias of influence by the authors' own political or social agendas, and inconsistency in quality and structure. To overcome these difficulties, I relied on the guidance of Adams et al.³¹ to categorise the publications in tiers beginning with material similar to publications now widely accepted in academic reviews, then moving outward to material that has potential to add more novel insights but is more challenging to assess in terms of source expertise and outlet oversight. In this way, the reports chosen all were either 1) published by a government department, 2) written for a government department, 3) supported by independent foundations with input from government bodies or 4) produced by researchers in universities. Following Denyer and Tranfield,³² I applied a structured case study approach to reporting the findings from the

²⁸ Although recently, there has been a change, see: Catherine Barnard, 'To Boldly Go: Social Clauses In Public Procurement' (2016) *Industrial Law Journal* 208; Amy Ludlow, 'Social Procurement: Policy And Practice' (2016) 7 *European Labour Law Journal* 479.

²⁹ Amanda Lawrence and others, 'Where Is The Evidence? Realising The Value Of Grey Literature For Public Policy And Practice:' (Swinburne Institute for Social Research 2014).

³⁰ Richard J. Adams and others, 'Shades Of Grey: Guidelines For Working With The Grey Literature In Systematic Reviews For Management And Organizational Studies' (2016) 19 *International Journal of Management Reviews* 432.

³¹ *ibid* 452.

³² David Denyer and David Tranfield, 'Producing a Systematic Review' in David A Buchanan, *The SAGE Handbook Of Organizational Research Methods* (SAGE 2011).

systematic review. The results of the literature review are provided in Appendix 1, with chapter 5 providing an overview of the findings categorised by Member State.

1.2 Why the Research Matters

The most important economic question today for members of the EU is what policies and actions are needed to achieve a more sustainable and inclusive society within the EU structure and what policies and actions are needed to bring this about.³³ The social and environmental provisions within the 2014 directives allow for some discretion in integrating non-market considerations within a process that was created purely by market and economic concerns. The Treaty of Lisbon committed Europe to a 'highly competitive social market economy, aiming at full employment and social progress', making the assumption that competition and market freedoms are compatible with social protections. The question of how social and economic objectives are balanced is one of fundamental importance and plays a central role in establishing the democratic legitimacy of EU policy-making and in understanding how to achieve the appropriate balance between market and non-market objectives within the EU.

1.3 Structure of the Thesis

The thesis contains of nine chapters, including the introduction. Chapters 1 to 4 situate the thesis within a theoretical framework and provide the economic and political context for considering the role of the EU member state in implementing social change against the role of the free market in pursuing economic efficiency. Chapter 2 orients the research within the adapted framework of Trepte's conceptual models of procurement regulation to identify the multiple forces that stakeholders are subject to in the procurement process and the causes of tension between the conflicting objectives. Chapter 3 provides the background to the development of public procurement regulation in the EU and the inclusion of horizontal policies. Chapter 4 focuses on the goals of EU public procurement regulation and value for money, its role in the EU regime and the directives. I examine the economic concepts of efficiency and competition and their relationship with internal market objectives and the role of the social market economy.

Chapter 5 addresses the concept of social value and what it means in the context of public procurement. I provide an overview of the existing approaches to measuring and evaluating social value and review the practical implementation challenges in the public procurement process. Chapter 6 defines the space given to Member States in the EU to pursue social policies in their procurement decision-making and the factors that set the parameters of this space. The research focuses on social clauses, what they are, what legal hurdles must be overcome to include them in the procurement process and where they are situated within Arrowsmith's taxonomy of horizontal considerations and the 2014 Public Procurement Directives. In chapter 7 a comparative analysis is done on the use of social

³³ Growing inequality within most countries around the world is one of the critical issues facing the world today. Some of the literature that provided the basis for this argument can be found in Anthony B Atkinson, *Inequality: What can be done?* (Harvard University Press, 2015), Joseph Stiglitz, *The Price of Inequality* (2012) and Thomas Piketty, *Capital in the 21st Century* (2013) Thomas Piketty notes that we are returning to the high levels of inequality that prevailed in the 19th century and in the 20th in the years before the Great Depression and concludes that inequality is likely to get worse unless interventions are made.

clauses within the national legal and policy frameworks of the UK, Scotland, Wales, Northern Ireland, Ireland and the Netherlands. That analysis provides the context for chapter 8 and the case study on the use and evaluation of social clauses and social value in the selected Member States from 1988 to 2017, with an emphasis on those that discuss social outcomes and social impacts. It also compares how selected Member States implement social clauses. Finally in chapter 9, the findings of the systematic review categorised by member state are reported and the key themes are identified. By identifying the potential protagonists and antagonists of using social clauses, the role of each of these *actors* can be evaluated. Through this process of identifying and evaluating the forces at play, the thesis aims to broaden our understanding the difficulties in achieving the appropriate balance between market and non-market objectives within the EU. The goal is to clarify the roles of free market economics, EU institutions and the state in resolving the balance between the market and the state in allocating resources and determining social outcomes and in creating social value in policy and practice.

1.4 Methodology

The theoretical perspective adopted is interdisciplinary: it combines law in context, economic theory and political science as reflected by the space that public procurement itself occupies. I am following the views of Graells,³⁴ Van Gestel and H-W Micklitz³⁵ that the study of EU law and thus, public procurement regulation, may require a new multidisciplinary methodological approach³⁶ that departs from the methodology followed in classical legal research. This can provide flexibility to allow the researcher to rely on external perspectives, such as economic, political, comparative and others, to provide more clarity on the normative assumptions made by both the researcher and others.³⁷ Although this view is not shared by all,³⁸ I consider that an integrated method should be used.³⁹

In Trepte's seminal book *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulations*, he sets out to investigate *why*, rather than *how*, procurement is regulated and re-examines universally accepted concepts such as *efficiency*, *competition* and *value for money*. Trepte argues that the reliance on these concepts belies the complexity of the process leading to the regulation of procurement. These principles essentially describe the way in which procurement is regulated—that is, *how* the underlying objectives are to be achieved. They do not explain *why* procurement is regulated in that way. In short, he argues that the application of such principles is not an end in itself but a means to an end, though they are frequently and, it is argued, misleadingly referred to as the primary objectives of regulation. To help in his enquiry, he uses the abstracted regulatory models of economic, political and international objectives, under the assumption of operating within a market economy, with the state's objective being to maximise the economic efficiency of society as a whole.⁴⁰ Trepte believes that it is the interrelationship among these different objectives and the extent to which they are complementary or in conflict which gives rise to tensions between the different procurement objectives, and it is the importance and extent of the mix of objectives which distinguishes individual procurement systems.

This thesis seeks to widen the lens on Trepte's enquiry but to narrow the focus by adopting a political economy perspective on Trepte's free market economic standpoint, calling into question the basic theoretical assumptions that are the building blocks of prescriptions about concepts such as efficiency and value for money. While Trepte explains what economic efficiency is, he accepts it as a norm within legislation and policy. This thesis attempts to determine why it has become a norm. By identifying and understanding the origin and development of these powerful concepts within the EU and Member State systems, the thesis aims to connect the concept of social value to the economic value production within the EU public procurement regime.

³⁴ Graells (n 7) 33.

³⁵ Rob van Gestel and Hans-Wolfgang Micklitz, 'Why Methods Matter In European Legal Scholarship' (2013) 20 *European Law Journal* 292.

³⁶ Graells (n 7) 19.

³⁷ Martijn Hesselink, 'A European Legal Method? On European Private Law And Scientific Method' (2009) 15 *European Law Journal* 31.

³⁸ See: Douglas W. Vick, 'Interdisciplinarity And The Discipline Of Law' (2004) 31 *Journal of Law and Society* 163. See also Brian Bix, 'Law As An Autonomous Discipline' (2002) *SSRN Electronic Journal* 975, 985.

³⁹ Anthony Arnull, 'The Americanization of EU Law Scholarship' in Anthony Arnull and others, *Continuity And Change In EU Law* (Oxford University Press 2008) 425.

⁴⁰ Peter Trepte, *Public Procurement In The EU* (Oxford University Press 2007).

This thesis takes a critical approach within an interdisciplinary theoretical framework combining law in context, economic theory and political science on the influence of the public market and its economic approach to the public procurement regulatory system and policy. The thesis suggests that this focus on *efficiency* and the need for *competition* to create optimal conditions for *welfare gain* results in a neoliberal economic approach to market integration and public procurement regulation.⁴¹

The main methodology employed in this thesis is that of traditional legal scholarship—that is, interpretation of legal sources, with recourse to classical rules of legal construction and the general principles of EU law. As a part of the legal methodology, comparative analyses are used. EU law is a legal discipline in its own right that maintains a *sui generis* relation with and exists between domestic and international law,⁴² and the thesis uses an integrative approach. EU principles, directives and guidance in public procurement regulation and the inclusion of horizontal considerations are examined, as is how they are applied and interpreted in the domestic legal frameworks and policy documents of the UK, Scotland, Wales, Northern Ireland, Ireland and the Netherlands. In general, the purpose of the comparative review is to identify how different political and economic approaches influence domestic law and policy and to provide fresh insights and inspiration in proposing new approaches.

The multidisciplinary approach is used to show both the strong influence of economic theory and policy in the area of EU public procurement regulation⁴³ and the normative assumptions that are made in this free market-oriented area of economic regulation.⁴⁴ An important theme of the thesis is the issue of the tension between social and economic motivations for procurement policy. By the development of a conceptual framework model that distinguishes two broad sets of objectives that the regulation of procurement markets serve—a set of political objectives and a set of economic objectives—the research attempts to identify the influences these objectives have on our understanding of social value and the way it is measured, calculated and assessed. This approach differs from much of the literature on public procurement regulation,⁴⁵ which generally takes a welfarist approach to the economic analysis of law⁴⁶ and a free market approach to the study of competition and efficiency as it relates to public procurement regulation.⁴⁷ This new framework is based on a critical analysis of Trepte's abstracted regulatory model of public procurement in the EU. By classifying the underlying objectives of procurement regulation into the three categories of political, economic and international, the thesis identifies the influence of these models on the issue of value, the effectiveness of

⁴¹ See Christopher Bovis, 'Public Procurement and the Internal Market of the 21st Century: Economic Exercise versus Policy Choice', Chapter 17 in Paolisa Nebbia and Takis Tridimas (eds), *EU Law for the 21st Century: Rethinking the New Legal Order* (Hart Publishing 2005).

⁴² See: Neil Walker, 'Legal Theory And The European Union: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 581, 585; Bruno de Witte, 'European Union Law: A Unified Academic Discipline?' (European Institute University Working Papers, RSCAS 2008).

⁴³ See Charles R Henderson that 'a lawyer who has not studied economics and sociology is very apt to become a public enemy' in Louis D Brandeis, 'Living Law' (1916) 10 *Illinois Law Review* 461, 470 cited in Graells (n.7) 33.

⁴⁴ Trepte writes that '[P]rocurement law and regulation cannot be dissociated from the economics of procurement. To do so is to lose the basis for a fundamental understanding of the nature and purpose of such regulation' in Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2006) viii.

⁴⁵ Andrew Cox, *Public Sector And Public Procurement In The European Community* (Earlsgate Press 1992); Trepte, *Public Procurement In The EU* (n 34); Christopher Bovis, *Public Procurement In The European Union* (Palgrave Macmillan 2005); Graells (n 7).

⁴⁶ See (n 6).

⁴⁷ See (n 7).

horizontal considerations as creators of social value, and the replacement of political judgement with economic evaluation.

The methodology used is purposefully multidisciplinary—more specifically it is an exercise in basic interdisciplinary research.⁴⁸ It is also eclectic in that the multidisciplinary approach will take different forms depending on the specific object of inquiry, adapting to the different approaches that can better shed light on the most salient features of the object of study. The goal in pursuing this methodology is to benefit from the multiple perspectives, which can be incompatible and thus useful in providing a better understanding of the legal issues covered by the present study.

⁴⁸ Mathias M. Siems, 'The Taxonomy Of Interdisciplinary Legal Research: Finding The Way Out Of The Desert' (2009) 7 *Journal of Commonwealth Law and Legal Education* 54.

Chapter 2: Theoretical Framework

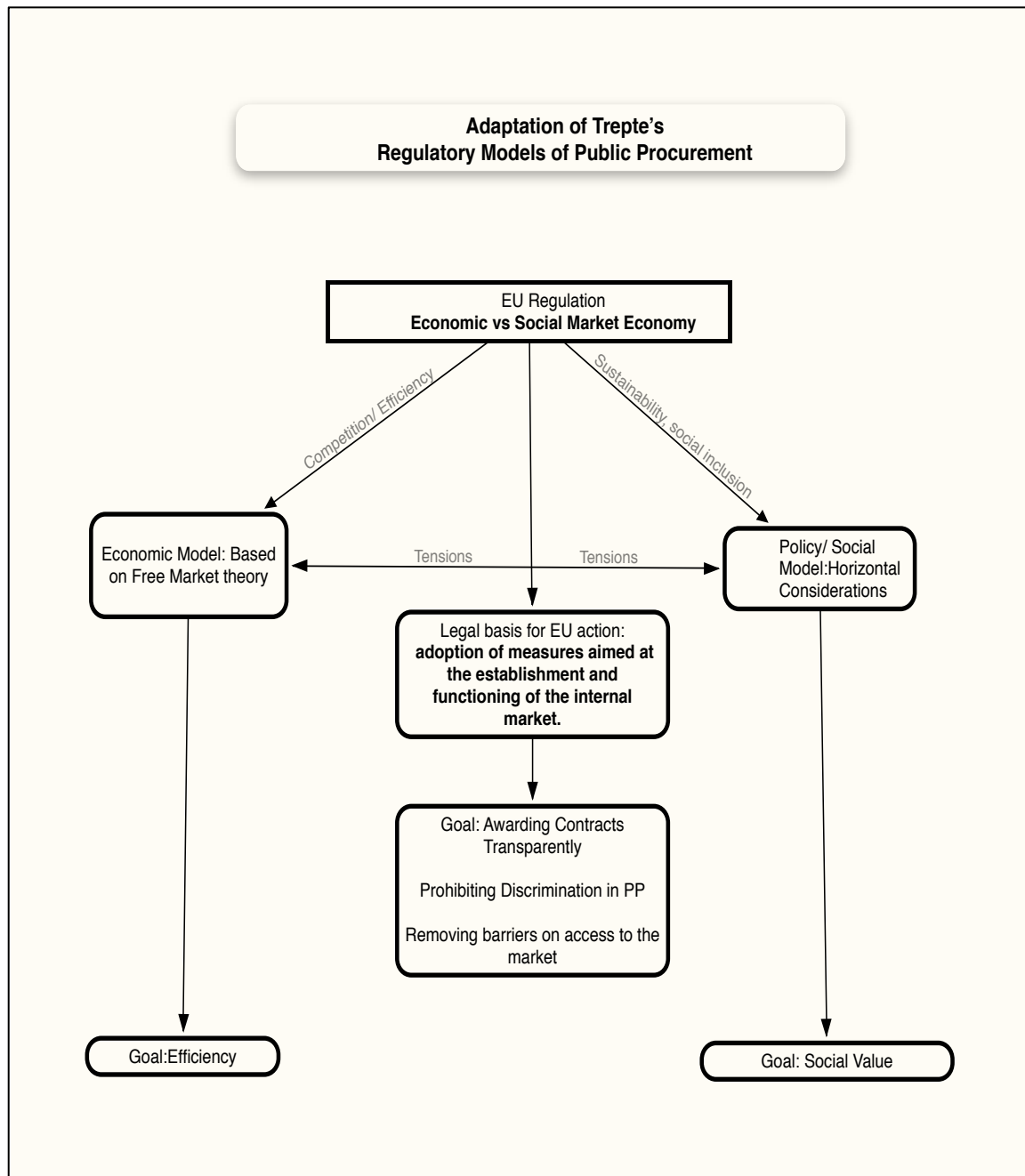
2.1 Introduction

This chapter presents the theoretical framework of the research based on an adaptation of Trepte's regulatory models of public procurement regulation providing the economic and political context for the role of the state within the EU, the public procurement process and the tensions between the objectives of social value creation and that of economic efficiency. Contextualising Trepte's economic model and the significance of the free market to the regulation of procurement, I trace the origin of free market economics, beginning with the development of classical economics and the concepts of competition, the invisible hand and comparative advantage. I move on to the rise of the neoclassical school, marginalist economics, the birth of welfare economics and the compensation principle. This provides the frame of reference for analysing the development of public procurement regulation in the EU. The importance of embedded liberalism and Keynesian economics, its replacement by neoliberalism and the relevance of the social market economy are then examined, and the relationship between the state, the EU and the disciplines of law and political economics is characterised to provide further context for the upcoming chapters.

2.2 Trepte's Regulatory Theory

Using Trepte's regulatory theory, we can say that the regulation of procurement markets can be divided into political, economic and international objectives, which can then be used as three abstracted regulatory models: the economic model referring to the significance of the market order to the regulation of procurement together with the issue of economic efficiency; the political model reflecting the use by governments of procurement as a policy tool, including social considerations; and the international model acknowledging the outside influence on national governments which may limit their scope of action in the field of procurement. Trepte finds that it is the interrelationship between these different models and the extent to which they are complementary or in conflict which gives rise to tensions between the different procurement systems: a tension which is clearly evident in the area of social procurement and social value.

Figure 1: Adaptation of Trepte’s Regulatory Model



In adapting Trepte’s framework, I first adjust the economic model from a free market economics model to a critique of the market economy, the welfare state and the objective of economic efficiency.⁴⁹ As a result, the political model is now in conflict with the free market economic model due to the incompatibility of social considerations with free market economic theory. Trepte’s international model has been transmogrified into the EU regulatory model, showing the conflicts between the internal market, with its goals of competition and market freedoms, and the social market economy, with its goals of sustainability and social protections.

⁴⁹ See Bovis ‘Public Procurement and the Internal Market of the 21st Century’ (n 38).

According to Trepte and others, procurement is primarily an economic activity, based on the economic relationship between vendor and purchaser, and to the extent that transactions occur in the context of a market order, that relationship will be determined by the laws of the market. When the European Economic Community (EEC) was established in 1957, its objectives were to create a common market to ensure economic integration, creating the optimum allocation of resources and economic growth throughout the Member States.⁵⁰ Thus the primary objective of public procurement regulation is market access and the abolition of barriers and obstacles to trade.⁵¹ This perspective reflects the sui generis nature of public markets and has provided ground for developing a regulatory system which is strongly influenced by neoclassical economics, with a focus on *efficiency* and the need for *competition* to create optimal conditions for *welfare gain* developing into a *neoliberal economic approach to market integration*.⁵² This approach underlies the reliance of EU public procurement regulations on the free market to guarantee the fundamental freedoms of the Treaty of the Functioning of the European Union (TFEU) and to implement the economic policy of opening up public procurement to competition.⁵³

Trepte explains that procurement regulation has been developed largely by societies which rely on economics concepts such as *welfare economics*, which relies on the *invisible hand* to explain the *market economy's* market mechanism, and *the theory of comparative advantage*, which explains the beneficial effects of international trade and underlies the internal market. Procurement regulation is seen as an instrument in the pursuit of economic welfare, which is achieved, in part, by pursuing the objective of economic or 'allocative' *efficiency*. This, in turn, gives rise to further considerations. First, regulation can be seen as an attempt to correct market and institutional failures in order to achieve the goal of *economic efficiency*. Secondly, this goal may be seen as insufficient in itself as a means of achieving economic welfare because it is based on the assumption that optimal economic welfare will result from the perfect functioning of the *free market* and the achievement of allocative efficiency.

These concepts arise from mainstream or orthodox economics⁵⁴ which are associated with neoclassical economics⁵⁵ and which, since the mid-20th century, have included the Keynesian approach to macroeconomics and the ascendancy of neoliberal thinking in economic theory and policy.⁵⁶ There are many critics of this mainstream approach⁵⁷ and its normative bias⁵⁸ which is evident in procurement regulation and its reliance on economic concepts such as *efficiency*, *value for money* and *competition*. As pointed out by Trepte himself, 'these concepts are merely labels and it is misguided simply to continue to repeat them.' Regulation requires commonality and consistency, but the ubiquity of such 'common' concepts belies the complexity behind the labels and the assumptions that have been made in the process leading to their use. To understand and challenge the separation of the market from the social, I use Polanyi's concept of embeddedness and engage a law and political economic framework to describe the context that public procurement operates within. A law and political economy approach

⁵⁰ Paul Craig and Graine de Búrca, *The Evolution Of EU Law* (Oxford University Press 2011) 642.

⁵¹ Christopher Bovis, *The Law of EU Public Procurement* (Oxford University Press 2016) 7.

⁵² See Bovis 'Public Procurement and the Internal Market of the 21st Century' (n.35).

⁵³ Graells (n 7) 6.

⁵⁴ Paul A Samuelson and William D Nordhaus, *Economics* (McGraw Hill 2010).

⁵⁵ Barry Stewart Clark, *Principle Of Political Economy* (Praeger 1998); Robert Nadeau, *The Wealth Of Nature* (Columbia University Press 2003).

⁵⁶ Deborah Johnson and Alfredo Saad-Filho, *Neoliberalism: A Critical Reader* (Pluto Press 2005).

⁵⁷ See Chapter 8 in Lee Boldeman, *The Cult Of The Market* (ANU E Press 2007).

⁵⁸ Robert H Nelson, *Economics As Religion* (Pennsylvania State University Press 2014) i.

highlights how economic policy is not a neutral activity but represents the outcome of a political and social struggle.⁵⁹

Understanding the context is essential for identifying the tensions when implementing social policies, as the including social considerations is affected by both the particularities of the procurement and the environment within which procurement takes place, including the positions and perspectives of the actors involved in policy processes. To explore this further, we survey three levels of analysis: public procurement regulation, the creation of social value, and individual Member States' social clauses and evaluation practices. This chapter attempts to contextualise the political development of the economic concepts relied on in procurement regulation. The goal is to show how this economic approach by the EU to market integration influences how social value is conceived.

2.3 Mainstream Economics and the Market

2.3.1 Classical Economics - Competition, the Invisible Hand and Comparative Advantage

Markets have been described as networks constituted by acts of buying and selling, usually through the medium of money.⁶⁰ In recent history, markets came to be accepted as central to society, leading to a vigorous political debate, which is ongoing, about the appropriate relationship between the two. The publication of Adam Smith's *The Wealth of Nations* in 1776 provided a charter for 'the market' to assume its place as the dominant institution of modern societies⁶¹. The idea of economy, which started out as a principle of rural household management, now became closely identified with markets, as did the theory of economics which grew up to study them. Classical economics emerged from the work of Smith⁶² and was furthered by Ricardo,⁶³ Say⁶⁴ and Malthus⁶⁵ with the principle idea that the pursuit of *self-interest* by individual economic actors produces a socially beneficial outcome in the form of maximum national wealth. This paradoxical outcome is made possible by the power of *competition* in the market. In their attempts to make profits, producers strive to supply cheaper and better things, ultimately producing their products at the minimum possible cost, thus maximising national output. This idea is known as the *invisible hand*, and it is still reflected in the modern conception of the market: an autonomous sphere of human activity and ideally an object of scientific knowledge.⁶⁶

Ricardo went on to develop a new theory of international trade, known as the *theory of comparative advantage*: under certain assumptions, even when a country cannot produce any product more cheaply than another country can, free trade between them will allow both to maximise their outputs. They can achieve this outcome by specialising in, and

⁵⁹ I am using Paul Phillips's general definition of 'political economy' here as the guiding definition—'a fusion of economic and political theory into one single social theory' in Paul Arthur Phillips, *Inside Capitalism* (Fernwood 2003) 1.

⁶⁰ Chris Hann and Keith Hart, *Economic Anthropology* (Polity Press 2018).

⁶¹ See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1st edn W. Strahan 1776) 1.

⁶² *ibid* 1.

⁶³ David Ricardo, *On the Principles of Political Economy and Taxation* (1st edn, John Murray 1817).

⁶⁴ Jean Baptiste Say, *A Treatise On Political Economy: or the Production, Distribution, and Consumption of Wealth* (translated from the 4th edn of the French by C.R. Prinsep).

⁶⁵ Thomas Malthus, *An Essay on The Principle of Population* (1st edn 1798, unrevised).

⁶⁶ Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem 2002); J. K. Galbraith, *A History of Economics: The Past as the Present* (Penguin 1989); Tony Asprmourgos, *On the Origins of Classical Economics: Distribution and Value from William Petty to Adam Smith* (Routledge 1996).

exporting, products in which they have comparative advantage: those with the largest relative cost advantages in the case of the more efficient country and those with the smallest relative cost disadvantages in the case of the less efficient country.⁶⁷ Ricardo's theory of comparative advantage, while having clear limitations as a static theory that takes a country's technologies as given, is still regarded as the most important concept in international trade.⁶⁸

2.3.2 The Neoclassical School⁶⁹

The neoclassical school (also known as *marginalism*) arose in the 1870s from the works of Jevons⁷⁰ and Walras⁷¹ and was firmly established with the publication of Alfred Marshall's *Principles of Economics* in 1890.⁷² At this time, neoclassical economists succeeded in changing the name of the discipline from the traditional term 'political economy' to 'economics', signalling that the neoclassical school wanted its analysis to be seen as a pure science, free from political (and thus ethical) dimensions that involved what were seen as subjective value judgements. The neoclassical school claimed to be the intellectual heir of the classical school but felt itself to be sufficiently different to attach the prefix 'neo'. The key differences included an emphasis on the role of *demand conditions* (derived from the subjective valuation of products by consumers) in the determination of the value of a good. Classical economists believed that the value of a product is determined by supply conditions—that is, the costs of its production. They measured the costs by the labour time expended in producing it; this is known as the *labour theory of value*. Neoclassical economists emphasised that the *value* (which they called the price) of a product also depends on how much the product is valued by potential consumers; the fact that something is difficult to produce does not mean that it is more valuable. Marshall refined this idea by arguing that demand conditions matter more in determining prices in the short run, when supply cannot be changed, whereas supply conditions matter more in the long run, when more investments (disinvestments) can be made in facilities to produce more (less) of what is demanded more (less). The school conceptualised the economy as a collection of rational and selfish individuals rather than as a collection of distinct classes, as the classical school had done. The individual as envisaged in neoclassical economics is quite one-dimensional: a 'pleasure machine', devoted to the maximisation of pleasure (utility) and the minimisation of pain (disutility), usually in narrowly defined material terms. For the classical school, especially for Adam Smith, production was at the heart of the economic system. The neoclassical school shifted the focus of economics from *production* to *consumption and exchange*, where the economic system is essentially envisaged as a web of exchanges ultimately driven by choices made by 'sovereign' consumers. Despite these differences, the neoclassical school inherited and developed two central ideas from the classical school. The first is

⁶⁷ 'Comparative' in comparative advantage refers to comparison between the products that a country can potentially produce. The possibility that one country is more efficient than another in producing the same product is already reflected in the term advantage.

⁶⁸ Douglas A Irwin, *Against The Tide* (Princeton University Press 1998) Chpt. 40.

⁶⁹ See Roger E. Backhouse, 'Sidgwick, Marshall, And The Cambridge School Of Economics' (2006) 38 *History of Political Economy* 44; Paul S. Boyer (ed.), *The Oxford Companion to United States History* (Oxford University Press, 2001) 43; Sidney Fine, *Laissez Faire and the General Welfare State: A Study of Conflict in American Thought, 1805–1901* (University of Michigan Press 1956).

⁷⁰ W. Stanley Jevons, *The Principles of Political Economy* (1871).

⁷¹ Leon Walras, *The Concise Encyclopedia of Economics. Library of Economics and Liberty* (2nd edn, Liberty Fund 2008).

⁷² Alfred Marshall, *Principles of Economics* (revised edn, Macmillan; reprinted by Prometheus Books 1920).

that although economic actors are driven by self-interest, the *competition* in the market ensures that their actions collectively produce a socially benign outcome. The other is the idea that markets are self-equilibrating. The conclusion is, as in classical economics, that the *market economy*, is a system that is best left alone, as it tends to revert to the equilibrium.

This *laissez-faire* conclusion of the neoclassical school was further intensified by a critical theoretical development by Pareto⁷³ in the early twentieth century, intended to allow the judgement of social improvements objectively. He argued that, if the rights of every individual are to be respected, we should consider a social change an improvement only when it makes some people better off without making anyone worse off. There should be no more individual sacrifices in the name of the ‘greater good’. This is known as the *Pareto criterion* and forms the basis for judgements on social improvements in neoclassical economics. Chang and others point out that in real life there are few changes that hurt no one; thus the Pareto criterion effectively becomes a recipe to stick to the status quo and let things be: *laissez-faire*. Its adoption thus imparted a huge conservative bias to the neoclassical school.⁷⁴

Two theoretical developments in the 1920s and the 1930s severed the link between neoclassical economics and the advocacy of free market policies. The first was the birth of *welfare economics*, or the market failure approach, developed by Cambridge professor Arthur Pigou in the 1920s.⁷⁵ Pigou argued that there are occasions when market prices fail to reflect the true social costs and benefits. For example, a factory may pollute air and water because air and water have no market prices, and thus it can treat them as free goods. But as a result of such an ‘over-production’ of pollution, the environment is destroyed, and society suffers. The effects of some economic activities are not priced in the market and are thus not reflected in economic decisions. Such effects are known as *externalities*. In this case, it would be justified for the government to make the factory, which is said to create a negative externality, pollute less through pollution taxes or regulations. Conversely, there may be activities that represent positive externalities. An example may be research and development (or R&D) activities conducted by a company. By generating new knowledge that can be used by others, R&D creates more value than what accrues to the company conducting it. On this occasion, to generate more R&D, the government would be justified in paying subsidies to anyone who engages in it. Subsequently, other types of market failures were added to Pigou’s externality. A minor yet important modification came in the 1930s in the form of the *compensation principle*.⁷⁶ This principle proposes that a change may be deemed a social improvement even when it violates the Pareto criterion (in the sense of creating some losers), if the total gains for the gainers are large enough to compensate all the losers and still leave a benefit behind. By allowing them to endorse a change that may hurt some people (but can fully compensate for their damages), the compensation principle has allowed neoclassical economists to avoid the ultra-conservative bias of the Pareto criterion.

Thus the neoclassical school no longer needed to be coupled with free market policies, and between the 1930s and the 1970s, many neoclassical economists were not free market economists.⁷⁷ Many argue that the reason current neoclassical economists are free market

⁷³ Vilfredo Pareto, *The Mind and Society [Trattato Di Sociologia Generale]* (Brace 1935).

⁷⁴ Ha-Joon Chang, *Economics: The User’s Guide: A Pelican Introduction* (Penguin 2014) 115.

⁷⁵ Arthur Cecil Pigou, *The Economics of Welfare* (Macmillan and Co, Limited 1921); Gareth D. Myles, *Intermediate Public Economics* (2nd edn, MIT Press 2013).

⁷⁶ John S. Chipman, ‘Compensation Principle’, in *The New Palgrave Dictionary of Economics*, (2nd edn., Palgrave 2008).

⁷⁷ A.M.C. Waterman, ‘New Political Economies’ Then And Now: Economic Theory And The Mutation Of

leaning is actually due more to the shift *in political ideology* since the 1980s than to the absence or the poor quality of theories within neoclassical economics identifying the limits of the free market.⁷⁸

The neoclassical school has been criticised for the assumption that people are selfish and rational. Evidence amassed by scholars in other disciplines, such as psychology, anthropology and sociology, unequivocally finds against this assumption.⁷⁹ Another criticism of neoclassical economics is its acceptance of the underlying social and political structure—that is, how money and power are distributed—as fixed when analysing individual choices. It does not consider choices that require fundamental social changes. For example, Nobel prize winner Paul Krugman, the famous ‘liberal’ neoclassical economist, argued that we should not criticise low-wage factory jobs in poor countries because the alternative may be no jobs at all for those workers.⁸⁰ Chang and others point out that this claim is only true if the underlying socioeconomic structures are seen as unchangeable. But what if the low-wage countries also managed to generate large increases in productivity? If laws were introduced to strengthen worker rights, the choice for workers could be between low-wage jobs and higher-wage ones, rather than between low-wage jobs and no jobs.⁸¹ The neoclassical school’s focus on exchange and consumption fosters a neglect of the sphere of *production*, which is a large part of our economy—and the most important, according to many other schools of economics.

2.4 Law, Political Economy and Market Theory

It is generally agreed that the main objective of public procurement regulation in the EU is to ensure market access and abolish barriers and obstacles to trade. This perspective reflects the *sui generis* nature of public markets and has provided ground for developing a regulatory system which is strongly influenced by neoclassical economics, with a focus on efficiency and the need for competition to create optimal conditions for welfare gain.⁸² Trepte states that, ‘[P]rocedure law and regulation cannot be dissociated from the economics of procurement. To do so is to lose the basis for a fundamental understanding of the nature and purpose of such regulation’.⁸³ Public procurement regulation is seen as economic regulation,⁸⁴ and in general a law and economics approach is used, relying on free market economic principles and theory.⁸⁵ Therefore, it has been assumed that once rules to eradicate market barriers are put into place, the efficient operation of the market—when left to its own devices—will ensure that the public sector is served by the most efficient suppliers. This in turn will lead to significant savings in public expenditure.

Political Doctrine' (2002) 61 *American Journal of Economics and Sociology* 13.

⁷⁸ Luiz Carlos Bresser-Pereira, ‘The Global Financial Crisis, Neoclassical Economics, and the Neoliberal Years Of Capitalism’, (2010) *Revue de la Régulation. Capitalisme, Institutions, Pouvoirs* 7; Ha-Joon Chang, *Economics: The User’s Guide* (n 68) 115.

⁷⁹ Jacek Tittenbrun, ‘The Death Of The Economic Man’ (2013) 11 *International Letters of Social and Humanistic Sciences* 34; Luiz Carlos Bresser-Pereira, ‘The 2008 Financial Crisis And Neoclassical Economics’ (2010) 30 *Revista de Economia Política* 3.

⁸⁰ Paul Krugman, ‘In Praise Of Cheap Labor’ (*Slate Magazine* 2019).

<http://www.slate.com/articles/business/the_dismal_science/1997/03/in_praise_of_cheap_labor.html> accessed 30 June 2019.

⁸¹ Ha-Joon Chang, *Economics: The User’s Guide* (n 68) 115; William Greider, *One World, Ready Or Not* (Simon & Schuster 1997).

⁸² Bovis, *The Law of EU Public Procurement* (n 45) 7.

⁸³ Trepte, *Regulating Procurement* (n 38) viii.

⁸⁴ Graells, *Public Procurement and the EU Competition Rules* (n 7) 33 See also John Whelan and Edwin Pearson, ‘Underlying Values in Government Contracts’ (1961) 10 *Journal of Public Contract Law* 298.

⁸⁵ *ibid* 25.

It has also been assumed that most of the gains will flow into higher levels of employment and increases in economic growth.

One of the major limitations of the neoclassical approach to public procurement regulation law is captured in the notion of ‘markets left to themselves’. This reflects the perception that markets function according to natural forces or natural laws that public power can choose to act upon or withdraw from. But do markets function in society without a legal and political ordering already in place? At a minimum, public powers provide the legal and material framework conditions within which the economy operates. And this perspective on minimal state involvement needs to be complemented to take into account the detailed ways in which law and political authority condition and affect market relations, transactions and outcomes in practice and in distinct periods.⁸⁶ The free market paradigm is difficult to align with the legal nature of even textbook examples of ‘perfectly competitive’ markets. As Bernard Harcourt has demonstrated with reference to the wheat market in Chicago, the supposedly most perfectly competitive ‘free markets’ are shot through with disciplinary rules and regulations.⁸⁷ There is, one might conclude, no such thing as a ‘self-regulating market’ in which resources are allocated to their most efficient use through the free workings of the price mechanism. ‘Deregulation’ and ‘self-regulation’ are simply names for particular kinds of regulatory and disciplinary regimes.⁸⁸ As Polanyi states, ‘regulation and markets, in effect, grew up together.’ Law and politics structure economic activity both in their absence and in their presence. The most salient question is therefore not whether law and politics shape market activities, but how. The link between the governing apparatus of the state and supposedly ‘free’ private economic interactions has long been a central concern for critical legal scholars.

2.4.1 Keynesian Approach to Macroeconomics⁸⁹

John Maynard Keynes was arguably the most important economist of the 20th century. He redefined the subject by inventing the field of macroeconomics: the branch of economics that analyses the whole economy as an entity that is different from the sum total of its parts. Keynes started from the observation that an economy does not consume all that it produces. The difference—that is, the savings—must be invested if everything that has been produced is to be sold and if all productive inputs, including the labour service of workers, are to be employed (this is known as *full employment*). However, there is no guarantee that savings will equal investment, and investment, whose returns are not immediate, is dependent on investors’ expectations about the future. In turn, these expectations are driven by psychological factors rather than rational calculation, because the future is full of uncertainty.⁹⁰ In some situations, we can rather accurately calculate the probability of each possible contingency. Economists call this risk. Uncertainty applies to immeasurable unknowns and to unknowable unknowns. In an uncertain world, investors may suddenly become pessimistic about the future and reduce their investments, resulting in more savings than are needed, causing a ‘savings glut’. The classical economists thought this glut would sooner or later be eliminated, as the lower demand for savings would drive the interest rate down, making investments more attractive. Keynes

⁸⁶ Justin Desautels-Stein, ‘The Market as a Legal Concept: Classic Liberalism, Modern Liberalism. Pragmatic Liberalism’ in Ugo Mattei and John. D. Haskell (eds) *Research Handbook on Political Economy and Law* (Edward Elgar Publishing 2008) 29 - 44.

⁸⁷ Bernard E Harcourt, *The Illusion Of Free Markets* (Harvard University Press 2011).

⁸⁸ Steven Kent Vogel, *Marketcraft* (Oxford University Press 2018).

⁸⁹ See Alec Cairncross, ‘Keynes, John Maynard, Baron Keynes (1883–1946)’, in *Oxford Dictionary of National Biography* (Oxford University Press 2016).

⁹⁰ John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Macmillan 1936, reprinted 2007); Alvin Hansen, *A Guide To Keynes* (McGraw Hill 1953).

argued against this conclusion. As investment falls, overall spending falls, which then reduces income, given that one person's spending is another's income. A reduction in income in turn reduces savings, which contract to match the now lower investment demand. If excess savings are reduced in this way, there will be no downward pressure on interest rates and thus no extra stimulus for investment. Keynes thought that investment would be high enough for full employment only when the animal spirits—'a spontaneous urge to action rather than inaction'—of potential investors were stimulated by new technologies, financial euphoria and other unusual events. The normal state of affairs, in his view, would be that investment was equated to savings at a level of effective demand (the demand that is actually backed up by purchasing power) that was insufficient to support full employment. To achieve full employment, Keynes argued, the government must use its spending actively to prop up the level of demand.⁹¹

The prevalence of uncertainty in Keynesian economics means that money is not simply an accounting unit or a convenient medium of exchange but is a means to provide liquidity, and therefore the financial market can become a place for speculation. In this market, the buying and selling of an asset is driven not mainly by the ultimate return that it will deliver but by expectations about the future—and, more importantly, by expectations about what other people expect, or as Keynes put it, the 'average opinion about the average opinion'. This, according to Keynes, provides the basis for the herd behaviour that is often witnessed in financial markets, making these markets inherently prone to bouts of financial speculation, boom and ultimately bust.⁹² The Keynesian theory of employment determination maintains that the level of economic activity is determined by the level of aggregate demand. Additionally, Keynesians maintain that capitalist economies are subject to periodic weakness in the process of aggregate demand generation, resulting in unemployment. Occasionally, this weakness can be severe and produce economic depressions, as exemplified by the Great Depression. In such a world, monetary and fiscal policy can stabilise the demand generation process. Whereas Keynesians have always agreed on a common theory of employment determination, they have always been divided regarding a theory of income distribution.⁹³

Having started in 1936 with the publication of his *General Theory*, the Keynesian revolution in economic thinking had by the end of the 1940s elevated John Maynard Keynes's ideas to an ascendant position in mainstream economics.⁹⁴ The Great Depression caused neoclassicism to be rejected and replaced with policy prescriptions that approved of government intervention in the market to ensure full employment. The new post-World War II international monetary and trading system, reflected by embedded liberalism⁹⁵, was partly a creation of Lord Keynes, and not just theoretically. Keynes had personally negotiated many of the practical details at the 1944 Bretton Woods Conference. During the 'Golden Age of Capitalism' of the 1950s and 1960s, the governments of the United States, Great Britain and many other countries adopted Keynesian principles⁹⁶;

⁹¹ *ibid.*

⁹² *ibid.*; Robert W. Dimand, 'Macroeconomics, Origins and History of' in Steven N. Durlauf and Lawrence E. Blume (eds), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan 2008).

⁹³ Thomas Palley, 'From Keynesianism To Neoliberalism: Shifting Paradigms In Economics' (2004) *Foreign Policy in Focus* 45.

⁹⁴ Peter A. Hall, *The Political Power Of Economic Ideas* (Princeton University Press 1989).

⁹⁵ John Ruggie, 'International Regimes, Transactions, And Change: Embedded Liberalism In The Postwar Economic Order' (1982) 36 *International Organization* 23. The term was later used by many international political economy scholars and economic historians.

⁹⁶ John M. Keynes, *The General Theory of Employment* (n 84) ; Galbraith, *A History of Economics: The Past as the Present* (n 60) 76. See also Robert Heilbron, *The Worldly Philosophers* (revised 7th edn, Penguin 2000) 248–87.

Keynesians believed moderate intervention by governments in their domestic economies delivered higher levels of employment and prosperity than would be possible from the unaided free market.⁹⁷

2.4.2 Embedded Liberalism

Embedded liberalism was a concept first coined by John Ruggie in the 1980s, and it broadly captures the fundamental principle upon which the new international economic system was established in the early post-war period.⁹⁸ For Ruggie, ‘embedded liberalism’ referred to a multilateral economic system based not only on liberal principles but also on government intervention to address issues of domestic stability. Drawing lessons from the economic crisis of the inter-war era, the architects of Bretton Woods recognised that governments would need to assume far more direct responsibility for their nations’ social and economic stability. In contrast to the classical liberal system in which monetary policy had been dictated by movements in the international balance of payments, under Bretton Woods a fixed exchange rate and capital control would give states greater leeway to utilise both fiscal and monetary policy for domestic purposes. While societies were asked to embrace the uncertainties and risks that accompanied a liberal market, the state would mitigate these effects through its newly acquired domestic, economic and social policy roles. For Ruggie, this shift ‘fundamentally transformed state-society relations by redefining the legitimate social purposes in pursuit of which state power was expected to be employed’ and ‘reflected the shared legitimacy of a set of social objectives to which the industrial world had moved, unevenly, but as a single entity’.⁹⁹

Embedded liberalism as characterised by Ruggie is generally described as involving a compromise between *two conflicting objectives*.¹⁰⁰ The first objective was to revive free trade. Before World War I, international trade formed a large portion of global GDP, but the classical liberal order which supported it had been damaged by war and by the Great Depression of the 1930s. The second objective was to allow national governments the freedom to provide welfare programmes and to intervene in their economies to maintain full employment. This was considered to be incompatible with a full return to the free market system because with a free market in international capital, investors could easily withdraw money from nations that tried to implement interventionist and redistributive policies. The resulting compromise was embodied in the Bretton Woods system,¹⁰¹ which was launched at the end of World War II. The system was liberal¹⁰² in that it aimed to set up an open system of international trade in goods and services, facilitated by semi-fixed exchange rates. Market forces were ‘embedded’ into a framework where they could be regulated by national governments, with states able to control international capital flows by means of capital controls. New global multilateral institutions were created to support the new framework, such as the World Bank and the International Monetary Fund.¹⁰³ During the 1950s and 1960s, embedded liberalism and Keynesian economics were so

⁹⁷ Eric Hobsbawm, *The Age of Extremes: 1914–1991* (2nd edn, Abacus 1995) 102–08.

⁹⁸ John Ruggie, ‘International Regimes, Transactions and Change’(n 89).

⁹⁹ *ibid* 389.

¹⁰⁰ Jonathan Kirshner, ‘Keynes, Capital Mobility And The Crisis Of Embedded Liberalism’ (1999) 6 *Review of International Political Economy* 45; Kathleen R. McNamara, *The Currency of Ideas: Monetary Politics in the European Union* (Cornell University Press 1999); Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge University Press 2002).

¹⁰¹ The Bretton Woods system of monetary management established the rules for commercial and financial relations among the United States, Canada, Western Europe, Australia, and Japan after the 1944 Bretton-Woods Agreement.

¹⁰² The word ‘liberal’ here means supportive of free trade.

¹⁰³ John Ruggie, ‘International Regimes, Transactions and Change’(n 89) 2.

popular that conservative politicians found they had to largely adopt them if they were to have a chance of getting elected. This was especially the case in Britain and was called the post-war consensus, with a similar though somewhat less Keynesian consensus existing elsewhere, including in the United States.¹⁰⁴

2.4.2.1 The end of embedded liberalism

Harvey notes that while embedded liberalism led to the surge of economic prosperity which came to define the 1950s and 1960s, the system began to crack beginning in the late 1960s.¹⁰⁵ For Ruggie, the end of embedded liberalism has led to a discernible shift from the ‘compensatory’ state to a ‘competitive’ one in which greater openness to world markets no longer entails higher levels of government compensation to cushion the resultant social adjustment costs.¹⁰⁶ The 1970s were defined by an increased accumulation of capital and by unemployment, inflation and a variety of fiscal crises.¹⁰⁷ Much of the Western world was in economic stagnation, with high unemployment coupled with high inflation, also known as ‘stagflation’.¹⁰⁸ Among the causes were the 1973 oil crisis and the fall of the Bretton Woods system after the ‘Nixon Shock’.¹⁰⁹ Harvey further notes that ‘the embedded liberalism that had delivered high rates of growth to at least the advanced capitalist countries after 1945 was clearly exhausted and no longer working’.¹¹⁰ A number of theories concerning new systems began to develop, which led to extensive debate between those who advocated for ‘social democracy and central planning on the one hand’ and those ‘re-establishing market freedoms on the other’¹¹¹. Harvey states that by 1980, the latter group had emerged as the leader, advocating and creating a global economic system that would become known as neoliberalism.¹¹² Wendy Brown identifies the emergence of a new mode of governmentality under a neoliberal state in which the latter increasingly acts like a market actor, openly responding to the needs of the market and measuring its own legitimacy on the basis of its ability to successfully sustain and foster the market. More generally, this neoliberal mode of governmentality has meant that market-oriented thinking has extended its reach and influence into spheres of life traditionally governed by non-market norms.¹¹³

¹⁰⁴ Mark Blyth, *Great Transformations* (n 94).

¹⁰⁵ David Harvey, *A Brief History of Neoliberalism* (n 109).

¹⁰⁶ John Ruggie, ‘International Regimes, Transactions and Change’ (n 89).

¹⁰⁷ *ibid* 10.

¹⁰⁸ Peterson, Wallace, ‘Stagflation and the Crisis of Capitalism’ (1980) 38 *Review of Social Economy* 277; Alan S. Blinder, *Economic Policy and the Great Stagflation* (New York, Academic Press 1979).

¹⁰⁹ The Nixon shock was a series of economic measures undertaken by United States President Richard Nixon in 1971, the most significant of which was the unilateral cancellation of the direct international convertibility of the United States dollar to gold. John K. Galbraith, *A History of Economics* (n.90) 269–71.

¹¹⁰ *ibid* 11.

¹¹¹ *ibid* 12.

¹¹² *ibid* 13.

¹¹³ Wendy Brown, ‘Neo-Liberalism And The End Of Liberal Democracy’ (2003) 7 *Theory & Event* 1.

2.4.3 Neoliberalism

Friedrich Hayek¹¹⁴ is considered the grandfather of neoliberalism. For Hayek, the market did not just facilitate trade in goods and services; it revealed objective truth. Hayek's was a total worldview, a way of structuring all reality on the model of *economic competition*. He began by assuming that nearly all (if not all) human activity is a form of economic calculation and so can be assimilated to the master concepts of wealth, value, exchange, cost—and especially price. Prices are a means of allocating scarce resources efficiently, according to need and utility, as governed by supply and demand. For the price system to function efficiently, markets must be free and competitive. He believed that the market is not just one piece of society but society as a whole. Within such a society, people need only follow their own self-interest and compete for scarce rewards.¹¹⁵ Through competition, 'it becomes possible', as the sociologist Will Davies has written, 'to discern who and what is valuable'¹¹⁶. What makes neoliberalism 'neo' is the modification of the older belief in a free market and a minimal state known as 'classical liberalism'. Classical liberalism equalled *laissez-nous faire*. Neoliberalism, however, recognised that the state must be active in the organisation of a market economy. The conditions allowing for a free market must be won politically, and the state must be re-engineered to support the free market on an ongoing basis. Every aspect of democratic politics, from the choices of voters to the decisions of politicians, must be submitted to a purely economic analysis. The lawmaker is obliged to leave well enough alone—to not distort the natural actions of the marketplace—and so, ideally, the state provides a fixed, neutral, universal legal framework within which market forces operate spontaneously. The conscious direction of government is never preferable to the 'automatic mechanism of adjustment'—that is, *the price system*, which it is argued is not only efficient but also maximises liberty, or the opportunity for people to make free choices about their own lives. Stephen Metcalf argues that, left to its own devices, the price system functions as a kind of omniscient mind. Economics ceases to be a technique—as Keynes believed it to be—for achieving desirable social ends, such as growth or stable money. In its omniscience, the market constitutes the only legitimate form of knowledge. Individual values are not seen as subjective; collectively, the market converts them into prices, or objective facts. In so doing, it puts any value that cannot be expressed as a price—as the verdict of a market—on an equally unsure footing, as nothing more than opinion, preference, folklore or superstition.¹¹⁷

It was the post-war Chicago economist Milton Friedman who helped convert governments and politicians to the power of Hayek's big idea. But first he broke with two centuries of precedent and declared that economics is 'in principle independent of any particular ethical position or normative judgements' and is 'an "objective" science, in precisely the same sense as any of the physical sciences'. Values of the old, mental, normative kind were defective: they were 'differences about which men can ultimately only fight'. In other words, there is the market, and there is relativism.

The core of neoliberal discourse is its reliance on neoclassical economics and its belief in the superiority of the market over other types of governance. It represents a set of ideas

¹¹⁴ Oliver Marc Hartwich, 'Neoliberalism: The Genesis Of A Political Swearword' (Centre for Independent Studies 2009).

¹¹⁵ David Harvey, *A Brief History of Neoliberalism* (n 109).

¹¹⁶ William Davies, 'What Is 'Neo' About Neoliberalism?' (*The New Republic*, 2019). <<https://newrepublic.com/article/143849/neo-neoliberalism>> accessed 27 May 2019.

¹¹⁷ Stephen Metcalf, 'Neoliberalism: The Idea That Swallowed The World' (*The Guardian*, 18 August 2017) <<https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>> accessed 30 August 2018.

concerning which actors and institutions can best approximate the ideal-type market economy. These ideas include a ‘minimalist welfare state, taxation, and business regulation programmes; flexible labour markets and decentralised capital and labour relations unencumbered by strong unions and collective bargaining; and the absence of barriers to international capital mobility’¹¹⁸. Following this line, neoliberals insist on the need for general ‘deregulation’ and for the state to abstain from intervention in the economy. Liberalisation and privatisation of public activities are major elements of this argumentation. This is paired at the macroeconomic level with a focus on sound money and the primacy of fighting inflation, following the growing prominence of monetarist ideas. The reduction of budget deficits has become a central objective with reliance on *the theory of comparative advantage*. Contrary to the key role of public expenditure in regulating the economy in the Keynesian era, the new neoliberal/monetarist consensus argues for modest and balanced budgets and against public debt. At this level, too, privatisation and liberalisation of public sector activities are major elements, presented as ways of reducing government expenditure by cutting subsidies and raising revenue through the sale of assets.

2.4.3.1 The Neoliberalism era

The neoliberal era is commonly said to have begun in the 1980s. The rise in unemployment, inflation and economic stagnation in the West called into question the viability of Keynesian demand management, planning and public ownership. State intervention in the economy was increasingly deemed to be inefficient and inflationary, ‘crowding out’ private investment and reducing an economy’s attractiveness to international capital.¹¹⁹ Neoliberalism is also known as the Washington Consensus view,¹²⁰ referring to the fact that it is strongly supported by the three most powerful economic organisations in the world, all based in Washington, D.C.: namely, the U.S. Treasury, the International Monetary Fund (IMF) and the World Bank. Neoliberalism upheld a commitment to free trade, as had the previous era. Similar to the era of classical economic liberalism, neoliberalism involved the ‘*dis-embedding*’ of markets—at a policy level, some of the main changes involved pressure for governments to abolish their capital controls and to refrain from economic interventions.¹²¹ In Britain and the United States, domestic free market reforms were pursued most aggressively from about 1980–85. From a global perspective, the peak years of neoliberal influence were the 1990s.¹²² Yet by 1999, various adverse economic events, especially the 1997 Asian financial crisis and the harsh response by the IMF, had already caused free market policies to be at least partially discredited in the eyes of developing world policy makers, especially in Asia and South America.¹²³ By 2009, in the wake of the 2008 worldwide financial crisis, a number of journalists, politicians and senior officials from global institutions such as the World

¹¹⁸ John Campbell and Ove Pedersen, ‘Introduction’, in John Campbell and Ove Pedersen (eds.), *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press 2001) 5.

¹¹⁹ Guy Standing, *Global Labour flexibility. Seeking distributive justice* (Macmillan 1999) 74.

¹²⁰ John Williamson, ‘What Washington Means by Policy Reform’ in John Williamson (ed) *Latin American Readjustment: How Much has Happened* (Institute for International Economics 1989).

¹²¹ John Gerard Ruggie, *Globalization And The Embedded Liberalism Compromise* (Max Planck Institute for the Study of Societies 1997).

¹²² Bradley Bateman, Hirai Toshiaki and Maria Cristina Marcuzzo, *The Return to Keynes* (Harvard University Press 2010) Ch 1.

¹²³ Duncan Green, *Silent revolution: The rise and crisis of market economics in Latin America* (NYU Press 2003); Eirc Helleiner and others in John Ravenhill (ed) *Global Political Economy* (Oxford University Press 2005).

Bank began saying that the Washington Consensus was over¹²⁴. The fact is, however, that this policy paradigm appears largely intact several years after the dawn of the financial crisis.¹²⁵ Davies posits that the ‘liberal spirit’ of neoliberalism is kept alive by the authority that was bestowed upon methodologies, audits and measures of efficiency analysis; the purported neutrality of the economic method; and the broadening of the ‘arena’ in which competition is understood to take place, which is beyond definable markets and beyond the sphere of the ‘economy’, enabling cultural, social and political resources to be legitimately dragged into the economic ‘game’¹²⁶.

2.5 EU: A Social Economic Model?

To examine the relationship between the social and the market within the context of the EU and internal market integration, it is necessary to take a step back and look at the original EEC Treaty. This treaty has been described as a system of embedded liberalism—a combination of external trade liberalisation and domestic interventionism.¹²⁷ The idea behind the ‘social bargain’ of embedded liberalism was that through domestic interventionism the socially disruptive effects of free trade would be mitigated without eliminating the economic gains that could be derived from open markets.¹²⁸ The supranational bodies of the then EEC were tasked with ‘negative integration’ relying on ‘economic rationality’, while the politically sensitive decisions requiring broad social consensus were left to the Member States.¹²⁹ A division was envisaged between ‘the Economic Constitution’ and nationally embedded social law and policies,¹³⁰ creating a supranational market order ‘de-coupled’ from the national democratic social constitutions of the Member States,¹³¹ and thus de-coupling the economic from the social.

2.5.1 Social Market Economy

The term ‘social market economy’ is an ambiguous one¹³² and can be defined as a socioeconomic model combining a free market capitalist economic system alongside

¹²⁴ Robert Skidelsky, ‘Keynes: The Return Of The Master: Why, Sixty Years After His Death, John Maynard Keynes is the Most Important Economic Thinker for America’ (Public Affairs 2009); Helene Cooper and Charlie Savage, ‘A Bit of ‘I Told You So’ Outside World Bank Talks’ *The New York Times* (10 October 2008); Anthony Painter ‘The Washington consensus is dead’ *The Guardian* (10 April 2009).

¹²⁵ William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition (Theory, Culture & Society)* (SAGE Publications Kindle Edition) 4.

¹²⁶ *ibid* 192.

¹²⁷ Wolf Sauter and Harm Schepel, *State and Market in European Union Law: The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge Studies in European Law and Policy) (Kindle edn, Cambridge University Press 2009) Kindle Locations 787–789.

¹²⁸ Stefano Giubboni, *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective* (Cambridge University Press 2006).

¹²⁹ Václav Šmejkal and Stanislav Šaroch, ‘EU as a Highly Competitive Social Market Economy – Goal, Options, and Reality’ (2014) 14 (4) *Review of Economic Perspectives* 345.

¹³⁰ Christian Joerges, ‘What is Left of the European Economic Constitution? A Melancholic Eulogy’, (2005) 30 *European Law Review* 461; Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis* (Cambridge University Press 2014) 13; Christian Joerges, ‘The European Economic Constitution and its Transformation through the Financial Crisis’ (ZenTra Working Papers in Transnational Studies No 47/2015); Herwig Hofmann and Katerina Pantazatou, ‘The Transformation of the European Economic Constitution’ (University of Luxembourg Law Working Paper 2015).

¹³¹ Fritz W. Scharpf, ‘The Asymmetry Of European Integration, Or Why The EU Cannot Be A ‘Social Market Economy’ (2009) 8 *Socio-Economic Review* 211.

¹³² For a thorough explanation, see Václav Šmejkal and Stanislav Šaroch, ‘EU As A Highly Competitive Social Market Economy –Goal, Options, And Reality’ (2015) 14 *Review of Economic Perspectives* 395.

social policies and which establishes both fair competition within the market and a welfare state.¹³³ The social market economy was designed to be a third way between *laissez-faire* economic liberalism and socialist economics. Furthermore, the social market economy was strongly inspired by *ordo* liberalism, social democratic ideas, and the tradition of Catholic social teaching or, more generally, Christian ethics.¹³⁴ The social market economy refrains from attempts to plan and guide production, the workforce or sales, but it does support planned efforts to influence the economy through the organic means of a comprehensive economic policy coupled with flexible adaptation to market studies. Effectively combining monetary, credit, trade, tax, customs, investment, and social policies, as well as other measures, this type of economic policy creates an economy that serves the welfare and needs of the entire population, thereby fulfilling its ultimate goal.¹³⁵ The ‘social’ element named in the model refers to support for the provision of equal opportunity and the protection of those unable to enter the free market labour force because of old age, disability, or unemployment.¹³⁶

2.5.2 The State, National Social Models, and Economic Models

The state and the state system are key focal points for law and political economy analysis. The state remains a primary locus of political allegiance and continues to provide the main stage for ideological, distributive, and identity conflicts and struggles. Following Esping-Andersen’s¹³⁷ typology to classify national social models, we can say that the Netherlands is classified as social democratic: a welfare state model based on the principle of universalism, granting access to benefits and services based on citizenship. Such a welfare state is said to provide a relatively high degree of citizen autonomy, limiting reliance on family and market with social policies perceived as ‘politics against the market’.¹³⁸ The UK system has been classified as a liberal welfare state system based on market dominance and private provision; ideally, in this model, the state interferes only to ameliorate poverty and provide for basic needs, largely on a means-tested basis. Hence, the decommodification potential of state benefits is assumed to be low and social stratification high. Ireland has been classified as a hybrid, with Esping-Andersen locating it within the liberal model and others taking the view that Ireland is more mixed: it is a welfare state shaped not by the urban working class but by rural tenant farmers, dominated by conservative values and colonial legacy.¹³⁹ As regards European economic models, the classification of different varieties of capitalism¹⁴⁰ provides similar categories: the liberal (or Anglo-Saxon) model is based on minimalist conceptions of the state, support for competitiveness and decentralised industrial relations. UK and Ireland fall into this category. The coordinated model (combining the Nordic welfare capitalisms and the conservative models) is characterised by state interventionism, sector-wide or even national level collective bargaining and

¹³³ Ralph Wrobel, 'The Social Market Economy As A Model For Sustainable Growth In Developing And Emerging Countries' (2012) 12 *Economic and Environmental Studies* 54.

¹³⁴ Nils Goldschmidt and Hermann Rauchenschwandtner, 'The Philosophy of Social Market Economy: Michel Foucault's Analysis of Ordoliberalism' (Universität Freiburg, 2007).

¹³⁵ The CDU and the 'Social Market Economy': Düsseldorf Guidelines for Economic Policy, Agricultural Policy, Social Policy, and Housing (15 July 1949).

¹³⁶ Marcus Marktanner, 'Addressing The Marketing Problem Of The Social Market Economy', *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Bloomsbury Publishing 2017).

¹³⁷ Gøsta Esping-Andersen, *The Three Worlds Of Welfare Capitalism* (Polity Press 2009).

¹³⁸ Gøsta Esping-Andersen, *Politics Against Markets* (Princeton University Press 1985).

¹³⁹ Michelle Norris, *Property, Family And The Irish Welfare State* (Palgrave 2016).

¹⁴⁰ Peter A Hall and David Soskice, *Varieties Of Capitalism* (Oxford University Press 2013).

some degree of concertation as well as the coordination of activities within market sectors, rather than in competitive structures. The Netherlands falls into this category. The overall European national social and economic models converge on a common core: social models share the idea that societies have a responsibility for individuals' well-being,¹⁴¹ and economic models are concerned with organising society—regulating markets to avoid distortion of competition while at the same time tackling social inequalities.¹⁴²

¹⁴¹ Dagmar Schiek, 'The European social model and the Services Directive' in Ulla Neergaard and others (eds) *The Services Directive - Consequences for the Welfare State and the European Social Model* (Copenhagen, DJØF Publishing 2008) 25.

¹⁴² Kurt Bursch, 'Euro Crisis, Austerity Policy And The European Social Model How Crisis Policies In Southern Europe Threaten The EU'S Social Dimension' (Friedrich Ebert Stiftung 2013).

Chapter 3: Public Procurement Regulation and Horizontal Policies in the EU

3.1 Introduction

This chapter provides the background to the development of public procurement regulation within the political and economic framework detailed in chapter 1. I analyse the expanding discretion of Member States to integrate horizontal considerations, from the development of the first directives to the evolving case law of the European Court of Justice and the creation and implementation of the 2014 Procurement Directives. I also trace and examine the tension between the economic dimensions of EU integration and the social concerns of individual Member States, and the role it has in giving national governments the discretion to pursue social policies.

3.2 The Treaties

The basic objectives of the EC are set out in Article 2 of the EC Treaty. The original article provides that:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

The amendments to this definition by subsequent Treaties have significant consequences for the current investigation. However, to appreciate the context in which the procurement system of the EC was developed, it is necessary to take a historical view.⁵ This will enable us to consider the objectives at the heart of this system of regulation and to identify where it has evolved and the extent to which its original objectives have been supplemented.

To accomplish the task of establishing the common market, both the Community institutions and the Member States are entrusted with certain obligations. Article 3 sets out the means by which this objective is to be achieved.¹⁴³ These include the elimination of both customs duties and quantitative restrictions on the import and export of goods and of all measures having equivalent effect;¹⁴⁴ the establishment of a common customs tariff and of a common commercial policy towards third countries;¹⁴⁵ the abolition of obstacles to the freedom of movement of persons, services and capital;¹⁴⁶ the institution of a system ensuring that competition in the common market is not distorted;¹⁴⁷ and the approximation of the laws of the Member States to the extent required for the proper functioning of the common market.¹⁴⁸ Member States, on the other hand, are required to take all appropriate

¹⁴³ Trepte, *Regulating Procurement* (n 38).

¹⁴⁴ Article 3 (a).

¹⁴⁵ Article 3 (b). The effect of Article 3(a) and (b) is to establish a customs union, i.e. an area without internal tariffs or quantitative restrictions which is subject to a common external tariff which forms the basis for the common external trade policy of its Member States.

¹⁴⁶ Article 3 (c).

¹⁴⁷ Article 3 (f).

¹⁴⁸ Article 3 (h). Approximation of law means that countries aspiring to join the European Union must align their national laws, rules and procedures in order to give effect to the entire body of EU law contained in the *acquis communautaire*.

measures to ensure fulfilment of the obligations arising out of the Treaty or from actions taken by the institutions of the Community and to facilitate the achievement of their tasks. Member States should in addition abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.¹⁴⁹ Finally, Article 7 prohibits any discrimination on grounds of nationality.

These objectives and principles form the framework within which Community policies are developed and applied and the Treaty provisions are implemented by way of regulations, directives and decisions issued by the Community institutions which are either directly applicable in the Member States or which must be transposed into national law by the states. Both the Treaty and the ‘secondary legislation’ contained in these implementing provisions are capable of creating rights and obligations for the subjects of Community law. The Court of Justice stated very early on that:

[t]he European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.¹⁵⁰

3.2.1 The Treaties and Procurement

The Treaty of Rome (and the subsequent treaties amending it, together referred to as ‘the Treaties’) includes no explicit mention of public procurement.¹⁵¹ However, several treaty provisions have been applied and remain applicable to public procurement; specifically the rules and principles instituting and guaranteeing the proper operation of the single market. Of the fundamental principles, the most relevant in terms of public procurement are the following:

- 1) the prohibition against discrimination on grounds of nationality (Article 18 TFEU);
 - 2) the free movement of goods and the concomitant prohibition of quantitative restrictions on imports and exports and of measures having equivalent effect (Article 34 TFEU et seq);
 - 3) the freedom of establishment (Article 49 TFEU et seq); and
 - 4) the freedom to provide services (Articles 56 TFEU et seq).
- These are considered briefly in turn.

3.2.1.1 The rules prohibiting any discrimination on grounds of nationality

This principle embodies a standard of national treatment that requires persons in a situation governed by EU law to be placed on a completely equal footing with nationals of any EU member state—that is, in a procurement context, an economic operator from a

¹⁴⁹ Article 5.

¹⁵⁰ Case 26/62 *Van Gend en Loos* [1963] ECR 1, para 3.

¹⁵¹ To date, the amending treaties do not provide for a general regime on public procurement. Article 132(4) EC, now repealed, was the only provision which explicitly referred to public procurement. Article 45(1)(b) TEU is the only instance where procurement is explicitly referred to: it states that the European Defence Agency is tasked to ‘promote harmonisation of operational needs and adoption of effective, compatible procurement methods’.

member state must be treated in the same way as an economic operator from the contracting authority's member state. This is not the same as the principle of equal treatment, which does not rely on the concept of nationality. This article applies only to EU nationals, individuals and legal persons who are resident in any of the Member States of the Community. Nationals from third countries are excluded from the protection afforded by Article 12 because they are 'not within the scope of application of this Treaty'.

3.2.1.2 The rules on the free movement of goods (Article 34 TFEU et seq)

This principle seeks to prevent the creation of trading rules by EU Member States that are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. The objective is to prevent Member States, through their contracting authorities, from buying only national products ('buy national' campaigns). It applies to both distinctly applicable measures that are clearly intended to discriminate against foreign goods (such as local content clauses) and indistinctly applicable measures that apply equally to local and foreign goods but that nevertheless discriminate indirectly against foreign goods in that their effect is to make market access more difficult for imported products than for local ones. These provisions relating to the free movement of goods apply to both products originating in Member States and products coming from third countries that are in free circulation in Member States. Products coming from third countries are considered to be in free circulation in a member state if the import formalities have been complied with and if any customs duties or charges having equivalent effect that are payable have been levied in that Member State.

3.2.1.3 Freedom of establishment

This principle is designed to guarantee the rights of Community nationals to establish themselves or an agency, branch or subsidiary in the territories of other Member States. It also acts to protect the pursuit of activities of self-employed persons. Thus, an economic operator from a member state will be permitted to carry out a business in another member state through the establishment of a local entity.

3.2.1.4 Freedom to provide services

This principle protects the rights of the nationals of Member States who are established in the Community to provide commercial or professional services in the territories of other Member States. This would include the right of temporary establishment in the territory of another member state for the purposes of providing a service in that member state. Thus, an economic operator based in one member state is entitled to submit a tender in another member state without the need to set up a local entity or representative.

3.2.2 Treaty of Rome: Economic versus Social

The Treaty of Rome has been described as a system of embedded liberalism, a combination of external trade liberalisation and domestic interventionism.¹⁵² The idea behind the social bargain of embedded liberalism was that, through domestic interventionism, the socially disruptive effects of free trade would be mitigated without eliminating the economic gains that could be derived from open markets.¹⁵³ The supranational bodies of the then EEC were tasked with 'negative integration' relying on 'economic rationality', while the politically sensitive decisions requiring broad social

¹⁵² Sauter and Schepel, *State and Market in European Union Law* (n 121) 787–789.

¹⁵³ Stefano Giubboni, *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective* (Cambridge University Press 2006).

consensus were left to the Member States.¹⁵⁴ This division of competences, expressed sometimes in the shorthand ‘Keynes at home, Smith abroad’¹⁵⁵, meant that policies, legislation and case law developed at the EU level were focused primarily on market freedoms.

EU law explicitly acknowledges Member States’ freedom to operate mixed economies in what is now Article 345 of the TFEU, according to which the Treaty ‘shall in no way prejudice the rules in Member States governing the system of property ownership’. The absence of any provisions on social policy in the Rome Treaty can be interpreted as a decision to give discretion to Member States in this area, as opposed to it being a policy choice in favour of economic liberalism. Reich explains that, ‘this was not as a result of a simple omission by the drafters of the Treaty, but of a failure to reach agreement on a set of principles, because of the complexity of the subject matter and the highly sensitive nature of preference policies’.¹⁵⁶

3.3 The Background to the EU Directives

Initially, the focus of the European Commission was on the removal of visible barriers to trade rather than invisible or non-tariff barriers. By 1968, customs duties on intra-Community trade in manufactured goods had been totally abolished and a common external tariff introduced. With the creation of this Customs Union, the Commission had succeeded in abolishing most of the visible barriers to intra-EU trade, and it turned its attention to the removal of non-tariff barriers. Here the two most flagrant examples were national product and technical standards and hidden protectionism in the form of ‘buy national’ public purchasing regimes.¹⁵⁷ General principles of law are difficult to apply in specific situations and tend to be negative in substance: that is, they tend to proscribe incompatible behaviour but do not, at the same time, provide positive guidance on their application in the concrete situations to which they apply. It was deemed necessary, therefore, to introduce procedural conformity to achieve non-discriminatory access to public procurement markets. To underpin the Treaty principles in the field of public procurement and to provide the necessary guidance to Member States, the Community adopted a series of procurement directives. Based on principles of non-discrimination and competitive procurement, the directives are to be seen as a specific application of Treaty principles which complement those principles by applying them in the specific context of public procurement.

In 1971 and then in 1977, the first Community directives were enacted to provide a specific framework enshrining the basic treaty rules applicable to public procurement procedures. These directives¹⁵⁸ aimed at liberalising public procurement practices to ensure the proper operation of the single market. These were the first steps towards eliminating some of the means by which governments avoided open competition through the use of hidden non-tariff barriers. For example, in the case of public works contracts, the directives were applicable to all contracts above 1 million euros and, for public supplies, all contracts over 200,000 euros. Measures were introduced to try to ensure equal conditions for tendering in public procurement contracts and encourage a more

¹⁵⁴ Šmejkal and Saroch, ‘EU as a Highly Competitive Social Market’ (n 126).

¹⁵⁵ Stefano Micossi and Giano I. Tosato (eds), *The European Union in the 21st Century* (Centre for European Policy Studies 2009) 36.

¹⁵⁶ Arie Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (Kluwer 1999) 71–2.

¹⁵⁷ Andrew Cox, *Public Procurement in the European Community: The Single Market Rules and the Enforcement Regime after 1992* (Earlsgate Press 1993) 32.

¹⁵⁸ Council Directive 71/305/EEC of 26 July 1971; Council Directive 77/62/EEC of 21 December 1976.

transparent, open, competitive and efficient public procurement market. However, the directives failed to have the desired impact.

3.3.1 The Growth of Neoliberalism and EU Reform

The 1970s have been referred to as a period of political stagnation for the Community. This period coincided with the start of the technical revolution and the setting in of a recession. Faced with difficult choices, governments were more inclined to protect their domestic industries.¹⁵⁹ The European Commission experienced great difficulty in securing Council agreement to its proposals, and as a result there were significant delays in the attainment of Treaty objectives.¹⁶⁰ Member states were only paying lip service to the trade rules of the General Agreement on Tariffs and Trade (GATT) and of EC (as it was then). The Reagan and Thatcher economic policies enacted in the 1980s favoured market-based ideologies such as deregulation, supply-side tax cuts, privatisation and limited social spending. These policies seemed to stimulate economic growth, resulting in a rise to prominence of neoliberal intellectual ideas.¹⁶¹ After the procurement directives of the 1970s and 1980s, the consensus around embedded liberalism disappeared, ‘both because it was no longer apparent that one could avoid trade-offs between domestic interventionism and open global markets, and also because large numbers of countries were welcomed as members of the multilateral trading system, without any attention to whether they shared even a minimalist conception of appropriate domestic public interest regulation’.¹⁶² In place of the consensus emerged an alternative neoliberal consensus, known as the Washington Consensus, which continued as the dominant paradigm until the mid-1990s. This view held it appropriate to separate the economic forces of globalisation from the social and political realm. ‘On this view’, according to Langille, ‘... the economic ... is prior to and separate from the social (including basic issues of democracy, human rights, equality concerns, etc.), the latter being conceived as a set of luxury goods which might be purchased with the fruits of economic progress generated elsewhere’.¹⁶³ McCrudden notes that this change in ideological approach is duly reflected in changes in EU procurement policy during the 1980s.¹⁶⁴

¹⁵⁹ Paul Craig and Grainne De Búrca, *EU Law – Text, cases and materials* (Oxford University Press 2011).

¹⁶⁰ *ibid.*

¹⁶¹ Cox, *Public Procurement in the European Community* (n 154) 32.

¹⁶² Robert Howse and others, ‘The World Trade Organization and Labour Rights: Man Bites Dog’ in Virginia Leary and Daniel Warner (eds), *Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (Brill Academic 2005) 158.

¹⁶³ Brian Langille, ‘Globalization and the Just Society—Core Labour Rights, the FTAA, and Development’ in John Craig and Michael Lynk, *Globalization and the Future of Labour Law* (Cambridge University Press 2006) 278.

¹⁶⁴ Christopher McCrudden, *Buying Social Justice* (Oxford Univ Press 2013) 108.

3.3.2 Procurement and Internal Market Reforms

In 1985, the Commission published a white paper, ‘Completing the Internal Market’,¹⁶⁵ which argued for the elimination of a series of non-tariff barriers via 282 legislative measures for the completion of the single market. The white paper acknowledged the failure of the 1971 Public Works Directive and the 1977 Directive and the lack of adherence by Member States to the directives. Protectionist public procurement policies by national public bodies would delay the achievement of the single market more generally. The Community had long had an interest in breaking down such protectionist approaches and in stimulating further cross-border activity. Competitive tendering would reduce ‘the burden on the public purse but also enhance macroeconomic growth, since it promotes restructuring and adjustment’.¹⁶⁶ The Single European Act (SEA)—which embodied the 1985 White Paper—represented Member States’ willingness to accept treaty reform, as well as a political commitment to removing the long list of identified barriers to the Single European Market. Although public procurement represented only one of the 282 legislative reforms proposed by the 1985 White Paper, this was enough for the European Commission to take its goals forward. The SEA and the procurement directives adopted following the SEA were based on the new Article 100a (now Article 95), which permitted the Council to adopt, by qualified majority, measures which have as their object the establishment and functioning of the internal market. As both Moravcsik and Pollack argue, the SEA was ‘a quintessentially neoliberal project’.

In 1988 the Cecchini Report¹⁶⁷ was published and revealed that only a third of the journey towards accomplishing the 1985 White Paper had been completed. Europe’s market was still fragmented. Cecchini believed that the absence of common action at the European level might result in *efficiency* loss in both specific sectors and, potentially, the public good. This concept, coined as ‘the cost of non Europe’ in the Atkins report, can be defined as the collective economic cost of not undertaking policy action at a European level in a particular field.¹⁶⁸ The barriers identified by Cecchini were categorised under three main headings: first, physical barriers, characterised mainly by frontier controls, delays and administrative burdens; second, fiscal barriers, characterised by differing rates of VAT and excise duties; and lastly, technical barriers, characterised by differing technical standards and regulations, conflicting business laws and nationally protected public procurement markets. Government protectionism in public procurement markets across the EU was identified as a significant non-tariff barrier and described as a ‘shot in the foot’.¹⁶⁹ This reiterated classical economic theory, under which the removal of these barriers to trade could be expected to yield trade benefits by permitting specialisation based on comparative advantage, a better use of economies of scale and increased competition. It was expected that savings would be achieved from the purchase of lower cost imports, from the lowering of prices by domestic firms and from a resulting restructuring of European industry. Most of the gains were expected to be achieved by ending market segmentation in Europe and by strengthening the ability of European industries to compete on the global stage. Broadly, two initiatives were taken: first, to

¹⁶⁵ Commission, ‘White Paper to the Council on completing the Internal Market’, COM (85) 310 final.

¹⁶⁶ José Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (OUP 1996) 42.

¹⁶⁷ ‘The Cost of non-Europe in Public Sector Procurement’ in *The Cost of Non-Europe, Basic Findings*, (vol 5, WS Atkins Management Consultants, Luxembourg, 1988).

¹⁶⁸ Paolo Cecchini and others, *Europe 1992: The Overall Challenge* [summary of the Cecchini report] SEC (88) 524 final (European Commission 1988).

¹⁶⁹ *ibid* 16.

improve the existing directives and, second, to extend the scope of the directives and rationalise the growing number of applicable documents.¹⁷⁰

This report led to amendments to the directives and, in due course, consolidation in two new directives: Directive 93/36/EEC¹⁷¹ on public supply contracts and Directive 93/37/EEC¹⁷² on public works contracts. In addition, coverage was extended by Directive 92/50/EEC¹⁷³ to certain (non-construction) services. Regulation was also extended to utilities by Directive 90/531/EC,¹⁷⁴ which covered works and supplies; services contracts were added for utilities by Directive 93/38/EC,¹⁷⁵ which replaced Directive 90/531/EC. The Utilities Directives covered, and still cover, not only public utilities but also private utilities that are considered to present a risk of discriminatory behaviour because of the potential for state influence over their purchasing policy. In addition, Remedies Directives 89/665/EC¹⁷⁶ and 92/13/EC¹⁷⁷ were adopted to provide systems of remedies for public and utilities contracts, respectively. There were now three coordination directives covering separate types of contracts (works, supplies and services): a directive on utilities procurement and two on remedies. Calleja argues that while the legislation on public procurement has sought to bring about a gradual reform of public procurement practices among Member States, its motives go beyond the eradication of discriminatory practices and protectionist behaviour; the White Paper on completing the internal market, the Single European Act, the Cecchini Report and the Atkins Report all played a vital role in building upon prevailing intellectual foundations in support of neoliberal economics.¹⁷⁸

3.3.3 The Position of Horizontal Considerations

Up to the 1980s, the focus of EC legislative activity was on overall reform of public procurement and not on the use of horizontal considerations.¹⁷⁹ The dichotomy between the social and the economic approaches to public procurement issues did, however, come strongly to the fore during this time. The Council of Ministers adopted a firm, though in some cases tempered, ‘purity principle’,¹⁸⁰ whereby the economic function of competition in public procurement should not be tainted by social policy diversions. The European Parliament adopted a strongly instrumental view of the role of public procurement,

¹⁷⁰M.A.Pollack, 'A Blairite Treaty: Neo-Liberalism and Regulated Capitalism in the Treaty of Amsterdam', in K.Neunreither, A.Wiener (eds), *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, 2000) 273; Moravcsik A., 'Negotiating the Single European Act', in R.O.Keohane, S.Hoffmann (eds), *The New European Community: Decision making and Institutional Change* (Westview Press,1991) 42.

¹⁷¹ Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts [1993] OJ L199/1.

¹⁷² Directive Council 93/37/EEC concerning the coordination of procedures for the award of public works contracts [1993] OJ L199/54.

¹⁷³ Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1.

¹⁷⁴ Council Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1990] OJ L297/1.

¹⁷⁵ Council Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L199/84.

¹⁷⁶ Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33.

¹⁷⁷ Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L76/14.

¹⁷⁸ Antoinette Calleja, *Unleashing Social Justice Through EU Public Procurement* (Routledge 2017).

¹⁷⁹ McCrudden, *Buying Social Justice*, (n 158) 318.

¹⁸⁰ *ibid* 257.

advocating strong links between public procurement and the achievement of social policy objectives. As a result, the greatest pressure to include social issues came from the majority of the Parliament, together with a loosely organised group of trade unions. At that time, the Parliament only had the power to give its opinion on an issue, and the other institutions could, and largely did, ignore that opinion.

By the end of the 1990s, the political context of European procurement regulation had undergone a sea change and was significantly different than it had been during the 1980s¹⁸¹. Despite the promise of economic benefits from the procurement reforms of the 1980s, changes in the practice of procurement at the national level were slow in appearing. This was partly seen as a result of slow implementation by Member States of their obligations under the directives, leading to Commission decisions to increase infringement actions, and partly as a result of entrenched attitudes among purchasers and suppliers. Although the procurement reforms of the 1980s were intended to increase cross-border flows of procurement, by the mid-1990s little appeared to have changed.¹⁸² Hence, there was a sense that the economic benefits that were expected had been imperfectly realised.

The balance of power between the EU institutions was changed by the 1992 Maastricht Treaty and the 1997 Amsterdam Treaty. In certain areas of Community policy, most notably in the area of internal market reforms, the Parliament was now given the role of co-deciding with the Council. This, together with a number of other factors, pushed the issue of the link between procurement and social considerations to a central focus in the discussions that ensued. These other factors included the activism of a coalition of unions and Non-Governmental Organisations (NGOs) operating in the social and environmental field, and the European Court of Justice (ECJ) itself, with decisions in several cases being of direct relevance to the legislative discussions.

3.4 Case law and Horizontal Policies

The most important driving force in the integration of horizontal policies in public procurement law was the ECJ.¹⁸³ An analysis of the Court's case law highlights the initial impetus of the ECJ to introduce industrial, social and environmental concerns into public procurement law. The reasoning followed by the Court, while not always consistent or coherent, was a reflection of the image of a European Union deeply divided about the opportunity to allow national authorities to protect non-economic interests in the area of public procurement.

3.4.1 The Beentjes Case

In the first rulings in this area, the ECJ seemed to emphasise that it is possible to limit the internal market legislation to pursue other values foreseen in the Treaty. Thus, in *Beentjes*,¹⁸⁴ the ECJ considered a request for a preliminary ruling made by a Dutch Court¹⁸⁵ concerning a decision to award a public works contract which had included employing the long-term unemployed as a necessary condition. Beentjes had submitted

¹⁸¹ *ibid* 111.

¹⁸² See Fabienne Ilzkovitz and others, 'Steps Towards A Deeper Economic Integration: The Internal Market in the 21st Century. A Contribution To The Single Market Review' (Directorate-General for Economic and Financial Affairs 2007).

¹⁸³ Edoardo Chiti and Bernardo Giorgio Mattarella, *Global Administrative Law And EU Administrative Law* (Springer 2011) 191 - 'The ECJ has traditionally adopted an active approach regarding integration of secondary considerations in public procurement.'

¹⁸⁴ Judgement in '*Beentjes*', discussed in Bovis, *Public Procurement In The European Union* (n 34) 615.

¹⁸⁵ Sue Arrowsmith, *A Guide to the Procurement Cases of the Court of Justice* (Earlsgate Press 1992) 73–82.

the lowest bid, but the contract had been awarded to the second-lowest bidder, as Beentjes was not able to employ long-term unemployed persons. Beentjes challenged the decision, contending that the Works Directive precluded the contracting authorities from taking account of this consideration. The ECJ was asked whether the ability of contractors to provide work for the long-term unemployed could be taken into account by the national awarding authority under the Works Directive [Directive (EEC) 71/305] if, in the invitation to tender, no criteria of this type had been stipulated. The Court interpreted this question as raising two different issues: first, could such considerations be taken into account at all and, second, if they could be taken into account, was the awarding authority required to notify bidders of them in advance? The ECJ ruled that a condition of contract performance which required the successful contractor to employ long-term unemployed persons could be compatible with the procurement directives if it complied with all the relevant provisions of Community law, in particular the principle of non-discrimination, and was mentioned in the contract notice. The condition would be acceptable if it was non-discriminatory, both directly and indirectly, in the light of all the circumstances of the case.¹⁸⁶ The ECJ qualified the requirement in question as an ‘additional specific condition’ which must comply with the general principles of (then) EEC law and must be mentioned in the contract notice so that contractors could become aware of its existence.¹⁸⁷ Most Economical Advantageous Tender [MEAT] award criteria may include more than purely economic elements:¹⁸⁸ the Court decided that award criteria are not limited to those of a ‘purely economic nature’ and that, in principle, criteria relating to ‘the employment of long-term unemployed persons’ could be used if they complied with all the relevant principles of European law. Disagreeing with the Commission, the Court therefore recognised the possibility for contracting authorities to take into account social considerations, albeit subject to the protection of the principles of non-discrimination and free movement.¹⁸⁹ The question remained whether social criteria could be used in the awarding of the contract or just as a contract performance condition.

Following the *Beentjes* case, the Commission issued a communication interpreting the case, and discussing its implications for the issue of including horizontal consideration.¹⁹⁰ In the Commission's view, there was ‘no reason to suppose’ that other social objectives, any more than the reduction of long-term unemployment, fell outside ‘the area of liberty left to the Member States by Directive 71/30 ... though of course a definitive judgement necessarily depends on an appreciation of all the material facts of a particular case’.¹⁹¹ In addition, the Commission created the concept of ‘contract performance condition’ as distinct from both selection and award criteria.

A change was seen in the Commission’s position on social issues that was attributed at that time to the development of an economic rationale view of the directives.¹⁹² In particular, the Commission interpreted strictly the requirement that, if the purchasing body did not use lowest price for the award of the contract, it should use the criterion of ‘most economically advantageous offer’. This was interpreted as meaning that tender evaluation was limited to economic or commercial grounds only. In 1997, the Commission stated: ‘There is widespread agreement that social policy and public

¹⁸⁶ Case C-31/87 *Gebroeders Beentjes BV v State of the Netherlands* [1988] ECR 4635.

¹⁸⁷ *ibid* para 36.

¹⁸⁸ Sue Arrowsmith (ed), *EU Public Procurement Law: An Introduction* (Nottingham 2010) 313.

¹⁸⁹ Roberto Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010) 20.

¹⁹⁰ Commission, ‘Public Procurement: Regional and Social Aspects’ COM(89) 400 final.

¹⁹¹ *ibid* para 57.

¹⁹² José M Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (OUP 1996) 46.

procurement should not overlap. Social objectives should be pursued through adequate social legislation and not by using the power to award procurement contracts.¹⁹³ The Commission then embarked on a strategy of infringement proceedings for alleged violations of the public procurement directives, becoming less complaint-driven and more proactive in seeking to prevent infringements and taking the initiative in launching proceedings.¹⁹⁴

3.4.2 Nord Pas de Calais

In the *Nord Pas de Calais* case,¹⁹⁵ the Commission challenged the awarding in a region of France of a number of school-building contracts which included an ‘additional award criterion’ relating to local employment. The criterion was based on a French government policy which allowed this to be taken into account when two tenders were of equal value. The European Commission interpreted *Beentjes* as permitting promotion of employment only as a contract performance condition and not as an award criterion; this was also because (then) Community law allowed two award criteria only: namely, lowest price and MEAT. However, the ECJ rejected this view, finding that a condition relating to unemployment could be applied as an award criterion provided that it was consistent with the fundamental principles of Community law, in particular the principle of non-discrimination, and that it was expressly referred to in the contract notice.¹⁹⁶ Rather than referring to the criterion as one relating to local unemployment, the judgement refers more vaguely to ‘the campaign against unemployment’.¹⁹⁷ The meaning of the ruling is disputed by commentators because of the Court’s reasoning and the circumstances of the case.¹⁹⁸ The reliance on the decision in *Beentjes*, which did not suggest that the directives permit award criteria based on workforce matters but instead concerned *special conditions*, suggests that the ECJ were saying that anything permitted as a special condition is automatically permitted as an award criterion.

3.4.3 Concordia (Helsinki) Bus Finland

Soon after the *Nord Pas de Calais* case, the ECJ was presented with a public procurement case with environmental considerations.¹⁹⁹ The *Concordia Bus* judgement was a full court judgement, thus indicating the special importance of the issues under scrutiny. The municipality of Helsinki had decided to award bus transport services to a company that would offer the most advantageous tender. When assessing the economic advantages of the tenders, the contracting authority relied on three criteria: price, quality of the bus fleet, and the quality and environmental management of the operator. Under the second criterion, buses with lower emissions and noise were preferred, while under the third criterion extra points were given to operators who met certified quality criteria and had a certified environment protection programme. Concordia Bus came in second place, having been penalised under the second and third criteria, although it had the lowest price. The company then claimed in Court that the second criterion was discriminatory, as there was only one operator with the possibility of fully meeting the criterion. The Commission claimed that only those criteria resulting in a direct benefit of an economic

¹⁹³ Commission, ‘Public Procurement in the EU: Special Sectoral Report No 1’ (1997).

¹⁹⁴ See Grainne O'Brien, ‘Envisaged Change In The Procurement Regime: The Point Of View Of The European Commission’, *Legal Aspects of EC Public Procurement* (1998) 7-8.

¹⁹⁵ Case C-225/98 *Commission v France* [2000] ECR I-7445, paras 81–83.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid* para 54.

¹⁹⁸ See Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies* (n.20) 240.

¹⁹⁹ Case C-513/99, *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* (‘Concordia Bus’) [2002] ECR I-7213.

nature to the procuring entities could be allowed. The ECJ, following the opinion of Advocate General Mischo, held otherwise.

According to the Court, the words ‘for example,’ used by the Directive in introducing a list of possible criteria making up the most economically advantageous tender ‘read together with [then] Article 6 EC Treaty lead to the conclusion that public procurement law does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender’.²⁰⁰

This judgement is important, as it acknowledges that a contracting authority was entitled to include environmental considerations in its award criteria. The ECJ was clear that award criteria need not be purely economic in nature: ‘It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority.’²⁰¹ That conclusion was supported by the wording of the provision, which expressly referred to the criterion of the aesthetic characteristics of a tender. Since the purpose of the procurement directives was to eliminate barriers to the free movement of services and goods, and since the EC Treaty provided that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, the ECJ reasoned that ‘it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender’.²⁰²

This judgement lays down the conditions under which such criteria may be used. It sets out that ‘the criteria adopted to determine the economically most advantageous tender must be applied in conformity with all the procedural rules laid down in Directive 92/50, in particular the rules on advertising’.²⁰³ Criteria must also comply with the fundamental principles of EU law, in particular the principle of non-discrimination. The judgement concludes that a contracting authority may take into account ecological criteria provided that the criteria are linked to the subject matter of the contract; do not confer an unrestricted freedom of choice on the authority; are expressly mentioned in the contract documents or tender notice; and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.²⁰⁴

While it has been argued that this judgement was groundbreaking for the cause of the use of horizontal considerations,²⁰⁵ Arrowsmith notes that the ECJ refers to ‘the subject matter of the contract’ as a limitation on the free choice of the contracting authorities,²⁰⁶ conceding somewhat to internal market concerns.²⁰⁷ The ECJ’s subsequent *ENV and Wienstrom*²⁰⁸ judgement demonstrates the pivotal role of this connection between the subject matter of the contract and the criterion.

²⁰⁰ *ibid* para 57.

²⁰¹ *ibid* para 55.

²⁰² *ibid* para 57.

²⁰³ *ibid* para 62.

²⁰⁴ *ibid* para 64.

²⁰⁵ See on this subject Robert Caranta and Martin Trybus (eds), *The Law of Green and Social Procurement in Europe* (Copenhagen 2010) 22.

²⁰⁶ Sue Arrowsmith (ed), *EU Public Procurement Law: An Introduction* (Nottingham 2010) 321.

²⁰⁷ See Jörgen Hettne, ‘Sustainable Public Procurement And The Single Market – Is There A Conflict Of Interest?’ (2013) 8 *European Procurement & Public Private Partnership Law Review* 31, and Catherine Weller and Janet M. Pritchard, ‘Evolving CJEU Jurisprudence: Balancing Sustainability Considerations With The Requirements Of The Internal Market’ (2013) 8 *European Procurement & Public Private Partnership Law Review* 55.

²⁰⁸ Case C-448/01 *ENV AG and Wienstrom GmbH v Austria* (‘ENV’) [2003] ECR I-14527.

3.5 Guidance from the European Commission

The European Commission's Green Paper 'Public Procurement in the European Union: Exploring the Way Forward' was adopted in November 1996.²⁰⁹ The main theme was the need to simplify the legal framework for public procurement, while maintaining the stability of the basic structure already in place. The Green Paper recognised and accepted that procurement would be used as a mechanism for implementing domestic and Community social policy. It also accepted that doing so was compatible with the then existing directives when it was accomplished through the provisions enabling the exclusion of contractors or suppliers or by requiring compliance with contract conditions. However, the Green Paper was clear that award criteria 'must relate to the economic qualities required of the supplies, works or services covered by the contract'.²¹⁰ In March 1998, the Commission published its communication 'Public Procurement in the European Union'.²¹¹ In it, the Commission stated it 're-iterates that public contracts can be a means of influencing the actions of economic operators, providing the limits laid down by Community law are respected'. The Commission went further than before, however, going so far as to 'encourage the Member States to use their procurement powers to pursue the social objectives mentioned above'. The Commission also said it 'will act similarly in its own procurement activity'. In May 1998, the Council of Ministers published a statement on this communication.²¹² As regards the social aspects of procurement, the Council agreed that 'the legislative framework for public procurement should not hinder the pursuit of other Community policies, for example, on the environment or social issues, and that the provisions in the directives for taking account of such factors should be clarified by the Commission in consultation with Member States, taking account of the priorities attached to such factors by Member States'. A Parliamentary Resolution linked the Commission's proposals on the use of procurement to tackle corruption with the use of social criteria generally.²¹³ The European Commission developed a strategy for clarifying the scope for horizontal considerations that comprised two major elements,²¹⁴ and the Commission produced two parallel communications on horizontal policies. These were the Commission's 'Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement'²¹⁵ (hereafter the 'Communication on environmental considerations'), published in July 2001, and the Commission's 'Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement'²¹⁶ (hereafter the 'Communication on social

²⁰⁹ 27 November 1996, COM (96) 583 final.

²¹⁰ *ibid* para 5.43.

²¹¹ Commission, 'Public procurement in the European Union' COM(1998) 143 final, sections 4.3 and 4.4.

²¹² Commission, 'Statement, 2094th Council meeting – Internal Market', C/98/148, 18 May 1998.

²¹³ European Parliament, 'Resolution concerning the communication of the Commission: Public Procurement in the EU' (199) A4-0394/98.

²¹⁴ Commission, 'Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts' COM (2000) 275 final; European Commission, 'Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors' COM (2000) 276 final.

²¹⁵ Commission, 'Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement' COM (2001) 274 final. See also Commission Staff Working Document, 'Buying green! A handbook on environmental public procurement' SEC (2004) 1050.

²¹⁶ Commission, 'Interpretative Communication on the Community law applicable to public procurement

considerations'), published in October 2001. These were prompted by increasing demand for guidance and probably also by the Commission's desire to head off calls from the European Parliament for a greater role for horizontal policies. Arrowsmith and Kunzlik²¹⁷ found the Commission guidance had value as an indicator of its likely 'prosecutorial' policy. The value of the guidance in other respects however was questionable. From Kunzlik's perspective, the Commission's restrictive view on horizontal policies, 'almost to the point of seeming out of touch with reality',²¹⁸ together with its confused reasoning, arose from a sort of 'institutional schizophrenia' in which internal market staff take a view that favours market considerations and others take a different line as a result of the higher value that they place on issues such as 'green procurement'.

On 17 January 2002, the Parliament published its opinion,²¹⁹ which broadly approved the Commission proposal, subject to amendments, among which were several that related to the use of social criteria. The most notable was related to the provision on award criteria, which omitted the requirement that the beneficiary of the 'economic advantage' be the public authority. It also extended the environmental characteristics that contracting bodies could consider, and it included the tenderer's equal opportunities policy as a valid element at the award stage.²²⁰ In early May 2002, the Commission issued its amended proposal on both the Public Sector²²¹ and Utilities Directives²²², revising recitals as far as possible, rather than issuing new substantive articles or amending existing substantive provisions and emphasising the extent to which social issues could be dealt with through the use of contract conditions, rather than by way of award criteria. On 21 May 2002, the Council reached a political agreement on the Public Sector Directive. It essentially maintained the Commission's basic approach, while integrating several of the amendments adopted by the Parliament in one form or another. A notable feature of the approach adopted by the Council was again the addition or clarification of recitals as a way of accommodating the Parliament's concerns without amending the substantive articles. The Commission's assessment of the Council's common position was published in March 2003²²³ and subsequently received final approval by a plenary vote of the Parliament on 29 January 2004.²²⁴

3.6 The 2004 Directives

The 2004 EU public procurement law package was made up of two directives. Directive 2004/17/EC regulated public procurement in the utilities sector (water, energy, transport and postal services). Directive 2004/18/EC, the so-called classic or Public Sector Directive, promulgated rules applicable to works, supplies and services procurements and to works concessions. Directive 2007/66/EC amending the existing directives on remedies and Directive 2009/81/EC on procurements in the fields of defence and security were adopted later.

The 2004 directives included several provisions proposed by the Commission, including provisions for simplifying and facilitating small and medium enterprise (SME)

and the possibilities for integrating social considerations into public procurement' COM (2001) 566 final.

²¹⁷ Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies* (n.20) 94–95.

²¹⁸ *ibid* 93–94.

²¹⁹ European Parliament, 'Public sector proposal' PE-T5(2002)0010, 17 January 2002.

²²⁰ *ibid*.

²²¹ Commission, 6 May 2002, COM(2002)236 final.

²²² Commission, 6 May 2002, COM(2002) 235 final.

²²³ Commission, SEC(2003)0366, 25 March 2003.

²²⁴ European Report, 'Public Procurement: Parliament Moves Closer to Council Position on Legislative Package' No 2790, 5 July 2003.

participation in tenders, reducing costs and the administrative burden of procedures, making access less complicated and more transparent,²²⁵ and encouraging the spread of subcontracting in the award of public contracts.²²⁶

Moreover, also in accordance with Commission guidelines, the 2004 directives governed the introduction of social and environmental considerations at different stages of the public procurement procedure.²²⁷ They set out explicitly the pre-existing possibilities for Member States to implement horizontal policies, including the possibilities clarified in jurisprudence. Thus the directives now featured express references to the possibility of including environmental specifications in award criteria, specifications relating to access for all users, and special contract conditions requiring, for example, that contract work be given to the unemployed or people with disabilities (as recognised by the ECJ in *Beentjes*).²²⁸ In addition, the directives included certain restrictions on horizontal policies which had either been recognised in the jurisprudence (for example, that award criteria should be limited to the subject matter of the contract) or that the Commission had advocated in its guidance (for example, limiting special conditions to contract performance). The 2004 directives also included a provision allowing states to reserve contracts for sheltered employment programmes. Additionally it allowed Member States to use procurement to promote certain horizontal policies: authorities were obliged to exclude from contracts firms convicted of corruption and certain other criminal offences, to support EC policies, and to take into account both accessibility criteria for people with disabilities and design for all users.²²⁹

According to some authors, the European legislature could have done much more,²³⁰—for example, by clarifying once and for all ‘the position of contracting authorities over the legitimacy of pursuing socioeconomic and environmental policies through public procurement’.²³¹ The new legislation did not clarify whether the environmental and/or social criteria had to provide economic benefit to the contracting authority to be legitimate. The provision for ‘the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area’ is repeatedly contradicted by the legislation’s stated requirements for assessing costs and benefits, even those of an ethical and social or environmental nature, thereby validating that social value can be assessed in purely economic terms. One can conclude that the new directives were limited to incorporating only the requirements that the Commission had stated with certainty in its guidelines and not the requirements of the ECJ.²³² To that

²²⁵ See recital 12, Directive 2004/18.

²²⁶ See recital 32 and Arts 25, 60, Directive 2004/18.

²²⁷ See recitals 1, 5, 29, 33 e 46, Directive 2004/18 and recitals 1 e 55, Directive 2004/17. See also Arts 19, 23, 26, 27, 43, 45, 53 Directive 2004/18.

²²⁸ See recitals 1, 5, 29, 33 e 46, Directive 2004/18 and recitals 1 e 55, Directive 2004/17. See also Arts 19, 23, 26, 27, 43, 45, 53 Directive 2004/18.

²²⁹ Article 45, Directive 2004/18.

²³⁰ See Lynn Ramsey, ‘The New Public Procurement Directives: A Partial Solution To The Problems Of Procurement Compliance’ (2006) *European Public Law* 12, 284. According to the author, ‘The Directive tries to take account of the so-called sustainability issues: the environmental and social impacts of public procurement. The only innovation, if that is not too strongly put, is that the directive makes explicit reference to the potential to take sustainability issues into account. This is merely a ‘codification’ of the existing ECJ case law and the Commission’s earlier interpretative statements on the compatibility of the rules on public procurements with social and environmental objectives.’

²³¹ Christopher Bovis, ‘Public Procurement in The European Union: A Critical Analysis Of The New Regime’ (2006) *Legal Issues Economic Integration* 29.

²³² Ramsey, ‘The New Public Procurement Directives’ (n 224).

extent, the new directives have been seen as a ‘victory’ for the Commission and its restrictive approach.²³³

3.7 The 2014 Directives

3.7.1 The Reason Behind the Reform

Before the real impact of the 2004 directives could be examined, the Commission was already working a new reform package.²³⁴ The Commission began consultations on a revision to the procurement directives in January 2011²³⁵ with the aim of ‘modernising’ the market to support ‘growth and job creation’. Commissioner for DG MARKT Michel Barnier described the motivation for the revision of the procurement directives as follows: ‘The current directives have proven their worth. But directives must move with the times. I would like to make sure that the public procurement directives become simpler and more effective and that they make life easier for those whose daily work involves public procurement.’²³⁶ While the technical elements of the implementation of the market were up for review, the parameters of the conceptual scope of the market were not: ‘Public purchasing has to be underpinned by particular safeguards. These prevent any preferential treatment that could favour specific economic operators and guarantee sound competition between economic operators, to ensure that contracting authorities get the best value for European Taxpayers’ money’.²³⁷ This indicates that as a public policy mechanism, the dominance of the market paradigm was to be maintained and that value for money would be derived from this.

3.7.2 Green Paper on the Modernisation of EU Public Procurement Policy

On 27 January 2011, the Commission published a ‘Green Paper on the modernisation of EU public procurement policy’, subtitled ‘Towards a more efficient public procurement market’.²³⁸ This was a follow up to the previous Lisbon Strategy, which failed in its goal of making the Union ‘the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’.²³⁹ This was the launch of a wide-ranging public consultation, opened to stakeholders and civil society at large, on a number of questions on potential legislative changes to make the awarding of public contracts simpler and more flexible and to enable better use of procurement in support of other policies. While the purpose of the 2011 Green Paper was to survey key areas to be reformed and to obtain the opinion of stakeholders on the options, the paper also had another agenda. The paper stresses that ‘obtaining optimal procurement outcomes through efficient procedures is of crucial importance in the context of the severe budgetary constraints and economic difficulties in many EU Member States’.²⁴⁰

²³³ Joel Arnould, ‘Secondary Policies In Public Procurement: The Innovations Of The New Directives’ (2004) *Public Procurement Law Review* 1.

²³⁴ An initiative in this area was announced in the ‘Communication Towards a Single Market Act – For a highly competitive social market economy’, COM (2010) 608.

²³⁵ Commission, ‘Regions in the European Union – Nomenclature of Territorial Units for Statistics’ NUTS 2010/EU-27 E,143.

²³⁶ *ibid* 1.

²³⁷ Commission, ‘Proposal for a Directive of the European Parliament and the Council on Public Procurement’ COM (2011) 896 final.

²³⁸ Commission, ‘Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market’ COM (2011) 15 final.

²³⁹ European Council, ‘Presidency Conclusions, Lisbon European Council’ 23 and 24 March 2000. relaunched in 2006.

²⁴⁰ *ibid* 3.

The 2011 Green Paper begins with a reference to the Europe 2020 strategy for smart, sustainable and inclusive growth.²⁴¹ Public procurement was seen as one of the market-based instruments to be used to deliver the Europe 2020²⁴² strategy for such growth by aiming to improve conditions for business innovation; encourage the wider use of green procurement; ensure the most efficient use of public funds and keep procurement markets open EU wide. This Green Paper also states that the Europe 2020 strategy for public procurement policy ‘must ensure the most efficient use of public funds and ... procurement markets must be kept open EU wide’.

The questions covered included the need to simplify procedures and make them more flexible; to enable the strategic use of public contracts to promote other policy objectives (greener and more socially responsible and innovative purchasing, etc.); to give SMEs better access to public contracts; and to combat favouritism, corruption and conflicts of interest. In total, the European Commission received 623 contributions from a wide range of stakeholder groups. The results of the consultation were summarised in a synthesis document, which was presented and discussed at a public conference held on 30 June 2011.²⁴³ Those taking part in the consultation had differing views on the priority to be attached to each of the reform aims. Simpler procedures, better access to contracts—especially for SMEs—and the promotion of innovation were popular. Everyone considered that it was particularly important to rationalise procurement procedures and make them more flexible. The evaluation also shows that it is possible to strike a better balance between the costs of the regulatory system and the advantages that it provides, especially from the point of view of low-value orders.²⁴⁴

The 2011 Green Paper appears to have challenged the internal market rationale of EU public contract legislation.²⁴⁵ While the need to keep the EU market open is mentioned, the motivator behind the reform package was to simplify and update the European public procurement legislation ‘so as to make the award of contracts more flexible and enable public contracts to be put to better use in support of other policies’.²⁴⁶ The Green Paper then presents the evolution of the directives, whose principal aim had been ‘to ensure that economic operators benefit fully from the basic freedoms in the field of public procurement’, and mentions ‘a number of objectives relating to the integration of other policies in this framework, such as protection of the environment and social standards or the fight against corruption’. The proposal aims at modernising public procurement tools and methods ‘to make them better suited to deal with the evolving political, social and economic context’ and more notably to achieve a number of complementary objectives. The first objective is to increase the efficiency of public spending. A complementary objective is to allow procurers to make better use of public procurement to support common societal goals. Collaterally, EU public procurement law could also help prevent and fight corruption and favouritism and improve the access of European undertakings to third-country markets.²⁴⁷

²⁴¹ Commission, ‘Communication from the Commission – EUROPE 2020 – A strategy for smart, sustainable and inclusive growth’ COM (2010) 2020 3 March 2010.

²⁴² *ibid.*

²⁴³ Commission, ‘Towards a more efficient procurement market, Conference on the modernisation of European public procurement policy’, 30 June 2011.

²⁴⁴ On average, a procurement procedure takes 108 days and costs EUR 28 000. The procedure takes three times as long in the least efficient member states as in those achieving the best results.

²⁴⁵ Totis Kotsonis, ‘Green Paper On The Modernisation Of EU Public Procurement Policy: Towards A More Efficient European Procurement Market’ (2011) 3 *Public Procurement Law Review* 5.

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

3.7.3 Impact Assessment

The Commission then carried out an impact assessment on the proposal for the new directive. It relied upon external expertise, consultants and the findings of the Green Paper on the modernisation of EU public procurement policy and the Green Paper on the expansion of the use of e-procurement in the EU.²⁴⁸ The main problems identified by the impact assessment were insufficient cost efficiency of public procurement, a failure to optimise resources, and the continuing lack of cross-border procurement.²⁴⁹ The causes of these problems were identified as overly complex rules, disproportionate and inflexible procedures, uncertainty and insufficient provisions on the integration of strategic goals, regulatory and 'natural' market barriers, and different models and administrative capacities across the Member States.

The Commission drew up the following objectives to resolve these problems: improving the cost efficiency of EU public procurement rules and procedures, taking advantage of all opportunities in compliance with the treaties to deliver the best possible outcomes for society, and creating EU rather than national markets for public procurement. The reception of the impact assessment was muted. The quality of the assessment was generally viewed as weak, and the conclusion was viewed as based on a set of political assumptions with an overly optimistic vision of market economy mechanisms.²⁵⁰

3.7.4 Overview of the 2014 Public Procurement Directives

On 20 December 2011, as announced in the Single Market Act, the Commission adopted three proposals for new directives intended to thoroughly modernise public procurement in the European Union, with the stated intention of pursuing four complementary objectives: simplifying procurement procedures and making them more flexible; improving SMEs' access to the public procurement market; fostering a better qualitative use of public procurement through a strategic use of public contracts, including better integration of social and environmental criteria, and finally improving governance. With substantial changes, these proposals were approved by the European Parliament and the Council, and they entered into force in 2014.²⁵¹ The Directive provides notable opportunities for the promotion of environmental and social objectives through public procurement procedures while leaving a large amount of discretion to the Member States as to how they wish to transpose the relevant provisions into national law. In addition the so-called horizontal clause (Article 18(2)) include a general obligation on Member States as suggested in the Commission's Green Paper, for member states to take appropriate measures to ensure that that in the performance of public contracts economic operators comply with applicable obligations in fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions. This obligation now means that Member States must ensure that, in the performance of public contracts, economic operators comply with, inter alia, EU environmental law; enterprises which do not respect

²⁴⁸ Commission, 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM (2011) 896.

²⁴⁹ Over 98% of the contracts awarded according to EU rules (ie approximately 96% of total value) are won by national bidders.

²⁵⁰ Eric van den Abeele, 'The Reform Of The EU's Public Procurement Directives: A Missed Opportunity?' (2012) SSRN Electronic Journal.

²⁵¹ The proposals were published as COM (2011) 895, 896 and 893 final.

environmental law may be excluded from the tender procedure, or not awarded the contract or their tender rejected due to lack of compliance with these obligations.²⁵²

The three new directives are as follows: The new Public Procurement Directive 2014/24/EU, referred to in this publication as the ‘2014 Directive’, to replace Directive 2004/18/EC; the new Utilities Directive 2014/25/EU, referred to in this publication as the ‘2014 Utilities Directive’, to replace Directive 2004/17/EC; and the Concessions Directive 2014/23/EU, referred to in this publication as the ‘2014 Concessions Directive’, which creates a new regulated regime for the awarding of concession contracts. Two of the directives, relating to procurement by public sector contracting authorities and utility entities, replace the EU procurement directives of 2004. The third Directive creates a new regulated regime for the award of concession contracts. These directives predominantly cover the procedural rules.

There are two other directives, which apply to complaints and review (i.e. to the enforcement of the directives). These are known as the Remedies Directives. In the public sector, remedies are governed by Directive 89/665/EC. In the utilities sector, remedies are governed by Directive 92/13/EC. Both of the above Remedies Directives significantly amended Directive 2007/66/EC. The 2014 Concessions Directive made some minor amendments to the Remedies Directives. In addition, there is now a new Directive which applies a more flexible and confidential regime to the procurement of military supplies and related works and services: Directive 2009/81.

It should be added that the European Commission has supplemented these procedural and remedial directives with further legislation dealing with various aspects of the procurement process. These include, in particular, the following: Directive 2001/78/EC on the use of standard forms in the publication of public contract notices; Regulation 2151/2003 amending Regulation 2195/2002 on the Common Procurement Vocabulary (CPV); updated CPV codes were adopted under Regulation 213/2008; Regulation 842/2011 establishing standard forms for the publication of notices in the field of public procurement procedures, repealing Regulation 1564/2005. New legislation on standard forms will be adopted to reflect the 2014 Directives. Directive 2014/55/EU establishing electronic invoicing in public procurement.

The directives are not meant to harmonise all national rules on public procurement. Instead, they are intended to coordinate national contract award procedures by introducing a minimum body of common procedural rules that reflect the basic Treaty principles. The directives do not seek to impose a new common regulatory regime on EU Member States in the field of procurement, and Member States can continue to apply their national procedures adapted to the directives. The scope of the directives are thus limited to those measures required for the coordination exercise, and they permit the Member States to maintain or adopt substantive and procedural rules to the extent that these are not in conflict with the directives or with Treaty provisions.²⁵³ As a result, Member States remain free to regulate a number of issues, mainly practical matters.

²⁵² This insertion of an overriding obligation of the Member States to take ‘appropriate measures’ to ensure that in the performance of public contracts the applicable environmental, social and labour law obligations are duly respected is very important. However due to time constraints, I have chosen not to focus more on this. For further discussion See Chapter 4, Anja Wiesbrock, ‘Socially responsible public procurement’ in Sjäfjell, B., & Wiesbrock, A. (Eds.). (2015) *Sustainable public procurement under EU law: new perspectives on the state as stakeholder* (2015 Cambridge University Press)

²⁵³ Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd edn, Sweet & Maxwell 2014).

Member States may require, for example, the application of a specific standard form for tender and contract documents; they may require adherence to specific tender opening procedures or tender submission procedures; they may require the submission of appropriate tender or performance guarantees; and they may impose specific contractual obligations on public contracts that result from public procurement. In essence, the common rules of the directives apply the basic principles of non-discrimination, equal treatment and transparency to the following: the publicity for proposed procurement contracts, the design of technical specifications, the choice of procurement procedures, the qualification and selection of candidates and tenderers, and the award of contracts.²⁵⁴ The directives, however, apply only to proposed procurement contracts with a financial value above a given threshold.²⁵⁵ Rather than seeking to regulate with precision all public procurement contracts within the EU, the Community legislature chose to regulate only those contracts that were most clearly capable of affecting trade between Member States. Those falling within this broad definition include 1) contracts that are of a sufficiently high value to attract economic operators from other Member States (i.e. where the potential benefits of winning the contract outweigh the extra costs of providing the goods, works or services from a greater distance) and 2) contracts concerning objects that are amenable to cross-border trade. Contracts below the financial threshold are still subject to the fundamental principles of the Treaty and to the general principles of law.

3.7.5 Structure of the Directives

One of the reasons for the new directives was the need to simplify and streamline the existing directives. While it is generally agreed that this was not achieved,²⁵⁶ there is evidence of a greater degree of procedural logic; for example, by starting with general definitions, addressing the scope of application (entity and activity coverage), and then following the steps in the procurement process itself. The 2014 Directive generally follows this structure.

3.7.6 The ‘Legal Effect’ of the Directives

Member states are bound to take all appropriate measures to fulfil obligations arising from the Treaty or resulting from actions taken by the Community institutions. The legal bases for the EU institutions to introduce more specialised ‘secondary’ EU legislation are stipulated in the Treaty: Articles 53 (2), 62 and 114 TFEU are the most relevant for procurement legislation.²⁵⁷ This legislation is called secondary because it depends on the primary legal bases in the TFEU. The type of legal instrument chosen for public procurement was the directive. An EU directive can be described as a model law agreed at the EU level which sets out the basic parameters and objectives of legislation that then must be transposed into the national laws of the 28 Member States by a specified deadline.²⁵⁸ Within certain limits, the Member States are free to choose the method of

²⁵⁴ *ibid* chapter 3.

²⁵⁵ The Court’s settled case law on this is clear: see Joined Cases C-147/06 and C-148/06, *SECAP SpA and Santorso Soc. coop. arl* [2008] ECR I-3565; see Case C-412/04 *Commission v Italy* [2008] ECR I-0000 para 65.

²⁵⁶ See Sue Arrowsmith, ‘Special Issue – The New EU Procurement Directives: Part I; Editor’s Note’ (2014) *Public Procurement Law Review*, which emphasises that the European legislature introduced many significant changes and many new requirements thereby again greatly complicating the system, despite the stated aim of simplification; Steen Treumer ‘Evolution of the EU Public Procurement Regime: The New Public Procurement Directive’ in Robert Caranta and others (eds) *Modernising Public Procurement: The New Directive* (2014); Éric Van den Abeele, ‘The reform of the EU’s public procurement directives’ (n 244).

²⁵⁷ See the Preambles to all EU procurement Directives.

²⁵⁸ Paul Craig and Grainne de Búrca, *The Evolution Of EU Law* (Oxford University Press 2011).

transposition, as long as the resulting national instrument is fully compliant with the original EU directive.²⁵⁹

The procurement directives, as with all directives, are by definition not directly applicable—that is, they do not apply automatically. To produce their effects within the Member States, they must be implemented or ‘transposed’ into national law. The Member States are, therefore, required to take the measures necessary to give full effect to the provisions of the directives in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the directives into national law and the abrogation of all contrary legislative provisions.²⁶⁰

The directives are binding only in terms of the result to be achieved but leave to the national authorities the choice of form and methods. Thus, it is not necessary for EU Member States to produce an exact copy of the directives in their national legislation, although some Member States have done precisely that, by reference to the directives themselves. In Ireland, the 2014 Directives did not require the country to make choices, and a ‘copy-out’ approach was largely adopted in transposing these EU rules. Where discretion was granted to Member States under the directives, this discretion was largely passed on to contracting authorities under the regulations.

Failure to implement the directives correctly or on time does not mean, however, that the directives have no effect. Member States are not entitled to deprive the subjects of directives (in this case the contracting authorities and economic operators) of the rights they are intended to enjoy under the directives. In accordance with the ECJ’s doctrine of ‘direct effect’, individuals may enforce in national courts the rights conferred by the directives wherever the appropriate conditions are satisfied. This will happen, for example, if a Member State fails to implement or transpose the directive into national law by the due date (each directive includes a date by which it must be transposed) or if it has transposed the directive on time but has done so incorrectly.

The conditions necessary to give rise to the direct effect of a particular directive are as follows:²⁶¹

- the obligation imposed on Member States is clear and precise;
- the obligation is unconditional;
- the Member States or Community institutions are not given any margin of discretion in implementing the measures.

When a directive has direct effect and must be applied under the doctrine of direct effect, entities to which the doctrine applies must—as with TFEU obligations—disregard any conflicting national legislation. This was indicated by the CJEU in the *Costanzo* case. An important limit on the principle of the direct effect of directives is that direct effect applies only to the state and to bodies that provide a service under state control and which enjoy special powers (Case C-188/89, *Foster v British Gas*).²⁶² Direct effect will apply

²⁵⁹ *ibid.*

²⁶⁰ Directives are provided for in Article 288 TFEU. In principle, as is stated in Article 288, a directive is a measure of general application which requires member states to achieve certain results but leaves to each member state the precise form and method of implementation. Unlike the TFEU and regulations, a directive envisages that member states will need to take action to give it effect within that member state’s own legal system: action is unnecessary only in those very rare cases in which the legal system of the member state concerned is already adequate to achieve the results in question. Directives are used when it is considered that the rules in question might need to be implemented in different ways in different member states to take account of different circumstances – such as different administrative, social or political arrangements (that is, when it may be desirable in principle to allow for different approaches), and are also useful if it is not practical to provide for every detail of the rules at EU level.

²⁶¹ *Van Gend en Loos*.

²⁶² Case C-188/89 *Foster v British Gas* [1990] ECR I-3313.

against most of the bodies subject to the EU's public procurement rules, since these rules regulate mainly public bodies. However, there are some procuring entities regulated under these rules—for example, utilities with special or exclusive rights which are on the border of or are outside the 'public sector'—to which it is not quite clear whether the doctrine of direct effect applies.

The ECJ has stated that many of the provisions of the directives do have direct effect but that each provision will be considered individually. The ECJ has found that the provisions relating to advertising, competition, selection and award criteria have direct effect. Thus in *Costanzo* the CJEU ruled that the obligation contained in Directive 71/305 on public works contracts (a predecessor of the current Public Sector Directive) to examine tenders that appear abnormally low has direct effect. Later, in *Walter Tögel*,²⁶³ the CJEU indicated more generally that the various Titles of Services Directives 92/50 (also a predecessor of the current Public Sector Directive) that regulated award procedures have direct effect—although the CJEU also commented that there may be some exceptions. On the other hand, a number of the provisions of the Remedies Directives, which require additional choices and decisions to be taken by the Member States, such as the choice of a review body, cannot—according to the third condition mentioned above—be considered as directly effective in their entirety. Nevertheless, some of the provisions of the Remedies Directives, such as the provisions relating to the available remedies [namely, Articles 1(1) and 2(1)(b)], are directly effective.

3.8 Conclusions

Looking at the development of the EU procurement directives, it is evident that they were not developed as a means of addressing the procurement function in the EU but rather as a mechanism for applying the Treaty principles of non-discrimination and free movement of goods, labour and services to secure the internal market between the Member States. EU members are permitted to pursue social, political or environmental objectives to the extent that these objectives do not give rise to any discrimination against other EU members. The focus of the EU is limited primarily to securing non-discriminatory and reciprocal access to the procurement markets of its members. To the extent that the procedures adopted reflect those which already existed in the national systems of the members, those systems will 'fortuitously' promote economic efficiency or, at least, will not impede it. These systems permit the pursuit of horizontal considerations to the extent that such considerations do not discriminate, and they would themselves encourage such objectives where they have become the objectives of the EU itself, even where those horizontal objectives would be inconsistent with efficiency objectives.

The dominant purpose of the EU was often seen as economic harmonisation together with an economically driven approach to procurement interpreted EU law, thereby limiting the use of horizontal considerations. However, recent developments have challenged this approach, as the discretion to include social considerations has expanded significantly. The importance of recent developments is that these tensions between the social and economic perspectives on procurement can no longer be translated as simply equating to Member State versus EU level policy clashes; social policy is now increasingly incorporated EU level policy. The next chapter expands on these developments, together with the role of the social market economy and the social rights enshrined in the EU Charter of Fundamental Rights.

²⁶³ Case C-76/97 *Walter Tögel v Niederösterreichische Gebietskrankenkasse* ('Walter Tögel') [1998] ECR I-5357.

Chapter 4: Objectives of EU Regulation - Economic versus Social

4.1 Introduction

Regulation, its practice and study, are central to the interaction among the economic, legal, political and social spheres. Public procurement regulation is traditionally viewed as emerging from a neoliberal economic approach to market integration.²⁶⁴ As public procurement regulation developed in societies which subscribed to the economics of the market economy, the state, in pursuit of economic welfare, pursued policies, including procurement policies, which sought to ensure economic efficiency.²⁶⁵ The most important objective of probably all national procurement systems is the need to acquire the goods, works or services concerned on the best possible terms²⁶⁶. This is often referred to as value for money,²⁶⁷ which is regularly treated as equivalent to efficiency, or economic efficiency.²⁶⁸ In chapter 5 I go on to look at the concept of value, and in chapter 6 I expand on Member States' individual definitions of value for money. In this chapter I focus on value for money and its role in the EU regime and the directives. The economic concepts of efficiency and competition are examined, as are their relationship with internal market objectives. Finally, I look at how the Treaty of Lisbon offers a new understanding of the internal market and the goal of a 'highly competitive social market economy'.

Trepte defines value for money in terms of economic efficiency, where consumers make purchasing decisions to maximise their own benefit or 'utility'. When the purchaser is the state, its assessment of value for money is more complex and rests on a whole range of considerations, both economic and political. Value for money will, as a result, incorporate a cost/benefit analysis taking into account the achievement of all policy goals. As a concept, value for money is thus heavily contingent on individual preferences and on the political and social value judgements of the state. It does not have meaning independent of the person or entity whose value judgements are at issue.²⁶⁹ I submit here that how value for money is determined, is a political rather than a technical choice, and decisions about what to measure, and how, both reflect and influence collective values about what is important. In the case of the state, it will formulate its economic approach to 'efficiency' together with political and social policy objectives.

4.2 Economic Efficiency and Public Procurement

The 'law and economics' approach to regulation relies on free market economic principles and the rules consistent with neoclassical economic theory.²⁷⁰ An efficient outcome occurs when resources, goods and services are allocated to their expected highest valued uses. Such efficient outcomes are said to be *Pareto-optimal*, after the economist Vilfredo Pareto, by which it is meant that 'value uses' is measured by individual 'willingness to pay'.²⁷¹ Resources cannot be reallocated so as to make one

²⁶⁴ See Bovis 'Public Procurement and the Internal Market of the 21st Century' (n 35).

²⁶⁵ Fernánadez Martín, *The EC Procurement Rules* (n 186) 39.

²⁶⁶ See Sue Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International, 2000), chapters 2 and 3.

²⁶⁷ *ibid.*

²⁶⁸ Omer Dekel, 'The Legal Theory Of Competitive Bidding For Government Contracts' (2007) 37 *Public Contract Law Journal* 237.

²⁶⁹ Trepte, *Regulating Procurement* (n 38) 205.

²⁷⁰ Graells, *Public Procurement and the EU Competition Rules* (n 7) 25.

²⁷¹ The term 'expected' here is used to take account of risk and uncertainty, expected being used in the sense of the expected value of an uncertain outcome, and to emphasise that economic efficiency is an ex

individual better off without making someone else worse off. This Pareto criterion is based on two additional value judgements: 1) that the individual is the best judge of his or her own welfare and 2) that the welfare of society depends on the welfare of the individuals that comprise it.²⁷² The difficulty with Pareto's 'no-one-is-harmed' constraint is that it precludes the economist from commenting on all but the most trivial policy change, since most policies have winners and losers.²⁷³ As has been generally recognised, Pareto efficiency is unlikely to be achieved. Economic literature in the wake of Pareto therefore relies on a more flexible formulation known as the 'compensation principle' or Kaldor-Hicks efficiency. A policy is Kaldor-Hicks efficient if those who gain can in principle compensate those who have been 'harmed' and still be better off. In other words, the cost-benefit test is satisfied, as the economic gains exceed the losses accrued. In this way economists believe that the Kaldor-Hicks approach separates efficiency from the thorny and indeterminate issue of wealth distribution.²⁷⁴ Perfect competition relies on a number of assumptions, and the 'law and economics' approach to regulation believes that it is the inadequacy of these assumptions, or market failures, which requires the intervention of the state by way of regulation.

4.3 Market Theory and Public Procurement

Following market theory economics, among the aims of public procurement regulation are protecting competition from distortion, ensuring maximum allocative and productive efficiency, and requiring contracting authorities to act like purchasers in private markets. When public purchasers make requirements that differ from private purchasers in private markets, they prevent sellers from undertaking 'rational' profit-maximising behaviour in such markets.²⁷⁵ Consequently, procurement regulations should impose upon contracting authorities 'a duty to ensure that public contracts reflect normal market conditions to the maximum extent'²⁷⁶, to ensure the free market achieves the optimum outcome in terms of *allocative and productive efficiency*. In short, *competition* principles require public purchasers to advance allocative and productive efficiency, which requires procurement to replicate the operation of the free market and interfere as little as possible with 'normal' market behaviour in the private market. Additionally, as proposed by Trepte, procurement regulation can be viewed as an instrument for the pursuit of economic welfare, which is achieved, in part, by pursuing the objective of economic or 'allocative' efficiency under a situation of perfect *competition*²⁷⁷.

4.3.1 Economic Efficiency: Value-Neutral?

ante concept, see Robert Baldwin, *The Oxford Handbook of Regulation*. *Oxford Handbooks* (Oxford University Press 2010) 35.

²⁷² Jules L Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 Hofstra Law Review 509, 513.

²⁷³ See, for example, Guido Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further' (1991) 100 Yale Law Journal 1211, 1216.

²⁷⁴ See Lewis A Kornhauser, 'Wealth Maximization' in Peter Newman (ed) *The New Palgrave Dictionary of Economics and the Law* (3rd edn, Macmillan 1998) 679–84.

²⁷⁵ Graells, *Public Procurement and the EU Competition Rules* (n 7) 41, 49, 58–60, 100, 101 and 111.

²⁷⁶ Albert Sánchez Graells, 'More Competition-Oriented Public Procurement to Foster Social Welfare' in KV Thai (ed) *Towards New Horizons in Public Procurement* (PrAcademics Press 2010) 81, 105.

²⁷⁷ Robert Baldwin, *The Oxford Handbook of Regulation*, *Oxford Handbooks* (Oxford University Press 2010) 20.

Graells and Trepte both view economic efficiency as an appropriate normative criterion in EU regulation, and this view is supported by mainstream economic text books.²⁷⁸ However, this infers the neutrality of economic efficiency, particularly when it is linked to policy recommendations. However, economic efficiency, as Blaug notes, involves ethical considerations and can be viewed as normative in the sense of offering statements of desirable states of affairs via persuasion. Blaug offers three examples of this: first, the assumption that every individual is the best judge of his or her own welfare; second, the view that social welfare is defined only in terms of the welfare of individuals; and third, the view that the welfare of individuals may not be compared.²⁷⁹ While these value judgements are widely accepted among mainstream economists, they nevertheless are conjectures based on subjective views. Efficiency is necessarily a value-laden concept and cannot be freed from the notion that efficiency is somehow more desirable than inefficiency and is an assertion of the superiority of the market mechanism.

4.3.2 Efficiency and Neoliberalism

The law and economics approach²⁸⁰ justifies the goal of maximising efficiency by arguing that efficiency promotes social welfare maximisation because efficient policies maximise the size of the pie, which can then be redistributed through taxes. This is how neoliberalism, the core of law and economics theory, establishes *economic efficiency* as the primary route to public well-being.²⁸¹ In this view, unfettered market competition produces incentives for maximising overall resources and individual responsibility, thereby making society better off in the long run in spite of harsh short-term effects on some people.²⁸² Neoliberalism distinguishes the goal of *efficiency* from the goal of social

²⁷⁸ Mankiw writes that the concept of efficiency is neutral in NG Mankiw, *Principles Of Economics* (South-Western Cengage Learning 2012).

²⁷⁹ Mark Blaug, 'The Fundamental Theorems Of Modern Welfare Economics, Historically Contemplated' (2007) 39 *History of Political Economy* 185.

²⁸⁰ See Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, Addison-Wesley 2012) at 8; AM Polinsky, *An Introduction To Law And Economics* (2nd edn, Wolters Kluwer Law & Business 1989) at 9–10 ('[E]fficiency should be the principal criterion for evaluating the legal system ... [I]t is often impossible to redistribute income through the choice of legal rules and [], even when it is possible, redistribution through the government's tax and transfers system may be cheaper and is likely to be more precise.'). For commonly used textbooks taking this view, see, for example, Richard A. Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 15–20; Robert Cooter and Thomas Ulen, *Law & Economics* (6th edn, Addison-Wesley 2012) 7–8 (saying that the book 'will focus on efficiency rather than distribution' in analysing the law because of the availability of the tax system for redistribution); Steven Shavell, *Foundations of Economic Analysis of Law* (Belknap 2004) 2–3, describing social welfare as the normative basis for analysis in law and economics, but then restricting attention to efficiency by excluding analysis on distribution.

²⁸¹ See Alan Greenspan, 'The Challenge of Globalization', Robert P Maxon Lecture at George Washington University (3 December 2001), in Federal News Service, 3 Dec 2001 (rejecting the view that 'free markets' lack moral or civic virtue by explaining that neoliberal policies 'reflect the value preferences of consumers', maximize these most valued resources, promote quality and excellence, and facilitate 'greater political freedom'); see also Jon D Hanson and Melissa R Hart, 'Law and Economics' in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (1996) 311, 312 (stating that now 'the vast majority of law and economics scholarship assumes without hesitation that the goal of law should be efficiency'). For a discussion of the role of law-and-economics in promoting neoliberalism, see Daniel T Rodgers, 'The Revival of Market Ideology' in Casey Blake and Kenneth Cmiel (eds) *Thinking Through the Seventies* (2003). This neoliberal idealization of an efficient market fits comfortably with -- or is even enhanced by -- its approval of a supporting role for 'redistribution'.

²⁸² See Daniel Yergin and Joseph Stanislaw, *The Commanding Heights* (Free Press 2008) at 13 (reporting the move away from government economic involvement 'toward reliance on competition in the marketplace as a more efficient way to protect the public'). For examples of neoliberal legal arguments, see generally Posner, *Economic Analysis of Law* (n 275); see also Steve Calandrillo, 'Responsible Regulation: A Sensible Cost-Benefit, Risk Vs. Risk Approach To Federal Health And Safety Regulation' (2005) 81

equity, which represents the redistribution of resources according to particular fairness or equality values.²⁸³ In neoliberalism, efficiency is about expanding the societal pie; equity redistribution is about dividing it.²⁸⁴ Policies that seek to fulfil policy objectives which are not based on a purely economic justification will be derogating from such economic objectives by redefining the allocative efficiency which would otherwise be secured by market forces. In regard the use of horizontal considerations to advance social policy, Trepte states that is ‘essentially a choice between efficiency and equity, the one economic, the other political. All countries are free to make such a choice (and to waste resources), and their procurement regulation will reflect those choices’.²⁸⁵ While Trepte claims to be free from any biases regarding this choice, his statement that derogating from economic objectives (by the use of horizontal considerations) is a waste of resources somewhat contradicts this.

This division between *equity redistribution* and efficiency is the linchpin that enables the argument that the addition of social value to a public procurement contract is a potential public liability.²⁸⁶ If the free market is, by definition, the system that maximises overall societal well-being, then ‘redistribution’, which by definition diverges from that market, inherently risks detracting from overall societal well-being.²⁸⁷ However, as Blaug explains²⁸⁸, although this goal of a division between equity and efficiency has proved elusive, ‘without faith in the equity/efficiency distinction, the whole “elaborately constructed apparatus” of modern economic policy evaluation “collapses like a house of cards”’.²⁸⁹ From the start, non-neoclassical economists have questioned the fundamental efficiency/equity division as false,²⁹⁰ and have explained, ‘[T]he whole point is that global welfare maximisation is meaningless.’²⁹¹ Nonetheless, most mainstream economics and policy analysis continues to take this equity/efficiency distinction on faith

Boston University Law Review 23 (asserting that regulatory policy should adopt the goal of Kaldor-Hicks efficiency because it ‘intuitively feels closest to serving our nation’s best interests by seeking the greatest good for the greatest number’); John McGinnis and Mark L Movsesian, ‘The World Trade Constitution’ (2000) 114 Harvard Law Review 511, 521–27 (asserting as a ‘well established’ premise that neoliberal ‘free trade’ – as regulated by the World Trade Organization – promotes countries’ overall social welfare in the long run despite harms to ‘special interests’). For an opposing view, see Pierre Bourdieu, *Acts of Resistance: Against the Tyranny of the Market* (Richard Nice transcript, The New Press 1998) 30–31 (describing and criticising the neoliberal message of economic productivity as the ultimate human goal and the route to universal liberation).

²⁸³ See Mark Blaug, *Economic Theory in Retrospect* (5th edn, Cambridge University Press 1996) 549–93 (discussing the history of general welfare economics as a struggle to find a measure of efficient outcomes separate from distributive judgments).

²⁸⁴ AM Polinsky, *An Introduction To Law And Economics* (2nd edn, Wolters Kluwer Law & Business 1989) 7.

²⁸⁵ Trepte, *Regulating Procurement* (n 38)139.

²⁸⁶ *ibid* 7.

²⁸⁷ Posner, *Economic Analysis of Law* (n 275) (giving arguments for the theory that equalising income through government welfare programmes often has efficiency costs); AM Polinsky, *An Introduction To Law And Economics* (n 279), at 127 (concluding that ‘income redistribution generally is costly, whether it is accomplished by the tax and transfer system or by the legal system’).

²⁸⁸ Mark Blaug, *Economic Theory in Retrospect* (5th edn, Cambridge Univ Press 1996) at 575 (noting that the ‘long discussion’ of efficiency criteria among various theorists such as Pareto, Hicks and Kaldor ‘brought us no further’ toward ‘purely ‘positive’ grounds’ for distinguishing efficiency from equity).

²⁸⁹ *ibid* 592–93 (discussing the history of welfare economics and accepting its assumption of an equity/efficiency division).

²⁹⁰ See ‘Law and Economics: An Institutional Perspective’ in Nicholas Mercuro and Steven G Medema, *Economics and the Law: From Posner to Post-Modernism* (1997) 119.

²⁹¹ A Allan Schmid, ‘Law and Economics: An Institutional Perspective’, in Nicholas Mercuro (ed), *Law and Economics* (Springer 1989) 69.

and to focus instead on dissecting the relationship between the two separate goals.²⁹²

4.4 Value for Money - Not an Objective of the EU

Value for money in public procurement purchasing is viewed as the most important objective of most national regimes on public procurement, and it is often stated that value for money is an object of EU regulation.²⁹³ Indeed, the Commission itself has suggested that ensuring value for money is an objective of the EU procurement regime. For example, in the 2002 communication ‘*Corporate Social Responsibility: a business contribution to sustainable development in the section on public procurement policy*’,²⁹⁴ the European Commission refers to previous communications on social and environmental issues in public procurement, stating that these clarify how the EU regime allows public purchasers to take account of such issues ‘while at the same time ensuring respect for the principle of value for money for taxpayers and equal access for all EU suppliers’. However, Arrowsmith and others argue against this view, not on ideological grounds but on the legal basis of EU action. The free movement provisions in the Treaty address hindrances to trade (or, in the case of public procurement, hindrances to suppliers wishing to access the market), not the regulation of the competitive behaviour of purchasers. While the Treaty involves positive obligations to advertise as well as negative obligations not to discriminate, the ECJ has stated that the purpose of the obligations to advertise is not to ensure value for money—it is instead to ensure monitoring of the obligations not to discriminate.²⁹⁵ Therefore ensuring the wise expenditure of public money and improving the quality of services are not objectives that the EU is competent to pursue: it must act within the limits of the powers conferred upon it and the objectives assigned to it by the Treaty. The limits of Union competences are governed by the principle of subsidiarity and proportionality which is enshrined in Article 5(1) Treaty on European Union (TEU).²⁹⁶ The legal basis for EU action is provided by Articles 53(1), 62, and 114 of the TFEU, which authorises the adoption of measures aimed at the establishment and functioning of the internal market only. Disparities between national rules and an abstract risk of future obstacles to trade or a risk of distortion of competition are not sufficient to authorise legal measures.²⁹⁷ As emphasised in the 1998 *Tobacco* case,²⁹⁸ the internal market provisions do not give a general power to regulate the internal

²⁹² See Suzanne Shanahan and Nancy Tuma, ‘The Sociology of Distribution and Redistribution’, in Neil J Smelser and Richard Swedberg (eds) *The Handbook of Economic Sociology* (1994) 733, 734 (concluding that the prevailing dichotomy between market distribution and government redistribution appears arbitrary and part of classical Western economic thought’s false attempt to construct markets as more natural than governments, but nonetheless accepting this division as fundamental to social science).

²⁹³ CR Yukins and J Cora, ‘Feature Comment: Considering the Effects of Public Procurement Regulations on Competitive Markets’ (2013) 55(9) *Government Contractor* 64. For some specific rebuttal of the criticisms, see Graells, *Public Procurement and the EU Competition Rules* (n 7) 117.

²⁹⁴ COM (2002) 347 final (section 7.5).

²⁹⁵ Arrowsmith and Kunzlik, *Social and Environmental Policies in EC Procurement Law* (n 20) 33.

²⁹⁶ The principle of subsidiarity is designed to ensure that decisions are taken as closely as possible to the citizen at the level most appropriate for the intended objective(s) to be achieved effectively.

²⁹⁷ Case C-376/98 *Federal Republic of Germany v European Parliament and the Council of the European Union*, para 84.

²⁹⁸ *ibid.* This statement was not directed at whether harmonisation can be justified by reference to improving transparency in operating conditions in other member states, to support the exercise of the ‘four freedoms’, but was a response to an argument that the internal market provisions may be invoked to harmonise national rules to eliminate appreciable distortions of competition between operators arising from different regulatory conditions in their own member states. However, the statement seems incompatible with a general power to harmonise to improve operator information. Harmonisation for this reason may, of

market, or to put this in the words of Advocate General Fennelly, ‘the internal market is not a value-free synonym for general economic governance’.²⁹⁹ Thus the EU only has the competence to regulate member state procurement policies to ensure that they do not hinder free movement and thereby obstruct the internal market.³⁰⁰ Ensuring the proper expenditure of public money and improving the quality of public services are not intrinsically objectives that the EU is competent to pursue.

4.4.1 The Public Procurement Directives and the Internal Market

Arrowsmith, Kunzlik and others argue that the directives are concerned mainly with promoting the internal market. The recitals to the earlier directives, on which the current ones are based, indicate clearly that the directives seek an internal market by two means: first, by using transparency to facilitate the obligation not to discriminate, with competition being a tool for creating this transparency,³⁰¹ and second by removing barriers that prevent suppliers from other Member States from accessing a market. The issue has not been directly analysed in the jurisprudence, but the limited role of the directives is supported by the opinion of Advocate General Jacobs in *SIAC Construction*:³⁰² ‘the main purpose of regulating the award of public contracts in general is to ensure that public funds are spent on the basis of a serious assessment and without any kind of favouritism or quid pro quo whether financial or political. The main purpose of Community harmonisation is to ensure in addition abolition of barriers and a level playing-field by, inter alia, requirements of transparency and objectivity.’

The procurement directives can be seen as a negative effort towards harmonisation, in that their aim is to eliminate member state actions that present a hindrance to trade in the public procurement market.³⁰³ There are three main means through which the EU regime seeks to achieve an internal market in public procurement.

The first is by prohibiting discrimination in public procurement. This prohibition lies at the heart of the EU’s efforts to achieve an internal market in procurement and is included expressly in the directives.³⁰⁴ It is also reiterated in specific obligations, such as the obligation to use non-discriminatory selection criteria.³⁰⁵ In addition, other procedural obligations prohibit practices with an intentional or unintentional discriminatory effect—for example, minimum time periods for key phases³⁰⁶ such as for submitting tenders and the obligation to advertise contracts through an EU wide notice.

course, be possible in special limited circumstances but it is difficult to see why public procurement is a special case.

²⁹⁹ *ibid*, para 85 of the Opinion.

³⁰⁰ Arrowsmith and Kunzlik, *Social and Environmental Policies in EC Procurement Law* (n 20) 31.

³⁰¹ The recitals to Directive 77/62, for example, refer to competition as the means to ensure the transparency that will allow restrictions under the Treaty to be complied with: ‘Whereas that prohibition [on free movement in the EC Treaty] should be supplemented by the coordination of the procedures relating to public supply contracts in order, by introducing equal conditions of competition for such contracts in all the Member States, to ensure a degree of transparency allowing the observance of this prohibition to be better supervised’.

³⁰² Case C–19/00, *SIAC Construction v Mayo CC* (‘SIAC Construction’) [2001] ECR I–7725, para 33 of the Opinion.

³⁰³ *ibid* paragraph 32 (‘[T]he purpose of coordinating at Community level the procedures for the award of public contracts is to eliminate barriers to the freedom to provide services and goods and therefore to protect the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State’).

³⁰⁴ Public Sector Directive, Art 2; Utilities Directive, Art 10; Defence and Security Directive, Art 4. That these provisions refer to, and emphasise, discrimination on grounds of nationality is clear from the fact that the same Articles also contain a more general equal treatment obligation.

³⁰⁵ Public Sector Directive, Art 44(1).

³⁰⁶ Public Sector Directive, Art 38.

The second method is by requiring Member States to award contracts through procedures that are transparent, to prevent them from concealing discriminatory behaviour, particularly behaviour that is discriminatory in intent. In particular, the directives limit the discretion of public purchasers by requiring them to hold a competition that is publicised to all interested suppliers and conducted according to rules set out in the directives, with pre-disclosed selection and award criteria, so that discriminatory measures cannot be concealed behind a cloak of subjective decision-making. The implementation of a transparent system of procedures to support the non-discrimination principle has always been the primary aim of the directives.³⁰⁷ Thus, while the recitals to the first Directive on works (Directive 71/305/EEC) refer merely to the need for ‘coordination of national procedures’, later recitals refer to the non-discrimination purpose. See, for example, Directive 77/62/EEC (the original coordination Directive on public supply contracts), which states the need for transparency ‘allowing the observance of [the prohibition on measures restricting imports] to be better supervised’, and Directive 89/440/EEC (amending Directive 71/305/EEC on public works), which refers to the need to improve transparency ‘in order to be able to monitor compliance with the prohibition of restrictions [on freedom of establishment and freedom to provide services] more closely’. The requirement for transparency in public contracts under the TFEU has been implied by the CJEU for the same purpose: namely, to allow monitoring for compliance with non-discrimination rules.

Third, the EU procurement rules are concerned with removing certain restrictions on access to the market—even, in certain cases, non-discriminatory restrictions—that are considered disproportionate in light of their objectives. For example, to limit the burden of participation, the Public Sector Directive contains a limited list of evidence that purchasers may require from firms to assess their technical capacity.

Therefore from the perspective of EU law, the requirement in the directives to award contracts on the basis of MEAT is meant to ensure that national processes for obtaining best value for money are operated in a transparent manner that ensures that any discrimination against the industry of other Member States can be identified. The objective is to determine the economically most advantageous tender ‘for the contracting authority’, and the assessment of ‘the most economically advantageous tender’ must be made from the point of view of the authority, as held in *Concordia*.³⁰⁸

4.4.2 The Principle of Competition: An Objective of the EU?

While there appears to be agreement that procurement should be based on the concept of competitive supply, and acquiring goods and services is considered best achieved by competitive bidding, there is debate over whether *the principle of competition*³⁰⁹ is a core

³⁰⁷ The recitals to the first directive on works (Directive 71/305/EEC, OJ 1971 No. L185/5) refer merely to the need for ‘co-ordination of national procedures’, but later recitals refer to this purpose: see Directive 77/62/EEC, OJ 1977 L13/1, stating the need for transparency ‘allowing the observance of [the prohibition on measures restricting imports] to be better supervised’; Directive 89/440/EEC, OJ 1989 L210/1 (amending Directive 71/305) (need to improve transparency ‘in order to be able to monitor compliance with the prohibition of restrictions [on freedom of establishment and freedom to provide services] more closely’); and Case C-44/96, *Mannesmann Anlagenbau Austria AG v Strohal Rotationsdruck GmbH* [1998] ECR I-73, para 33 (stating that ‘the aim’ of Directive 93/37/EC is to ‘avoid the risk of preferences being given to national tenderers or applicants’, cited in many subsequent judgments).

³⁰⁸ Case C-513/99, *Concordia Bus Finland Oy Ab v Helsingin kaupunki & HKLBussiliikenne* [2002] ECR I-7213.

³⁰⁹ The principle of competition is the most controversial of the main objectives in public procurement systems, in particular in the context of the EU procurement regulatory framework. For an in-depth analysis, see Graells, *Public Procurement and the EU Competition Rules* (n 7) 79–116; Peter Kunzlik, ‘Neoliberalism and the European public procurement regime’ in Catherine Barnard et al (eds), Cambridge

objective of the EU. Graells is the main supporter of the argument that the economic principle of competition³¹⁰ is embedded in EU public procurement law, and he argues that the directives have the function of promoting the internal market by implementing in public markets a process of competition that replicates that in private markets. Thus, the internal market is achieved only if purchasers behave ‘efficiently’ in choosing the best supplier. I am in agreement with Arrowsmith and Kunzlik in the rejection of this perspective as a misunderstanding of the purpose of the directives’ rules on *competitive procedures* and on selection and award criteria.³¹¹ Arrowsmith argues that the purpose of the directives is not to regulate procurement procedures so that the best tenderer is awarded the contract nor to otherwise replicate the private market. The directives are concerned only with *hindrances to trade* (which in procurement procedures mean hindrances to suppliers that wish to access the market), and there are three mechanisms available to deal with such hindrances: 1) removing discrimination, 2) removing barriers to entry into the competitive market and 3) implementing competitive procedures for transparency reasons. The *competitive behaviour of purchasers* is not at issue. A broader conception of competition is a misunderstanding of the reason for introducing the requirement for competition in the directives and of the purpose for the detailed procedures for conducting that competition. The recitals to Directive 77/62 indicate that the requirement for competition was introduced for the purpose of *ensuring transparency to prevent discrimination*. Therefore competition is required to ensure transparency, transparency is not required to support competition.³¹² Arrowsmith argues that suggestions of a broader function of the directives are an unjustified judicial reorientation of a detailed set of rules introduced for a more limited purpose, and that such a reorientation is outside the legitimate bounds of judicial interpretation.³¹³

4.4.3 Relation Between Competition Rules and Public Procurement Rules

What is the relationship between EU procurement rules, competition and competition law? Competition law is limited to ‘undertakings’, which is defined³¹⁴ to mean any person (natural or legal) ‘engaged in an economic activity’, which potentially includes state-run enterprises in cases where they pursue economic activities like a private business. According to *FENIN*³¹⁵, purchasing for consumption is not considered an economic activity, and purchasing constitutes an economic activity only if the goods and services acquired are subsequently used as an input for an economic activity—the offering of goods and services on a market. Where the overall activity of the contracting authority is not an economic activity, the purchases necessary to carry on such an activity will not be submitted to competition law rules. Consequently, EU procurement rules regulate a relatively narrow part of the procurement process when this process is being looked at from a viewpoint of its effects on competition. The very object of the procurement process (the question ‘what to buy’) is not subject to procurement rules. The application

Yearbook of European Legal Studies 2012–2013 (Hart Publishing, 2013) 283; Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Studies in International Trade and Investment Law) (Bloomsbury Publishing 2017).

³¹⁰ See Graells, *Public Procurement and the EU Competition Rules* (n 7) Chapter 1, para 2.

³¹¹ Arrowsmith and Kunzlik, *Social and Environmental Policies in EC Procurement Law* (n 20) 33.

³¹² *ibid* Arrowsmith indicates that Advocate General Stix-Hackly wrongly assumes this in Case C-247/02 *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici* [2004] ECR.

³¹³ Sue Arrowsmith, ‘The Purpose Of The EU Procurement Directives: Ends, Means And The Implications For National Regulatory Space For Commercial And Horizontal Procurement Policies’ (2012) 14 Cambridge Yearbook of European Legal Studies 1.

³¹⁴ *Höfner and Elser v Macrotron GmbH*(C-41/90) [1991] ECR I-1979

³¹⁵ See *FENIN v Commission* (C-205/03)[2006]ECR-6295.

of procurement rules starts at the definition of technical specifications and the publication of a contract notice and, in principle, ends with the award decision. The rules are relatively detailed as far as selection of economic operators and award of contracts are concerned. After the award decision, procurement rules still apply to the performance of the contract, but the relevant rules—on contract performance conditions and modifications of contracts that are allowed without a new procurement procedure—are less detailed and are mostly based on general principles. Many aspects of the process, such as the definition of the object of procurement, the contractual conditions and the behaviour of the contracting authority towards the economic operator, are not or are only very lightly regulated by procurement law.³¹⁶ Thus the aim of EU regulation is to assist contracting authorities in achieving the greatest possible competition for the contract in the procurement process, but the process does not aim to achieve that itself. Bovis confirms this view, writing that whereas price competition is the main characteristic of competition law, public procurement regulation first pursues market access.³¹⁷

Arrowsmith does not rely on dissecting the ideology behind Graell's stance to argue against it, but the view that the directive promotes the internal market by implementing in public markets a process of competition with the goal of economic efficiency does have a strong ideological basis, as persuasively argued by Kunzlik in his influential paper, 'Neoliberalism and the European public procurement regime.'³¹⁸ Graells acknowledges that linking economic efficiency inextricably to the EU internal market objective³¹⁹ requires an acceptance of the 'free market' economic theory and concepts,³²⁰ consistent with a neoliberal approach.³²¹ Following this view, social and environmental policies are seen as unrelated to the core function and objectives of the public procurement process and will necessarily deviate from the economic definition of either technical or allocative efficiency³²² by generating significant distortions of competitive market dynamics and thereby 'restrict[ing] the effective chances for the public buyer to obtain best value',³²³ thus becoming an obstacle to the adoption of an economically oriented approach to regulating the market behaviour of the public buyer.³²⁴ However, social and environmental considerations *are* explicitly allowed within the 2014 Directives, indicating a change from market or economic concerns to non-market considerations. This change is embedded in the Treaty of Lisbon, with Article 3(3) committing Europe to a 'highly competitive social market economy, aiming at full employment and social progress'³²⁵. How social objectives are balanced against economic objectives in the EU is the question at the root of establishing the democratic legitimacy of EU policy-making. It goes to the heart of who defines the space given to Member States to pursue social policies in their procurement decision-making and how this pursuit is exercised in

³¹⁶ Adrián Tokár, 'Public procurements and general EU law, including competition and State aids law in Neergaard', U.B., Jacqueson, C. and Ølykke, G.S., *Public procurement law: limitations, opportunities and paradoxes* (Djøf Forlag 2014).

³¹⁷ Christopher Bovis, *EU Public Procurement Law* (Edward Elgar 2015).

³¹⁸ Peter Kunzlik, 'Neo-liberalism and the European public procurement regime' in Catherine Barnard et al (eds), *Cambridge Yearbook of European Legal Studies 2012–2013* (Hart Publishing 2013) 283.

³¹⁹ 'economic efficiency must, by necessity, derive from the completion of the internal market' Graells, *Public Procurement and the EU Competition Rules* (n7) 233.

³²⁰ *ibid* 24-25.

³²¹ Graells, 'More Competition-Oriented Public Procurement' (n 271) 5.

³²² Trepte, *Regulating Procurement* (n 38).

³²³ Graells, 'More Competition-Oriented Public Procurement' (n 271) 5.

³²⁴ Graells, *Public Procurement and the EU Competition Rules* (n 7) 41, 49, 58–60, 100, 101 and 111.

³²⁵ Article 3 (2) TEU.

practice. To better understand the development of the two objectives, it is useful to sketch the roots and evolution of the concept of a ‘social market economy’ and the way this concept has entered the EU Treaty.

4.5 The EU: Economic and Social

What is the meaning of ‘social’ within the EU? What constitutes social is a broad church and is discussed further in chapter 5. In chapter 2, we examined national and European social models and saw that they converged on a common idea that there is a responsibility of societies for individuals’ well-being. In particular, this idea informs policies providing transfer payments for periods of loss of employment-based income and policies maintaining institutional social services or correcting labour markets through legislation and collective bargaining.³²⁶ In 1976 the Court in *Defrenne v. SABENA* said of (what was then) the Community that it is ‘not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples’. The Community was seen as pursuing ‘a double aim, which is at once economic and social’.³²⁷ Over 30 years later, in *Viking Line*, the Court declared that the EU has ‘not only an economic but also a social purpose’, which means that ‘the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy’.³²⁸ While this judgement, together with *Laval* and *Ruffert*,³²⁹ has been seen as simultaneously widening the definition of potential restrictions on the free movement provisions³³⁰ approach while narrowing the scope for justification on social ground³³¹, the courts did confirm that the EU has not only an economic but also a social purpose.³³² The aim of ensuring social progress and citations to *Defrenne* can be found in several other decisions and in Advocate Generals’ (AGs’) opinions.³³³ In cases on the freedom of establishment, the Court has also mentioned the ‘economic and social interpenetration within the European Union’.³³⁴ Furthermore, the CJEU has accepted the use of Article 114 TFEU and the EU’s competence to pursue non-economic policies as long as there is a contribution to the functioning of the internal market.³³⁵ The Court has noted its rules on free movement and competition are not an end in themselves, but rather they are means for attaining wider objectives, ultimately, as,

³²⁶ Dagmar Schiek, ‘The European Social Model And The Services Directive’ on *The Services Directive- Consequences for the Welfare State and the European Social Model*. (Copenhagen, DJØF Publishing 2009) 25-63.

³²⁷ *Defrenne v. SABENA*, (Case C-43/75) [1976] ECR 455 at para. 10.

³²⁸ *Viking Line* (Case C-438/05) [2007] ECR I-10779 at para. 79.

³²⁹ *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others* (Case C-341/05) [2007] ECR I-11767 1; *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* (Case C-438/05) [2007] ECR I-10779.

³³⁰ Advocate General Tizzano in *CaixaBank France v Ministère de l’Économie, des Finances et de l’Industrie* (C-442/02) [2004] ECR I-08961, para. 63 of the Opinion, describing in disapproval an approach that catches non-discriminatory measures that do not affect access to the market in any other way than to reduce the economic attractiveness of pursuing a particular activity.

³³¹ Sacha Garben, ‘The Constitutional (Im)Balance Between ‘The Market’ And ‘The Social’ In The European Union’ (2017) 13 European Constitutional Law Review 23.

³³² *Viking Line* (n 322); *Laval* (n 323); *Defrenne* (n 321).

³³³ Joined opinion of AG Cosmas, *Deutsche Telekom AG v Agnes Vick and Ute Conze* (Joined cases C-234/96 and C-235/96) [2000] ECR I-00799, para 79.

³³⁴ Among others, *Ingrid Schmelz v Finanzamt Waldviertel* [2010] (Case C-97/09) ECR I-10465

³³⁵ Bruno de Witte, ‘A Competence to Protect: The Pursuit of the Nonmarket Aims through Internal Market Legislation’ in Philip Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 25.

they contribute together to making concrete progress towards European unity.³³⁶ More recently in *Demirkan*, the Court found that the EU's agreement with Turkey regarding freedom to provide services was for solely an economic purpose and therefore establishes no general principle of freedom of movement of persons between Turkey and the EU. This is in contrast to Member States within the EU, as EU law 'is based on the objective of establishing an internal market, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market'; and it is 'precisely that objective which distinguishes the Treaty from the Association Agreement, which pursues an essentially economic purpose'.³³⁷ Weatherill concludes that this shows that the internal market project *within* the EU goes beyond economic goals.³³⁸

4.5.1 Social Market Economy

The social market economy is a concept that has been used in different ways in Germany and Europe over the past 70 years or so. At its core, it denotes a model that seeks to combine free markets and social protection arrangements, in opposition to both unfettered free market capitalism and certain forms of socialism. However, the emphasis has moved from a focus on the free market element (as in the post-war German notion of an economic constitution) to a focus on the social elements of the model (when it was used to demarcate more 'social' continental European economic models from more 'liberal' Anglo-Saxon ones).³³⁹

Prior to the Lisbon Treaty, the term 'social market economy' did not exist in EU legal texts. It has, however, long been part of the official discourse within the European institutions. For example, a speech of the former Competition Commissioner Mario Monti on the topic 'Competition in a Social Market Economy' dates back to 2000.³⁴⁰ Additionally, socially driven inclusions have a long history within the treaties. The Treaty Establishing the EEC Treaty), for example, included several express mentions of socially driven elements, such as 'to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it', and 'to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained'. The TFEU's preamble includes the resolve to ensure the 'social progress of their States by common action to eliminate the barriers which divide Europe'; the TEU's preamble refers to 'fundamental social rights ...and the promotion of social progress', and the EU Charter of Fundamental Rights recognises a wide range of social rights. However, these social provisions that predate the Lisbon Treaty emphasised the economic ahead of the social.³⁴¹ This focus changed with the entry into force of the Lisbon Treaty.

³³⁶ Opinion 1/91, [1991] ECR I-6079 citing Article 1 of the Single European Act.

³³⁷ *Leyla Ecem Demirkan v Bundesrepublik Deutschland*, judgment of 24 September 2013, Case C-221/11, ECLI:EU:C:2013:583.

³³⁸ Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford University Press 2017).

³³⁹ Rutger Claassen and others, 'Introduction To The Special Issue 'Rethinking The European Social Market Economy'' (2018) 57 *Journal of Common Market Studies* 3.

³⁴⁰ Marco Monti, 'Reform Of European Competition Law' (2001) 1 *Competition Policy Newsletter* 2. Since then, the 'social market economy' has become a standard reference for EU competition law, see Joaquín Almunia, Vice President Of The European Commission Responsible For Competition Policy 'How competition policy contributes to competitiveness and social cohesion' (Speech, Lisbon 14 January 2011) 2 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_17> accessed 29 January 2019.

³⁴¹ In *Fernando Zaera v INSS and others*, (C-126/86)[1987] ECR-03697, paras 10–11, the CJEU ensured that these clauses would remain largely non-judicable and were therefore merely aspirational in their tone from a judicial perspective. They could be used as an additional basis for judicial decisions to be rendered

in a more socially conscious manner, but this did not occur so often in Delia Ferri and Fulvio Cortese, *The EU Social Market Economy And The Law* (Taylor and Francis 2019) 12-13.

4.5.2 Lisbon Treaty and Its ‘Social Market’ Potential

With the entry into force of the Lisbon Treaty, the EU reinvented itself as a ‘highly competitive social market economy’ aiming at full employment and social progress, and provided that it ‘shall combat social exclusion and discrimination, and shall promote social justice and protection’. This reference to the ‘social market economy’ was a compromise between those who lobbied for reference to a ‘European social model’ and those who pushed to maintain the reference to an ‘open market economy with free competition’ (as contained in Article 4(1) of the EC Treaty).³⁴² It was seen as a catch-all expression, used to simultaneously recognise the social and economic interests at stake,³⁴³ and as an attempt to balance different sides of the political spectrum.³⁴⁴ It is generally agreed that phrase was not intended to copy the post-war German economic policy, but the drafters borrowed the concept of a possible compromise between economic growth and competitiveness on the one hand,³⁴⁵ and social-oriented redistributive measures on the other.³⁴⁶

These objectives are furthermore mainstreamed across all EU policies, in accordance with Article 9 TFEU which provides that:

[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

This requires the EU to take into account the promotion of employment and social protection and the combatting of social exclusion in its policies. This ‘horizontal social clause’ has raised hopes of enhancing the EU’s social profile.³⁴⁷ The biggest change was the repeal of the commitment to ‘undistorted competition’ embedded in the fundamental provisions of the EC Treaty (Article 3(1)(g) EC), and its transfer to a Protocol annexed to the Treaties.³⁴⁸ This commitment now appears in the Protocol (No 27) on Internal Market and Competition: ‘the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted’. A protocol is legally binding, so in this sense one could treat this as a rearrangement without legal significance. However, one might argue it has been relegated from its previous prominence at the beginning of the Treaty, thereby adjusting the balance in favour of socially motivated public regulation at the expense of market competition, and that this should be taken into account in the interpretation of the key Treaty Articles.³⁴⁹ Indeed this swap has been read as an expression of resistance against the neoliberal direction of

³⁴²Secretariat of the European Convention, ‘Final Report Of Working Group XI On Social Europe’ (Brussels 2003).

³⁴³ Francesco Costamagna, ‘The Internal Market And The Welfare State After The Lisbon Treaty’ (2011) 5 Research Paper Observatoire Social Européen 7.

³⁴⁴ J Syllová, J L Pítrová and H Paldusová, *Lisabonská Smlouva, Komentář [Treaty Of Lisbon. Comment]* (CH BECK 2010) 15.

³⁴⁵ Andreas Búcker, ‘A Comprehensive Social Progress Protocol Is Needed More Than Ever’ (2013) 4 European Labour Law Journal 12.

³⁴⁶ Hermann-Josef Blanke and Stelio Mangiameli, *The Treaty On European Union (TEU)* (Springer 2013).

³⁴⁷ M Dawson and BD Witte, ‘The EU legal framework of social inclusion and social protection: Between the Lisbon Strategy and the Lisbon Treaty’ in B Cantillon, H Verschueren and P Ploscar (eds) *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia 2012) 41–69.

³⁴⁸ Commission, ‘Statement by European Commissioner for Competition Neelie Kroes on results of June 21–22 European Council – Protocol on Internal Market and Competition’ MEMO/07/250 23 June 2007.

³⁴⁹ See Protocol no 27 on the Internal Market and Competition, annexed to the Lisbon Treaty.

European integration.³⁵⁰ In *Albany*, the Court recognised that two conflicting Community objectives were in play. “It is important to bear in mind that, the activities of the Community are to include not only a ‘system ensuring that competition in the internal market is not distorted’ but also ‘a policy in the social sphere’”.³⁵¹

Moreover, the Lisbon Treaty in Article 6, paragraph 1, has made the Charter of Fundamental Rights of the European Union part of primary EU law. The Charter includes a list of social rights such as the right to education (Art. 14), the right to choose an occupation and engage in work (Art. 15), the right to social security and social assistance (Article 34) and the right to healthcare (Art. 35). Since, as the Court puts it, the ‘applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter³⁵²’ the application and interpretation of the free movement and procurement rules must be informed by Charter rights and principles and the fundamental nature of public service obligations. The Grand Chamber’s judgement in *Bauer et al.* has affirmed the constitutional status of fundamental social rights as enshrined in the EU Charter, confirming that these rights have a normative core that is applicable in all disputes that fall within the scope of EU law, so that they do not become, as the AG had so aptly put it, a ‘mere entreaty’.³⁵³

4.6 Conclusion

By breaking down the concepts contained in the public procurement rules of efficiency, competition and value for money, I have shown how the neoclassical economic model and the technical language that accompanies it have played a large role in shaping procurement policy and legislation and attitudes to the use of horizontal considerations and the creation of social value. The space allowed Member States was clarified by showing that the EU rules have no role in ensuring that national resources are spent efficiently, and therefore there is no role for the EU in deciding on the balance between value for money and other national policy considerations—such as procedural efficiency or accountability—and horizontal objectives. These considerations remain, in principle, matters for Member States to determine, according to their own priorities in deciding this balance as well as deciding the best means by which to implement those priorities—for example, whether through award criteria or contract conditions. With the entry into force of the Lisbon Treaty, the EU has committed itself to transforming the internal market into a fully formed social market economy by way of Article 3(3) TEU. While the balance between the market and social components remains unresolved, the need for a continuing dialogue remains. To better understand the nature of the conflict between the social and the economic, the next chapter focuses on the meaning of ‘social’ and its relationship to social value and how this relates to public procurement regulation, the role of the EU and the influence of economics.

³⁵⁰ See for instance: 'A Less 'Anglo-Saxon' EU: Sarkozy Scraps Competition Clause From New Treaty - SPIEGEL ONLINE - International' (*SPIEGEL ONLINE International*, 2007).
<<http://www.spiegel.de/international/europe/a-less-anglo-saxon-eu-sarkozy-scraps-competitionclause-from-new-treaty-a-490136.html>> accessed 3 December 2019.

³⁵¹ *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) [1999] ECR I-5751.

³⁵² *Åklagaren v Hans Åkerberg Fransson*, (Case C-617)[2013] ECR I-0000 at para. 21.

³⁵³ *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* (Joined Cases C-569/16 and C-570/16) [2018].

Chapter 5: Social Value

5.1 What is Social Value?

Although the term ‘social value’ has been frequently used in academic literature, a singular definition has not yet been produced³⁵⁴. To separate out the concept into its component parts, we can say broadly that ‘social’ represents a ‘type of connection’ between heterogeneous and homogenous entities and occurs when meanings and representations are passed from one human being to the other³⁵⁵. In chapter 2, we looked at the relationship between social models and the State’s responsibility for individuals’ well-being, and saw how the EU conceived of social in terms of considerations permitted to be included in the procurement process.³⁵⁶ The concept of ‘value’ has evolved over time and can be defined in different ways, including in terms of utility³⁵⁷ and possessing a ‘socially recognised importance’³⁵⁸. Anderson³⁵⁹ specifies that the term ‘value’ includes legal, religious, moral, and other non-economic forces of social motivation and control, while Wood discusses the characteristics of ‘values’ as being real, objective, cognitive or assertive.³⁶⁰ Mazzucato in her book *The Value of Everything* defines value as economic value related to the ‘process’ by which wealth is created with ‘the production of new goods and services’ at its heart.³⁶¹ The most common understandings of value in public procurement terms also relate to economic value. In the previous chapters, I showed how this is linked to the dominance of neoclassical economic theory, where value is ranked by price levels or ‘willingness to pay’, and different outcomes of social value activity can be translated into a common metric that be added together and compared. This approach has come to dominate and influence the way that social value in public procurement is conceptualised and measured, and it lies behind the focus on certain types of outcomes. This approach is particularly reflected in the development of metrics such as social return on investment (SROI) and the need to assert economic evidence of ‘added value’.

5.2 Social Value and Public Procurement

Since the 2008 crisis, countries in the EU have relied on market-based approaches to eliminate budget deficits, implementing large-scale public sector funding cuts to reduce public sector costs and responsibilities³⁶². Alongside this is the growth of public value

³⁵⁴ Dave Wilson and Michael Frederick Bull, 'SROI In Practice: The Wooden Canal Boat Society' (2013) 9 *Social Enterprise Journal* 315; Louise Floyd, 'The Elephant In The Room: The Public Services (Social Value) Act 2012' (2013) 129 *Law Quarterly Review* 180; Simon Teasdale, 'What's In A Name? Making Sense Of Social Enterprise Discourses' (2011) 27 *Public Policy and Administration* 99.

³⁵⁵ Franklin Giddings, 'The Idea And Definition Of Value' (1893) 8 *Publications of the American Economic Association* 87; Bruno Latour, *Reassembling The Social* (Oxford University Press 2007); Albion W. Small, 'Social Theory. A Grouping Of Social Facts And Principles, John Bascom' (1896) 1 *American Journal of Sociology* 492.

³⁵⁶ Commission, 'Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement' October 2010.

³⁵⁷ Giddings, *The Idea and Definition of Value* (n 349) 92.

³⁵⁸ Mike Bull and others, 'Conceptualising Ethical Capital In Social Enterprise' (2010) 6 *Social Enterprise Journal* 250.

³⁵⁹ B. M. Anderson, 'The Concept Of Value Further Considered' (1915) 29 *The Quarterly Journal of Economics* 674.

³⁶⁰ Daniel Leighton and Claudia Wood, 'Measuring Social Value: The Gap Between Policy And Practice' (Demos 2014).

³⁶¹ Mariana Mazzucato, *The Value Of Everything* (Penguin 2019) 6.

³⁶² Bryan Evans and others, 'Structuring Neoliberal Governance: The Nonprofit Sector, Emerging New Modes Of Control And The Marketisation Of Service Delivery' (2005) 24 *Policy and Society* 73; Peter

governance,³⁶³ with a renewed emphasis on the creation of public and social value, both by government and by others active in the public sphere, through which policymakers are encouraged to address effectively what the public most cares about and pursue what is perceived as good for the public through policy interventions³⁶⁴. The rise of what Power coined the 'audit society'³⁶⁵ saw the growing requirement for increased transparency in government activity together with the paradigmatic questions regarding public value creation in an era of new public management (NPM)³⁶⁶. The underlying ideology of NPM is neoliberal: public services can be 'improved' (made more 'efficient' and 'effective') through the import of private sector, free market practices and management. The market is said to offer an 'all-purpose key to better provision of public services', a means to solve 'management ills' in many different contexts and an 'apolitical framework within which many different values could be pursued effectively'.³⁶⁷ NPM creates a focus on neoliberal values and an emphasis on citizen demand for improved accountability of public services leading to a performance-based concern with 'value for money' (VfM). VfM integrates ideas of economy, efficiency and effectiveness into decision-making. Major shifts have been made towards the development of more intensive performance regimes in the public sector and towards using social procurement to create social value through outcomes-based commissioning that fits into the VfM model.³⁶⁸

While the measurement and definition of economic value is relatively straightforward, this is not true of social value. Despite its rise to prominence within policy discourses, policy makers' understanding of the scale and nature of the social value they create remains limited,³⁶⁹ and research and evaluation in the field lacks a conclusive definition and theoretical framework³⁷⁰. Academic research in this area is still in its infancy, with studies dominated by the grey literature of non-profit organisations, consultancies, research organisations and third-sector funding bodies. There is little evidence in the literature of analysis of the social value obtained with the original strategic procurement objectives, while academic case studies tend to focus on authors' generalised assumptions

Taylor-Gooby, 'Root And Branch Restructuring To Achieve Major Cuts: The Social Policy Programme Of The 2010 UK Coalition Government' (2011) 46 *Social Policy & Administration* 61.

³⁶³ taking the place of New Public Management. Interestingly, countries where NPM has penetrated furthest i.e. the USA, UK, Canada, Australia and New Zealand, are countries where the influence of neo-liberalism has been particularly significant See Eleonora Belfiore, 'Auditing Culture' (2004) 10 *International Journal of Cultural Policy* 183.

³⁶⁴ Kelly sees the concept of public value as a broader measure of value covering outcomes, means, trust, legitimacy, equity, ethos and accountability created by government and defined by the public themselves. Geoff Mulgan and David Albury, 'Innovation in the public Office of the Third Sector (2009) also see Chris Dayson, 'Evaluating Social Innovations And Their Contribution To Social Value: The Benefits Of A 'Blended Value' Approach' (2017) 45 *Policy & Politics* 395; John M. Bryson and others, 'Public Value Governance: Moving Beyond Traditional Public Administration And The New Public Management' (2014) 74 (4) *Public Administration Review* 445.

³⁶⁵ Michael Power, 'The Audit Society - Second Thoughts' (2000) 4 *International Journal of Auditing* 111.

³⁶⁶ Jo Barraket and others, *Social Procurement And New Public Governance* (Routledge 2015).

³⁶⁷ Christopher Hood, 'A Public Management for All Seasons?' (1991) 69(1) *Public Administration* 3, 8. See further Ewan Ferlie et al, *The New Public Management in Action* (Oxford University Press 1996).

³⁶⁸ Jean Ellis 'Developing, Monitoring And Evaluation In The Third Sector: Research Report' (Charities Evaluation Service (CES) 2008); Jenny Harlock, 'Impact Measurement Practice In The UK Third Sector: A Review Of Emerging Evidence' (Third Sector Research Centre 2013).

³⁶⁹ Geoff Mulgan and others, 'Social Innovation: What It Is, Why It Matters And How It Can Be Accelerated.' (Skoll Centre for Social Entrepreneurship 2007); Simone Baglioni and Stephen Sinclair, 'Introduction: Social Innovation And Social Policy' (2014) 13 *Social Policy and Society* 409.

³⁷⁰ Alexandra Graddy-Reed and Maryann Feldman, 'Stepping up: an empirical analysis of the role of social innovation in response to recession' (2015) 8 *Cambridge Journal of Regions, Economy and Society* 293.

about what constitutes social value rather than examining the types of value produced in relation to stated aims.

5.3 Definitions of Social Value

Multiple definitions of social value exist, with the meaning of social value being dependent on the context in which it arises.³⁷¹ Social value is defined differently in the literature according to the requirements and perspective of the sector in which it is defined, with a number of groups putting forward definitions which share a consideration of economic, environmental and social elements³⁷². Beyond overlapping definitions, there is a lack of consolidated research which analyses social value across different sectoral and organisational contexts. Existing research generally focuses on a combination of public sector, private sector and third-sector organisational perspectives. This makes it challenging to settle on a meaningful definition of social value relevant to all contexts; the result is that there is no single authoritative definition³⁷³.

5.3.1 Social Value as Outcomes

One common approach to defining and evaluating social value is the outcome based model. Westall³⁷⁴ states this approach is derived from the social entrepreneurship literature and that the approach relates ‘to specific outcomes which tend to focus on relieving disadvantage or on the results of local economic development. As such it suffers from being purely outcome-focused as well as only concerned with certain kinds of outcomes’. Whereas Westall’s definition conveys the notion that social value refers to certain outcomes and focuses on certain individuals or sections of society, Emerson et al. see social value as a concept which relates to society as a whole which implies that the outcomes associated with the concept benefit society and are not limited to just individuals.³⁷⁵ They describe social value as that which is created when resources, inputs, processes or policies are combined to generate improvements in the lives of individuals or in society as a whole. This view, in some ways, represents the traditional welfare economics definition, which links the concept of value with the notion of society rather than with the individual. Both definitions make interesting contributions in that they link the concept to outcomes.

³⁷¹ Geoff Mulgan, 'Measuring Social Value' (2010) 8 *Stanford Soc Innov Rev* 38.

³⁷² Cabinet Office, *A Guide to Social Return on Investment* (Strategy Unit, Cabinet Office London, 2003); C Wood and Daniel Leighton, 'Measuring Social Value: The Gap Between Policy And Practice' (Demos 2014); Public Services (Social Value) Act 2012; Stephen Dietz and Constance Porter, 'Making Sense Of Social Value Creation: Three Organizational Case Studies.' (2012) 14 *ECO* 23; Cheryl Kiser and others, *Creating Social Value: A Guide For Leaders And Change Makers* (Greenleaf Publishing 2014); Social Value Portal Website, *What is Social Value* <http://socialvalueportal.com/what-is-social-value/> accessed 31 May 2016.

³⁷³ Mulgan, 'Measuring social value' (n 365); Wood and Leighton, 'Measuring social value' (n 366).

³⁷⁴ Andrea Westall, 'Value And The Third Sector' (TSRC 2009) 8.

³⁷⁵ Jed Emerson and others, 'Social Return On Investment: Exploring Aspects Of Value Creation in the Non-Profit Sector' (The Roberts Foundation 2000).

5.3.2 Public Body Definitions

The most prominent definition of social value from the public sector is found in reference to the UK's Public Services (Social Value) Act 2012 and its interpretation by organisations. The UK government's definition of social value is fundamentally rooted in a top-down view of procurement: 'Social value is about seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and beyond the benefit of merely the goods and services themselves'.³⁷⁶ Here, it is not prescriptively defined but rather articulated in very general terms as the collective benefit to the community of the awarding of a public sector contract. Such benefits refer to the wider added value that may accrue to communities through the ways that services are procured and delivered. Emphasis on social value is purported to encourage public commissioners and service planners in the UK to consider the wider multiplier effects and benefits of service purchasing beyond the price value that accrues through the procurement process itself³⁷⁷.

5.3.3 Private Sector

As an example from the private sector, the Social Value Portal (a social enterprise proving an online tool that claims to allow organisations to measure and manage the contribution (financial and non-financial) that they and their supply chain make to society³⁷⁸) defines social value as 'the net social and environmental benefits (and value) generated by an organisation to society through its corporate and community activities reported either as financial or non-financial (or both) performance.' This statement refers to both corporate and community activities, and social value is defined in net terms. This is significant, not only for organisations which receive public funding and are therefore required to subtract this funding from their social value, but also from the perspective of an organisation's legitimacy in society. Social value is defined in social and environmental terms. This connects with the public sector definition but lacks the economic consideration. The definition of social value includes reference to reporting in financial terms, non-financial terms or both.

5.3.4 Third-Sector

Wood and Leighton³⁷⁹ found that for public procurement practitioners it remains a priority to differentiate between comparable procurement actions, despite the challenge of ascribing a numerical value to social value,³⁸⁰ and so they define the term within the context of the measurement of outcomes: 'wider non-financial impacts of programmes, organisations and interventions, including the well-being of individuals and communities, social capital and the environment'. This definition reflects the requirement that the value be used for comparison purposes with its genesis in the literature on SROI. Wider non-financial impacts and well-being are not defined or expanded upon, leaving these tasks to the user. Many commentators find this outcome based definition limited, as it is concerned with only certain kinds of outcomes and therefore presents an incomplete picture.³⁸¹

³⁷⁶ Department for Communities and Local Government (2011) Intro.

³⁷⁷ Jenny Harlock, 'From Outcomes-Based Commissioning To Social Value? Implications For Performance Managing The Third Sector' (2014) 16 *International Journal of Management Reviews* 417.

³⁷⁸ The UK Government website, <https://www.digitalmarketplace.service.gov.uk/g-cloud/supplier/708231>

³⁷⁹ Wood, & Leighton, 'Measuring social value' (n 366)

³⁸⁰ *ibid.*

³⁸¹ Westall, 'Value and the third sector' (n 368) 8.

5.4 Social Value Measurement and Evaluation

The prevailing assumption about social value is that it is measurable³⁸². While there are a range of agents and institutions, with a variety of ideological positions, involved in the production and use of social value, it can be argued that the underlying driver is ultimately economic³⁸³. However, the quantification of the environmental aspects are problematic, and its social elements and ethical aspects even more so.³⁸⁴ The measurement and evaluation of social value can be viewed in the context of the influence of neoliberal economic norms and the trend towards including social and environmental impacts in decision-making—impacts which in chapter 2 we noted were labelled in classical economic terms as ‘externalities’. Analysis of the literature finds that social value measurement is currently diverse³⁸⁵, ‘fragmented’³⁸⁶, ‘not yet fully developed’³⁸⁷ and in need of an industry standard.³⁸⁸ Many of the studies in this field are based on the ‘blended value proposition’, as coined by Emerson³⁸⁹: a conceptual framework for value creation in which non-profit organisations, businesses, and investments are evaluated based on their ability to generate a blend of financial, social and environmental value, a blend sometimes used interchangeably with the term ‘triple bottom line’.³⁹⁰

5.4.1 The Role of Evaluation

Broadly, evaluations should offer a systematic assessment of the results of an intervention, based on a logical collection of data. The preference for evaluations is often based on a belief that they will provide objective evidence of what works. Perspectives on evaluation drawn from business and finance literature frame evaluation as a strictly technical process of collecting evidence to improve decision-making³⁹¹, with the primary role of evaluation being to ensure cost-effectiveness for taxpayers.³⁹² This view is challenged by others who argue that social value is a social construction³⁹³ and that how it is evaluated is not a purely instrumental, rational means of establishing value but is a

³⁸² Barraket *Social Procurement and New Public Governance* (n 360).

³⁸³ Lindsey Metcalf, 'Measuring Impact: How Can Third Sector Organisations Make Sense Of A Rapidly Expanding Marketplace Of Tools?' (University of Birmingham 2013).

³⁸⁴ *ibid*; Wood, & Leighton, 'Measuring social value' (n 366).

³⁸⁵ *ibid*.

³⁸⁶ KPMG International 'A New Vision of Value Connecting Corporate And Societal Value Creation' (2014).

³⁸⁷ Cabinet Office 'Social Value Act review' (Cabinet Office February 2015).

³⁸⁸ 'Social Value Act Needs More Bite, Says Lord Adebawale' (*Pioneerspost.com*, 2019)

<<https://www.pioneerspost.com/news-views/20150205/social-value-act-needs-more-bite-says-lord-adebawale>> accessed 3 December 2019.

³⁸⁹ Jed Emerson, 'The Blended Value Proposition: Integrating Social And Financial Returns' (2003) 45 *California Management Review* 35.

³⁹⁰ *ibid*.

³⁹¹ Jeremy Nicholls, 'Why Measuring and Communicating Social Value Can Help Social Enterprise Become More Competitive' (Cabinet Office, Office of the Third Sector 2007).

³⁹² Tessa Hebb and Heather Hachigian, 'Social Value Procurement Measurement And Evaluation' (Carleton Centre for Community Innovation 2017).

³⁹³ Malin Arvidson and Helen Kara, 'Putting Evaluations To Use: From Measuring To Endorsing Social Value.' (Third Sector Research Centre 2013); Malin Arvidson and Fergus Lyon, 'Social Impact Measurement And Non-Profit Organisations: Compliance, Resistance, And Promotion' (2013) 25 *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations*; R Morgan, 'Calculating Social Value: A Critical Analysis Of How Social Value Is Constructed, Understood And Utilised Within Public Sector Value For Money Decision Making.' (Leverhulme Centre for the Study of Social Value 2015); Mulgan, 'Measuring social value' (n 365).

political choice that decides what is valued and how.³⁹⁴ For example, Morgan³⁹⁵ distinguishes between empirical assessments of the impacts of a procurement decision and normative assessments about the value that is attributed to that impact. Those in positions of power choose how social value is measured and evaluated, and they also have the power to shape what is valuable and, by omission, what is valueless. In other words, ‘evaluation is not just an instrumental procedure for collecting evidence of what works, but also tools that actively promote certain values.’³⁹⁶ Arvidson and Kara’s study on the evaluation of social value found that the choice of an evaluation framework is often based on pragmatic considerations such as cost, skills and the availability of data, thus masking the inherent value-bases of evaluations³⁹⁷. Hall states that the choice of an evaluation framework reflects ‘a normative belief in the superiority of particular approaches to performance measurement and evaluation’ and is tailored to highlight different policy priorities³⁹⁸. Arvidson and Kara conclude that the choice of an evaluation framework is a political one in which we find ‘the promotion of different values and political stances’ and that the choice of an evaluation approach carries political or normative implications. Evaluations can therefore promote both political and methodological values. An evaluation that is aimed at promoting equity in the distribution of healthcare will have a different focus than one that prioritises efficiency in service delivery.

5.4.2 Defining Evaluation Concepts

Social impact and social value are separate but connected concepts, although the two often overlap within the literature of social value³⁹⁹ such that the social impact results of a project are frequently used as commensurate with its social value. According to the UK’s Cabinet office, to measure social value, one must be able to measure the ‘impact’ of the social value intervention⁴⁰⁰. However there is an important distinction between these two separate but connected concepts, as in the process of evaluating the impact, underlying assumptions as to the value of the change at a societal level are made. Morgan notes that social impact is an explanation of the changes that have occurred within society through an intervention, using an empirically based observation, whereas social value is an ontological assumption about the nature and importance of that change, based on normative assessments of its ‘value’. This distinction has implications for the way that the concept is utilised and understood as part of valuation practices and decision-making. Morgan argues that when social value outcomes are commensurable with monetary calculations, either through financialisation or through more subtle valuation mechanisms, the commodification of social value is placed within a market-based framework that masks the underlying agenda of calculative rationality.

³⁹⁴Emily Barman, 'What Is The Bottom Line For Nonprofit Organizations? A History Of Measurement In The British Voluntary Sector' (2007) 18 VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations; Kelly Hall and Malin Arvidson (2013) 'How do we know if social enterprise works? Tools for assessing social enterprise performance' in Simon Denny and Frederick Seddon (eds), *Social enterprise: accountability and evaluation around the world* (London, Routledge 2013); Peter Rossi and others, *Evaluation* (Sage 2004).

³⁹⁵ Morgan 'Calculating Social Value' (n 387).

³⁹⁶ Arvidson and Kara 'Putting Evaluations to Use' (n 387).

³⁹⁷ *ibid* 110.

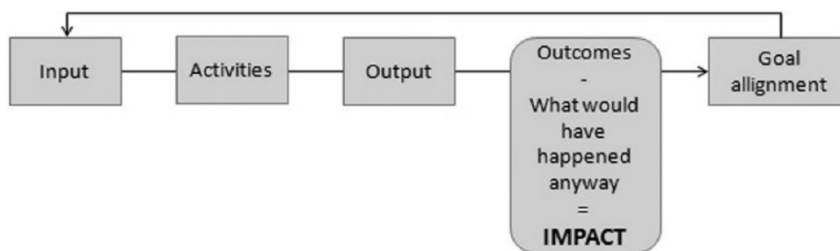
³⁹⁸ Matthew Hall, 'Evaluation Logics in the Third Sector' (2012) 25 VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations 309.

³⁹⁹ James Cox and others, 'Social Value: Understanding The Wider Value Of Policy Interventions' (New Economy 2012).

⁴⁰⁰ Cabinet Office 'Social Value Act Review' (February 2015).

There is a lack of consensus on the definition of social impact. Variations are found between the different academic fields of social science, business, management accounting and strategic management⁴⁰¹. It is described as a combination of resources, inputs, processes or policies that occur as a result of the real, implied or imagined presence or actions of individuals in achieving their desired outcomes⁴⁰². A useful example by Clark et al.⁴⁰³ is based on the impact value chain (Figure 2): ‘by impact we mean the portion of the total outcome that happened as a result of the activity of an organisation, above and beyond what would have happened anyway’.

Figure 2 Impact Value



Note: Adapted from Clark et al. (2004).

Inputs refers to all the resources that are needed to accomplish the alignment goal.

Activities are the things that are done with inputs to achieve the mission.

Outputs of a project are defined as the direct results of the activity that can be measured or assessed directly.

Outcomes are the wider benefits or changes for the intended beneficiaries. They tend to be less tangible and therefore less countable than outputs and include results such as such as increasing employability and improving living wages.

Impact refers to the long-term change or difference that the activity can create, which can be measured to assess how much impact has occurred.

Social value in this model refers to the value, financialised or not, attributed to that change to individuals, society, the economy or the environment, often relative to its cost.⁴⁰⁴ Hendricks et al.,⁴⁰⁵ emphasising the need to distinguish between measurement of the outcomes and their impact, highlight that simply aggregating data does not yield data on social impact. Conclusions regarding impact rely on assumptions or theories of change and can be influenced by the perspective or position of the particular actor making the assessment.

⁴⁰¹Maas, K., & Liket, K, ‘Social impact measurement: Classification of methods’ in *Environmental Management Accounting and Supply Chain Management* (Netherlands, Springer 2011) 171-202.

⁴⁰²J Emerson, J Wachowics and S Chun, 'Social Return On Investment: Exploring Aspects Of Value Creation In The Non-Profit Sector' (The Roberts Foundation 2000); Bibb Latané, 'The Psychology Of Social Impact.' (1981) 36 *American Psychologist*; J Reisman and A Giennap, 'Theory Of Change: A Practical Tool For Action, Results And Learning' (Organizational Research Services, Erasmus University 2004).

⁴⁰³Catherine Clark and William Rosenzweig, 'Double Bottom Line Project Report: Assessing Social Impact In Double Bottom Line Ventures' (The Rockefeller Foundation 2004).

⁴⁰⁴Wood, & Leighton, 'Measuring social value' (n366).

⁴⁰⁵Michael Hendricks, Margaret C. Plantz and Kathleen J. Pritchard, 'Measuring Outcomes Of United Way-Funded Programs: Expectations And Reality' (2008) 2008 *New Directions for Evaluation*. 13-35.

5.4.3 Principles of Measuring Social Value

While the marketplace offers a diversity of tools and methods, it is the principles, rather than the method, that influence the measuring and evaluation of social value.⁴⁰⁶ Wood and Leighton identify six principles for measuring social value which they consider the ‘fundamental elements of social reporting’: outputs; outcomes; wider impacts (these are the indirect impacts of an organisation, both social and environmental, which are in addition to the organisation’s stated aims and activities); stakeholder participation; and distance travelled—using outcomes to set quantifiable goals, against which progress can be measured and finally financial values—outputs or outcomes been given financial values.

The SROI network, influential in the field of measuring social value, lists seven core principles or edicts which underpin how an SROI analysis should be applied. These have some overlap:

1. Require stakeholders participation.
2. Understand what changes: This refers to outcomes and requires that the theory of how these changes are created be stated and supported by evidence.
3. Value the things that matter: This refers to the use of financial proxies so that the value of the outcomes can be recognised in the SROI model.
4. Include only what is material: This is in an attempt to accurately calculate impact.
5. Do not over-claim: This refers to isolating the value that a particular intervention is responsible for creating.
6. Be transparent: This is to show the basis on which the analysis may be considered accurate and honest and shows that it will be reported to and discussed with stakeholders.
7. Verify the result: This is done to ensure appropriate independent assurance.

5.5 Economic Measurement Frameworks

There are numerous diverse standards and frameworks that have been developed to measure social value, mainly intended for third-sector and social enterprises⁴⁰⁷. Metcalf for TSCR⁴⁰⁸ provides an overview of some guides that have been developed to categorise impact measurement tools and assists in navigating the wide array of available options. However, there is a lack of standardisation in the measurement and evaluation of social value⁴⁰⁹. The measurement of social value is currently structured around a series of overlapping approaches, such as social cost-benefit analysis, social accounting and audit, and SROI. These construct a model describing and separating social outcomes that arise from a particular activity so that their impact on stakeholders can be estimated. Depending on the method used, these social outcomes can then be valued using financial

⁴⁰⁶ Morgan ‘Calculating Social Value’ (n 387).

⁴⁰⁷ Bull M., Wilson D and Baines S, ‘Demonstrating value in chaos: The elephant in the room’(International Social Innovation Research Conference 2012).

⁴⁰⁸ Metcalf, ‘Measuring impact’ (n 377)

⁴⁰⁹ *ibid*; Wood & Leighton, ‘Measuring Social Value’ (n 366).

proxies. SROI leads to the calculation of an investment return ratio, such that social value can be described per unit of investment.

5.5.1 Standard Economic Approaches to Applying Values to Outcomes

Methods to quantify social value are largely based on neoclassical economic theory and welfare economics arising from the theories of Marshall, Pigou and Pareto, and from the concept of a Pareto-optimal allocation of resources, as discussed in chapter 2. This relies on the assumptions that ‘efficiency’ is value-free and ‘equity’ is value-laden, assumptions which many would argue against.⁴¹⁰ As elements of social value cannot be evaluated directly, proxies are assigned a monetary value that translate these non-market benefits into equivalents that do have a market value. This is achieved by assigning an exchange value based on what people say they would pay for a service or outcome (‘stated preference’ or SP) or on the choices people have made in related fields (‘revealed preference’ or RP) designed to elicit willingness to pay. These preference methods are the standard methods used in economics for the past 40 years⁴¹¹ and are the dominant frameworks for the evaluation of public policy in OECD countries.⁴¹² SP uses surveys to ask individuals their willingness to pay and is applicable to a wide range of situations, but it is expensive to conduct and is vulnerable to research biases (for example, respondents will often state that they would be willing to pay more than they actually do in practice).⁴¹³ RP examines the behaviour of individuals or groups and uses statistical techniques to draw conclusions about how they value goods and services, using market price proxies for value where they exist. It is based on the premise that welfare is reflected in people’s preferences and choices. In this context, we can infer welfare from people’s choices because ‘what is best for someone is what would best fulfil all of his desires’⁴¹⁴. The RP method requires that people’s preferences adhere to the axioms of RP⁴¹⁵, which state that people have well-informed, stable and coherent preferences. This also relates to the economic concept of ‘allocative efficiency’: that a market economy is able to find the best use for resources such that what is most valued is produced. Implicit in this economic approach is that it is possible to rank value as revealed by price levels or willingness to pay and be added together with different outcomes.⁴¹⁶ In recent years preference methods have come under increasing attack and scrutiny from psychologists and economists alike, who have found evidence that people may not always choose what is in their best interests; they may make choices with poor information and are easily susceptible to reversing preferences.⁴¹⁷

5.5.2 Cost-Benefit Analysis

Cost-benefit analysis (CBA) can refer to any methodology that monetises and compares the benefits and costs of a particular intervention,⁴¹⁸ such as a government policy, an investment or an activity. CBA dominates policy analysis within the U.S. federal

⁴¹⁰ Blaug, *Economic Theory in Retrospect* (n 383) 591.

⁴¹¹ Daniel Fujiwara, 'Measuring The Social Impact Of Community Investment: The Methodology Paper.' (Housing Associations Charitable Trust (HACT) 2014).

⁴¹² *ibid.*

⁴¹³ Cox, 'Social Value' (n 383).

⁴¹⁴ Derek Parfit, *Reasons And Persons* (Clarendon Press 1987).

⁴¹⁵ Paul A. Samuelson, 'Consumption Theory In Terms Of Revealed Preference' (1948) 15 *Economica* 56.

⁴¹⁶ Westall, 'Value and the third sector' (n 368).

⁴¹⁷ Daniel Fujiwara and Ross Campbell, 'Valuation Techniques for Social Cost-Benefit Analysis: Stated Preference, Revealed Preference and Subjective Well-Being Approaches A Discussion of the Current Issues' (HM Treasury 2011).

⁴¹⁸ Matthew Adler and others, 'Cost-Benefit Analysis' in *The Oxford Handbook of Well-Being and Public Policy* (Oxford University Press 2016).

government, Australia, Canada and, more recently, the EU⁴¹⁹. In the United Kingdom, CBA forms the core methodology of the HM Treasury (2003) Green Book guidance on policy appraisal and evaluation. CBA also features in policy evaluation guidance set out by, for example, in Australia (Department of Finance and Administration),⁴²⁰ in Canada (Treasury),⁴²¹ and in New Zealand (Treasury).⁴²² It has been traditionally used as a decision tool to determine the relative benefits of procurement and commissioning arrangements with regard to financial savings. The specific characteristic of CBA is its measurement, in monetary terms, of all benefits and costs of a project for society.⁴²³ In CBA there is an activity, project or intervention that is to be evaluated. The primary stakeholder is society as a whole, with secondary stakeholders being decision makers for the public benefit, the beneficiaries of the activity and lastly the independent reviewers. According to Massimo, both CBA and SROI share a common theoretical framework: they are conceived as a generalisation of traditional accounting systems and their related theoretical frameworks, and they share a common origin in welfare theory.⁴²⁴ CBA is based on economic principles of consequentialist welfarism: the outcomes of an action are what matter and get counted, and these outcomes are measured ultimately in terms of their implications for human welfare. Whether under the Kaldor-Hicks compensation test or the social welfare function approach, CBA requires monetisation or valuation of the impacts and outcomes of a policy.⁴²⁵ The value of a good, service, or outcome relates to the impact that it has on human welfare, expressed either as a compensating welfare measure (the amount of money, paid or received, that will leave the agent in his or her initial welfare position following a change from the status quo) or as an equivalent welfare measure (the amount of money, to be paid or received, that will leave the agent in his or her subsequent welfare position in absence of a change from the status quo), where the change is in the form of price changes or changes to the quantity or quality of non-market goods.

Boadway writes that the fundamentals of CBA include identifying the scope of the intervention being evaluated, its effect on resource allocation and prices, the consequences for the welfare of individuals affected, and a global measure of welfare change that aggregates fewer costs of the policy change.⁴²⁶ The key methodological issues that must be addressed in conducting a CBA are identifying the changes in economic outcomes resulting from an intervention. These include not only the direct outcomes of the intervention but also indirect effects elsewhere in the economy. These changes in economic outcomes are then evaluated based on the preferences of individuals

⁴¹⁹ Matthew Adler, 'The SWF Approach and Its Competitors.' in *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis* (Oxford University Press 2011).

⁴²⁰ Australian Government, *Cost Benefit Analysis* <https://www.pmc.gov.au/regulation/guidance-policymakers/cost-benefit-analysis> accessed 3 October 2019.

⁴²¹ Treasury Board of Canada Secretariat, 'Canadian Cost-Benefit Analysis Guide (2007).

⁴²² New Zealand, *The Treasury, Cost Benefit and Multi-Criteria Analysis* <https://treasury.govt.nz/information-and-services/regulation/information-releases/regulatory-review-programme/cost-benefit>, accessed 3 October 2019.

⁴²³ Norbert Terre and others, 'Cost/Benefit Analysis Of Public Projects' (1973) Management accounting; LC Diaz, 'Social Cost/Benefit Analysis' [1984] Accounts Journal; Commission 'Guide to Cost-Benefit analysis on Investment Projects - Economic Appraisal Tools for Cohesion Policy 2014-2020' Luxembourg, European Union, (2014) 3.

⁴²⁴ Massimo Costa, 'Social return on investment (SROI), including elements on cost-benefit analysis' in Bent Greve (ed.) *Handbook of Social Policy Evaluation* (Edward Elgar 2017).

⁴²⁵ Daniel Fujiwara and Paul Dolan 'Happiness-Based Policy Analysis' in Bent Greve (ed.) *Handbook of Social Policy Evaluation* (Edward Elgar 2017).

⁴²⁶ Robin Boadway, 'Cost benefit Analysis' in *The Oxford Handbook of Well-Being and Public Policy* (Oxford University Press 2016) 66.

affected by the project. For goods that are freely traded on markets, market prices reflect the monetary value individuals put on the goods and can be used to construct shadow prices. In the case of goods that are not marketed, such as public goods or environmental amenities, other means of obtaining individual preference evaluations must be sought. These typically aim to mimic market evaluations by estimating individuals' willingness to pay for the non-marketed items. The aggregate value of a policy is measured by its net social benefits, sometimes simply referred to as the net benefits. The net social benefits, NSB, equal the social benefits, B, minus the social costs, C. Therefore, $NSB = B - C$. Applying this individualistic approach relies heavily on individuals revealing their preferences for economic outcomes, either explicitly through their observed market behaviour or implicitly through indirect methods or survey responses.

5.5.3 Social Return on Investment (SROI)

SROI has been the most dominant of the measurement approaches across a number of countries and has influenced the development of a number of other alternative methodologies.⁴²⁷ A meta-analysis by Krlev, Munscher and Mulbert⁴²⁸ of social impact measurement methods utilised between 2002 and 2012 found that SROI was one of the most widely used and discussed methods in the field. It is defined as 'a form of adjusted CBA that takes into account, in a more holistic way, the various types of impact' that programmes have⁴²⁹.

With its origins in the work of the Roberts Enterprise Development Fund in the United States and later popularised through the New Economics Foundation and the SROI network in the UK, SROI developed from traditional CBA and social accounting. It develops the CBA analysis from the investor's viewpoint, explicitly generalising the traditional return on investment analysis from inside accounting to outside, towards social accounting. As in CBA analysis, a value in monetary terms is attributed to a social output. There has been a substantial expansion in the variety and quantity of SROI analysis over the past several years, and increasing numbers of public, private and third-sector organisations are drawing on the methodology. Meanwhile, an increasing number of commentators have begun mapping out how the methodology might be further developed and applied⁴³⁰. The principle is to capture social value in monetary terms. As with CBA the method applies accounting principles to a stakeholder-informed approach using financial proxies to determine a ratio for the (financial) costs versus the (monetised social) value created by particular interventions⁴³¹ over a certain period of time. The end product of the SROI methodology is an understanding of the relative importance of the material outcomes that result from an activity in relation to the cost of that activity⁴³². An example would be to equate the financial value of the service in question with the cost savings which that service facilitates elsewhere in the economy and then to establish to

⁴²⁷ MT Tuan, 'Impact Planning And Improvement Measuring And/Or Estimating Social Value Creation: Insights Into Eight Integrated Cost Approaches.' (Bill & Melinda Gates Foundation 2008).

⁴²⁸ Gorgi Krlev and others, 'Social Return On Investment (SROI): State-Of-The-Art And Perspectives' (Centre for Social Investment 2019).

⁴²⁹ Eilis Lawlor, 'Social Return On Investments: An Approach To Avoiding False Economies', UKES Annual Conference (2009).

⁴³⁰ Lucy Heady, 'Social Return On Investment, Position Paper' (New Philanthropy Capital 2010) 6; Wood & Leighton, 'Measuring social value' (n 366) 7; Cynthia Gair, 'SROI Act II: A Call To Action For Next Generation SROI' (REDF 2009).

⁴³¹ Belinda Luke and others, 'Measurement As Legitimacy Versus Legitimacy Of Measures' (2013) 10 *Qualitative Research in Accounting & Management* 234.

⁴³² Social Value UK website, *How to do an SROI analysis*, <http://socialvalueuk.org/what-is-sroi/how-to-sroianalysis> accessed 28 April 2016.

what extent the service was responsible for a social change. A ratio of cost to social return is then calculated based on that net figure. The SROI ratio is the value of benefits divided by the value of investments. Using a financial proxy allows for the conversion of non-financial information into financial terms.⁴³³

5.5.3.1 Analysis of SROI

A common theme in literature reviews on SROI is that it is labour and resource intensive and a complex task to undertake.⁴³⁴ The foundation stone for all these methods of measurement is placing a financial value on the 'soft' outcomes. In studies of the use of SROI, researchers have concluded that standardisation of the application of financial proxies was needed for the tool to be useful⁴³⁵. There is a lack of consensus on the topic of metrics and their weightings within SROI methodologies, and the SROI ratio loses relevance outside the context it is calculated for⁴³⁶. Millar and Hall⁴³⁷ agree, concluding that the use of SROI is 'contextually bound'. Bull similarly indicates that proxies used can be context specific and irreconcilable with equivalents from other regions.⁴³⁸ There is also a challenge in the complexity of carrying out an SROI assessment, including potentially significant cost implications for the organisation, and this has hampered its uptake by some organisations⁴³⁹.

More broadly, SROI has been criticised for its emphasis on positivistic 'mechanical' economic models of cause and effect, for treating interventions in isolation, and for attributing outcomes to interventions while failing to recognise the complexity and contexts of the social problems public services seek to address⁴⁴⁰. As a result, SROI analyses tend to produce narrow or oversimplified understandings of social value with limited emphasis on the more intangible and unexpected benefits or the actual processes that contribute to social value⁴⁴¹. More fundamentally, the biggest concerns have been whether the nature of data and evidence utilised in SROI can be aggregated meaningfully to produce an accurate cost measure, and whether it is even possible to put an accurate monetarised value on all interventions and outcomes. Disturbingly, it was found that the most underdeveloped aspect of the application of SROI was in the measurement of social value itself, where the social is treated '... as a residual category that lacks definitional criteria ... and is negatively affected by the urge of monetisation'⁴⁴².

5.5.4 Subjective Well-Being Valuation (SWV)

As discussed above, preference-based valuation methods, both RP and SP, have been criticised on both a technical and a theoretical basis. In terms of the technical issues, RP approaches are limited by the number of proxy markets available that can reveal

⁴³³ *ibid.*

⁴³⁴ Wood & Leighton, 'Measuring social value' (n 366).

⁴³⁵ Malin Arvidson and others, 'Valuing The Social? The Nature And Controversies Of Measuring Social Return On Investment (SROI)' (2013) 4 *Voluntary Sector Review* 3.

⁴³⁶ Mulgan, 'Measuring social value' (n 365) 228–241.

⁴³⁷ Ross Millar and Kelly Hall, 'Social Return On Investment (SROI) And Performance Measurement' (2013) 15 *Public Management Review* 938.

⁴³⁸ Dave Wilson and Michael Frederick Bull, 'SROI In Practice: The Wooden Canal Boat Society' (2013) 9 *Social Enterprise Journal* 315.

⁴³⁹ Michael Moody and others, 'Measuring Social Return On Investment' (2015) 26 *Nonprofit Management and Leadership* 19.

⁴⁴⁰ Neil McHugh and others, 'Social Impact Bonds: A Wolf In Sheep's Clothing?' (2013) 21 *Journal of Poverty and Social Justice* 247.

⁴⁴¹ Arvidson and others 'Valuing the Social?' (n 429); Harlock 'From outcomes-based commissioning ' (n 371).

⁴⁴² Krlev et al 'Social Return on Investment (SROI)' (n 422).

something meaningful about the value of a non-market good and by the fact that the non-market good must influence the market in order for a value to be placed on it.⁴⁴³ CBA tends to rely on actual preferences thus requiring well-informed consumers for RP valuation.⁴⁴⁴ In addition, the market itself also needs to be sensitive to changes in or levels of the non-market good. Fujiwara and Campbell provide the example of the state placing legislation caps on residential rental prices and thereby inadvertently hindering evaluation of environmental amenities such as clean air or reduced noise. Houses in clean and quiet areas, while more desirable, will not be able to benefit from higher rent, as they may be restricted by legislation from increasing in price.⁴⁴⁵ SP methods get around these problems by creating a hypothetical market, with full information about the good, allowing in theory, the estimation of values for any type of non-market good. However, a hypothetical market scenario has reduced incentive compatibility⁴⁴⁶, which can create problems of its own. RP and SP methods both suffer from problems related to the use of preferences as measures of welfare. Commentators conclude that the fundamental problem is that what people say they prefer is not what they actually prefer once they know the consequences of their choices⁴⁴⁷. Numerous studies have shown that we are unable to accurately predict the pleasure or benefits we will get from different goods or services, as we are unable to predict which stimuli will continue to hold our attention and which stimuli we will get used to and adapt to⁴⁴⁸.

As a result of these challenges, some economists have developed a range of potential solutions, while others have looked for alternative ways of valuing benefits, such as the subjective well-being valuation (SWV) method. The SWV approach is a relatively new approach to non-market valuation that uses subjective well-being measures to attach monetary values to outcomes for the purposes of CBA.⁴⁴⁹ It has also been termed 'well-being valuation' and the 'life satisfaction approach'. Alder and Fleurbaey explain that the subjective well-being (SWB) framework has two components.⁴⁵⁰ The first is an inclusive, comparable measure of individual well-being assigned using a methodology that delivers a comprehensive well-being number, as a function of an individual's attributes on all welfare-relevant dimensions, allowing a representation of each possible outcome as a list of well-being numbers, one for each person in the population of interest. The second component of the SWB framework is a rule for ranking these lists and, thereby, the corresponding outcomes. It is generally assumed that the rule is impartial and 'Paretian' (i.e. increasing someone's well-being without reducing anyone else's is defined as an improvement).

Alder and Fleurbaey state the SWV framework has close connections to a form of CBA which ranks policies by summing individuals' monetary equivalents where someone's

⁴⁴³ Organization for Economic Cooperation and Development, 'Cost-Benefit Analysis And the Environment: Recent Developments.' (2006); Kevin Boyle, 'Introduction to Revealed Preference Methods' Patricia Champ and others (eds), *A Primer on Nonmarket Valuation* (London, Kluwer Academic Publishers 2003) 259–67.

⁴⁴⁴ Fujiwara and Campbell, 'Valuation Techniques for Social Cost-Benefit Analysis' (n 411).

⁴⁴⁵ *ibid.*

⁴⁴⁶ A mechanism is incentive compatible if it provides an incentive for economic agents to truthfully reveal private information <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100000759>, accessed 10 October 2019.

⁴⁴⁷ Paul Dolan and Daniel Kahneman, 'Interpretations Of Utility And Their Implications For The Valuation Of Health' (2007) 118 *The Economic Journal* 215.

⁴⁴⁸ Paul Dolan, *Happiness By Design* (Penguin 2004).

⁴⁴⁹ Fujiwara and Campbell, 'Valuation Techniques for Social Cost-Benefit Analysis' (n 411).

⁴⁵⁰ Matthew D Adler and Marc Fleurbaey, *The Oxford Handbook Of Well-Being And Public Policy* (Oxford University Press 2016).

monetary equivalent for a given policy is the increment to that individual's income that would just suffice to make her or him indifferent in choosing between the policy and the status quo baseline. Various SWVs can be approximated by CBA with distributional weights, whereby the monetary equivalents are adjusted with weighting factors.

A number of approaches have been developed. Bronsteen, Buccafusco, and Masur⁴⁵¹ present the option of replacing CBA with 'well-being analysis' (WBA). They propose an approach to measuring SWB that is the sum of moment-to-moment happiness using emotional and satisfaction data and is calculated by maximising the sum of well-being indexes over the population, in a utilitarian fashion. A similar approach is suggested by Layard⁴⁵² and Layard, Mayraz, and Nickel⁴⁵³.

Another framework for using well-being data is presented by Dolan and Fujiwara,⁴⁵⁴ who emphasise that income and non-market goods have direct and indirect effects on SWB. For example, higher income improves living conditions and may improve health as well. Similarly, better health may improve economic success and thus increase SWB, in part via higher income. These authors propose abandoning the single SWB regression in which income and non-market goods jointly appear as factors and replacing it with two econometric regressions that separately estimate the total impact of income and the total impact of the non-market good. Then CBA would again proceed by calculating the monetary equivalent of a variation in the non-market good, but the calculation would use the coefficients derived from the separate equations. This methodology will yield a larger coefficient for income than the single equation, because income has many indirect effects. Thus the monetised values of the non-market good will appear less unrealistic than some of the earlier extremely high values obtained with a single SWB regression. This seems to simplify the evaluation of a project, but the fact that the indirect effects operate through mechanisms that are outside people's preferences may generate endogeneity problems. In a comprehensive study for the UK's Department for Work and Pensions (DWP), Fujiwara and Campbell examined the life satisfaction approach and found it cost-effective and time-effective; however, this was when the datasets were freely available and not when primary survey data collection was required. Further the study found that the life satisfaction approach has reasonably wide application, it has few biases, and it contains no market structure assumptions. The disadvantages are the newness of the approach: the number of applications is still relatively small, and research into understanding and refining the method is still ongoing. Another problem has been in some of the valuations. A number of studies that have been conducted have generated implausible results: the Culture and Sport Evidence Programme (CASE) 2010 Technical Report on the value of engagement in culture and sport reported a life satisfaction valuation estimate for going to the cinema once a week of about £85 per visit. Additionally there are difficulties in estimating the marginal utility of income and difficulties in estimating the marginal utility of the non-market good.⁴⁵⁵

⁴⁵¹ John Bronsteen and others, 'Well-Being Analysis Vs. Cost-Benefit Analysis' (2012) 62 (1) Duke Law Journal 603.

⁴⁵² Richard Layard, *Happiness: Lessons From A New Science* (Penguin Books 2014).

⁴⁵³ Richard Layard and others, 'The Marginal Utility Of Income' (2008) 92 Journal of Public Economics 1846.

⁴⁵⁴ Dolan and Fujiwara, 'Happiness based policy analysis' (n 419); Daniel Fujiwara, 'A General Method For Valuing Non-Market Goods Using Wellbeing Data: Three Stage Wellbeing Valuation' (Centre for Economic Performance 2013).

⁴⁵⁵ Fujiwara and Campbell, 'Valuation Techniques for Social Cost-Benefit Analysis' (n 411).

5.6 Toolkits for Evaluation

Consistent with the diversity of evaluation methodologies, there is a diverse range of toolkits and frameworks for evaluation. A review of the main social value toolkits was undertaken, and Table 1 provides the results of this review. Summarising key trends and themes in the evaluation toolkits and frameworks is challenging, as each serves a unique set of objectives. Moreover, many of the frameworks have been designed for specific sectors (e.g. housing) and for different levels of government. Additionally, as governments change and funding ends, many initiatives are stopped. The toolkits and frameworks vary in their level of detail and guidance; some focus on high level principles for evaluation of social value, alongside other considerations such as legal and governance advice, while others focus exclusively on evaluation and provide detailed guidance, templates, calculators and accompanying resources such as training programmes

Table 1. Social Value Procurement Toolkit

Toolkit/ Framework	Methodology	Where Used	Description	Active?
Camden Model	Outcomes Star/ LM3	The London Borough of Camden Council/The New Economics Foundation with support from HM Treasury The	The London Borough of Camden Council ‘sustainable commissioning model (SCM)’ focuses on outcomes and aims to capture the value of outcomes that are created by commissioning services at the service level and in the wider community. The SCM contains two key elements: an outcomes framework, which incorporates impacts in the tendering stage, and a valuing model to track outcomes. It also aims to track financial savings. ⁴⁵⁶ The model has been used to commission mental health day services, substance use services, and family and parenting support. ⁴⁵⁷	No
HACT Framework ⁴⁵⁸	Well-Being Valuation	Well-being valuation is in the HM Treasury’s Green Book—the UK Government’s core guide to policy evaluation—as a method for placing values on things that do not have a market value assigned through being bought and sold.	Well-being valuation allows one to measure the success of a social intervention by how much it increases people’s well-being. To do this, the results of large national surveys are analysed to isolate the effect of a particular factor on a person’s well-being. Analysis then reveals the amount of money needed to increase someone’s well-being by the same amount.	Yes
LM3online	Local Multiplier Factor ⁴⁵⁹	Wales Community Benefits Measurement Toolkit (UK) ⁴⁶⁰	Local Multiplier 3 (LM3) was developed by the New Economics Foundation as a way of measuring local economic impact by measuring how income entering the local economy then circulates within it, across three ‘rounds’ of spending.	Yes
	The Social Value Portal National TOMs Framework		Croydon Council In 2015 the Council launched Value Croydon, the Council’s brand for communicating social value with external stakeholders and maximising the benefits	Yes

⁴⁵⁶ London Borough of Camden, *Commissioning Outcomes and Recovery* (October 2008).

⁴⁵⁷ Kent County Council Website, Health, Planning and Sustainability Toolkit <http://healthsustainabilityplanning.co.uk/camdens-outcomes-oriented-commissioning-model/> accessed 3 October 2019.

⁴⁵⁸ HACT, 'Measuring The Social Impact Of Community Investment: A Guide To Using The Wellbeing Valuation Approach' (2014) <<http://www.hact.org.uk/measuring-social-impact-community-investment-guide-using-wellbeing-valuation-approach>> accessed 3 December 2019.

⁴⁵⁹ New Economics Foundation Consulting website, Local Multiplier 3 (LM3) <https://www.nefconsulting.com/our-services/evaluation-impact-assessment/local-multiplier-3/> accessed 3 October 2019.

⁴⁶⁰ Value Wales, ‘A Guide to the Community Benefits Measurement Tool Version 6.6’ (July 2014)

			available through commercial relationships. The social value toolkit for suppliers is published on Value Croydon. In 2019 the Council used its new process for monitoring high-value suppliers' social value contribution and used the TOMs calculator to assign and publicise the equivalent monetary value that would be needed to secure social value benefits. ⁴⁶¹	
			Harrow Council In January 2016 Harrow Council updated its Social Value Policy and Toolkit. This detailed a set of principles to improve the sustainability of the borough. Companies tendering for any work with a value over £100k are required to demonstrate in their submissions how they will meet the Council's Social Value Policy. Bidders are provided with 'background information' that details how the delivery of a contract will assist in the achievement of social, economic and environmental sustainability objectives. Tenders are evaluated against a social value weighting, which is set at a minimum of 10% of the total weighting. In 2017 Harrow Council was a pioneer in the introduction of the Social Value Portal, which was launched at Westminster in September 2016. ⁴⁶²	

⁴⁶¹ Croydon Council, *Social Value Policy 2019-2023*
<https://democracy.croydon.gov.uk/documents/s15740/Appendix%20%20-%20Social%20Value%20Policy%202019-2023.pdf> accessed 3 October 2019.

⁴⁶² Harrow Council, 'Report Social Value in Procurement'
<https://www.harrow.gov.uk/www2/documents/s147121/Social%20Value%20in%20Procurement%20-%20Main%20report%20Appendix.pdf> accessed 3 October 2019.

5.6.1 Local Multiplier 3 (LM3)

Local multiplier 3 (LM3) was created by the New Economic Forum in 2002 as a metric to make visible the link between social impact and economic benefits in the context of supply chains.⁴⁶³ It attempts to make a link between social impact and the economic benefit of local supply chains in organisations; it maps an organisation's source of income and how this is spent and re-spent in the local area⁴⁶⁴. The term 'multiplier' derives from the Keynesian economic approach: an increase in local capital expenditure leads to an increase in employment in firms which produce capital goods⁴⁶⁵. The multiplier effect calculation is performed on money spent, showing the ratio of money re-spent in the local area after three 'rounds' of spending⁴⁶⁶. It maps an organisation's source of income and how this is spent and then re-spent within the local area. LM3 has been used to influence the public sector to consider the impact of its procurement decisions and to highlight where an organisation can improve its impact.⁴⁶⁷ Sack's *The Money Trail*,⁴⁶⁸ details the results of two pilot projects in North Norfolk District Council and Knowsley Metropolitan Borough Council to evaluate the impact of local and nonlocal construction contracts on their respective local economies. Courtney et al. argue that the benefits of LM3 are its relative simplicity, cost efficiency and reduced reliance on complex secondary data that can be unreliable when disaggregated to required spatial levels.⁴⁶⁹ As Slee notes, the simplification is intended to make an esoteric approach comprehensible to local communities, which given the considerable data demands of multi-sectoral local multiplier studies, means that LM3 has considerable appeal for offering insights into local linkages while avoiding complex modelling demands.⁴⁷⁰ For example, LM3 can provide evidence of genuine economic gain from public procurement policy, and it highlights some of the 'leaks' and areas for possible improvement.⁴⁷¹ Furthermore, Edwards et al.⁴⁷² and Courtney et al.⁴⁷³ demonstrated that LM3 is particularly suitable for estimating economic impacts at the sub-regional (local) level, providing sufficient data can be collected.

The main strength of LM3 however, is also considered to be its greatest weakness. As it is designed with the non-economist in mind, LM3 is inherently simple. Sacks acknowledges that 'LM3 is only an indicator which is not exact and is open to interpretation'⁴⁷⁴. Winter and Rushbrook⁴⁷⁵ observe that LM3 was not created for

⁴⁶³ Justin Sacks, 'The Money Trail' (New Economics Foundation 2002).

⁴⁶⁴ Arvidson and others 'Valuing the Social?' (n 429).

⁴⁶⁵ Chris Mulhearn and Howard R Vane, *Economics For Business* (Palgrave Macmillan 2012).

⁴⁶⁶ Sacks, 'The Money Trail' (n 456) 1–118.

⁴⁶⁷ Arvidson and Kara 'Putting evaluations to use' (n 387).

⁴⁶⁸ Sacks, 'The money trail' (n 456).

⁴⁶⁹ Paul Courtney and others, 'A Socio-Economic Study Of Grant Funded Traditional Drystone Wall And Farm Building Restoration In The Yorkshire Dales National Park' (English Heritage & Defra 2000).

⁴⁷⁰ Bill Slee, 'The Socio-Economic Evaluation Of The Impact Of Forestry On Rural Development: A Regional Level Analysis' (2006) 8 *Forest Policy and Economics* 542.

⁴⁷¹ Jenny Thatcher and Liz Sharp, 'Measuring The Local Economic Impact Of National Health Service Procurement In The UK: An Evaluation Of The Cornwall Food Programme And LM3' (2008) 13 *Local Environment* 253.

⁴⁷² Courtney, 'A Socio-Economic Study' (n 465).

⁴⁷³ Paul Courtney and others, 'Spatial Patterns Of Production Linkages In The Context Of Europe's Small Towns: How Are Rural Firms Linked To The Local Economy?' (2008) 42 *Regional Studies* 355.

⁴⁷⁴ Sacks, 'The Money Trail' (n 456) 20.

⁴⁷⁵ Michael Winter and Liz Rushbrook, 'Literature Review Of The English Rural Economy: Final Report To DEFRA' (Centre for Rural Research, University of Exeter 2003).

academic research, which raises the question of whether it could be made more academically robust without significantly compromising its current ease of use. Potts argues that as LM3 works on the same implicit assumption as traditional Keynesian multiplier model, the existence of underutilised resources is ignored and it fails to take into account potential substitution effects.⁴⁷⁶ Thatcher and Sharp have a number of criticisms: LM3 models are based on only one year's financial records and thus provide only a snapshot of the situation at one point in time rather than accounting for variation in spending patterns over a longer time period. The LM3 models focus on just the first three rounds, thereby missing some impacts. Data collection is another issue, as LM3 surveys were found to be time consuming to conduct and were intrusive for respondents, and it was difficult to control the quality and accuracy of the data collected.⁴⁷⁷ The tool as a whole has been criticised as having a relatively simplistic understanding and application of Keynesian multipliers, particularly in relation to the size and complexity of local and regional economies. Those in favour of following the theory of comparative advantage and export base theory would advocate less localism and more specialisation and trade in economic activities as a means of growing local and regional economies and income.⁴⁷⁸ Despite these criticisms, Pike et al. acknowledge that such practical and necessarily basic initiatives can be a first step in promoting broader understanding and action in the ongoing challenge to localise economic activity in the context of globalisation. In addition, its relative simplicity and cost efficiency, and its reduced reliance on complex secondary data, make the LM3 model very attractive to public bodies.

5.6.2 Social Value Portal⁴⁷⁹

The Social Value Portal is a private consultancy and social enterprise that provides a web-based portal for social value procurement, management and measurement.⁴⁸⁰ 'The National Social Value Measurement Framework' or National TOMs (themes, outcomes and measures) was developed by the Social Value Portal and launched in 2017.⁴⁸¹ It has been endorsed by the Local Government Association⁴⁸² and the Crown Commercial Service⁴⁸³ and adopted by the NHS Sustainable Development Unit.⁴⁸⁴ The tool allows organisations to apply a customised set of TOMs that represent a broad triple bottom line definition of social value (as noted in the Social Value Act 2012) to quantify and report the social value delivered by their projects and to align their objectives with those of other organisations (e.g. local authorities). Data collected through the Social Value Portal can be analysed and displayed through a range of dashboards, charts and analytical reporting.⁴⁸⁵ Harrow Council engaged the Social Value Portal to pilot a social value

⁴⁷⁶ David Potts, 'Assessing The Impact Of Regeneration Spending: Lessons From The United Kingdom And The Wider World' (2008) 2 Education, Knowledge and Economy 213.

⁴⁷⁷ Thatcher and Sharp 'Measuring the Local Economic Impact' (n 464).

⁴⁷⁸ Andy Pike and others, *Local and Regional Development* (Routledge 2006).

⁴⁷⁹ See The Social Value Portal <http://www.socialvalueportal.com/> accessed 4 October 2019.

⁴⁸⁰ BSI, 'Social Value And Impact Assessment Due Diligence Research Report' (2016).

⁴⁸¹ The Social Value Portal, *What is Social Value* <http://socialvalueportal.com/what-is-social-value/> accessed 4 October 2019.

⁴⁸² Local Government Association, 'National Procurement Strategy for Local Government in England 2018' (2018).

⁴⁸³ UK Cabinet Office, *Guidance, Social Value Act: information and resources* (2016)

<https://www.gov.uk/government/publications/social-value-act-information-and-resources/social-value-act-information-and-resources#introduction> accessed 4 October 2019.

⁴⁸⁴ Public Health England Module 'Creating Social Value Implementation note' (2015).

⁴⁸⁵ The Social Value Portal, 'The National TOMS Framework' <http://socialvalueportal.com/national-toms/> accessed 4 October 2019.

assessment tool on a tender for the renovation and refurbishment of a council property in Harrow. The Social Value Portal procurement platform was used to assess the social value of each bid based on a set of themes, outcomes and measures (a TOMs matrix) developed by Harrow Council⁴⁸⁶. Each bidder successfully completed the assessment with offers varying from +3 to +57% (£51,000 to £780,000) of added social value.

5.6.3 The Well-Being Valuation Assessment Tool

The Well-being valuation assessment tool was inspired by the work of Daniel Fujiwara at SImetrica and was developed by the Housing Association Charitable Trust (HACT)⁴⁸⁷. The tool provides housing providers and their bidders with the guidance and processes for a social value approach that consistently applies monetary values to the increase in well-being an individual experiences by achieving an outcome. This tool attempts to address the challenges of placing a monetary value on non-market qualities such as 'confidence levels' and 'sense of belonging to the neighbourhood' by using large data sets from national surveys. The results of large national surveys are analysed to isolate the effect of a particular factor on a person's well-being. Analysis of income data reveals the monetary equivalent needed to increase someone's well-being by the same amount.⁴⁸⁸ Arguably the main appeal of the life satisfaction method relates to the fact that it does not rely on people having well-defined pre-existing rational preferences. The Homes and Communities Agency's regulatory framework for social housing in England (2012) requires housing associations to 'maintain a robust assessment of the performance of all their assets and resources (including financial, social and environmental returns)'. Further, the regulations state that a housing provider must 'have a robust approach to making decisions on the use of resources to deliver the provider's objectives, including an understanding of the tradeoffs and opportunity costs of its decisions'. HACT and SImetrica have developed 53 outcomes-based on the well-being valuation approach. The values were established with the housing sector in mind and focus on outcomes related to employment, financial inclusion, environment, health, and young people. In terms of procurement activity, HACT states that this approach enables the comparison on equal terms the level of social value in contracts bid for and delivered by different organisations. The Social Value Bank created by HACT is, according to them, the largest bank of methodologically consistent and robust social values currently available. The values can provide a basic assessment of social impact and offer evidence of value for money and can be used to compare the impact of different programmes.⁴⁸⁹ The approach is recognised in the HM Treasury Green Book as a method for establishing the social value of goods and services that are not traded in the market. Additionally, the recent Social Value Act review references well-being valuation and HACT's associated tools as examples of approaches to generating financial proxies to measure well-being. Despite these nods of approval, no outside research report has been done on the tool's usefulness and effectiveness, and thus it is difficult to evaluate this assessment tool.

5.6.4 Analysis

There are at least three key trends and themes that are consistent across the toolkits and frameworks.

⁴⁸⁶ Harrow Council, 'Social Value Case Study, Integrating Social value into Procurement at Harrow Council' (2017).

⁴⁸⁷ HACT, 'Procurement and Social Value: A White Paper for Wandle' (2015).

⁴⁸⁸ The values are calculated through statistical analysis of four large national datasets that contain data on wellbeing and life circumstances: British Household Panel Survey (BHPS), *Understanding Society*, *The Crime Survey for England and Wales*, and *The Taking Part Survey*.

⁴⁸⁹ HACT, Social Value Bank, <http://www.hact.org.uk/social-value-bank> accessed 4 October 2019.

Co-developing frameworks: Several local governments in the UK have partnered with each other to benefit from pooling resources and to work towards standardisation. Camden Council worked with Triangle and the New Economics Foundation⁴⁹⁰ to develop an evaluation framework. Another example of a collaborative evaluation framework is the HACT Framework, which seeks to establish standards for evaluation of social value for the housing sector. Croydon and Harrow among others worked with the Social Value Portal to co-develop a social value measurement framework for procurement called the TOMs Framework.

Life-cycle evaluation: The toolkits emphasise the importance of evaluation across all stages of procurement, including pre-procurement, tendering, contract monitoring and ongoing learning, to improve the commissioning life-cycle. However, the actual evaluation of social value in later stages of the procurement process is often ignored. For example, more detailed guidance for evaluation is provided for the earlier stages of procurement, while guidance for the monitoring and performance management stage uses vague and normative language, resulting in the approach being more aspiration than authoritative.

Emphasise on outcomes: Most toolkits and frameworks are intended to be used for evaluating tangible outcomes that have financial proxies and where outcomes are related to the achievement of economic goals rather than social goals. For example, Oldham County's framework emphasises that 'evaluation should focus on tangible outcomes'. Similarly, the TOMs Framework claims that its measurement framework 'removes subjectivity from decision-making' (see Figure 2), and the Croydon toolkit emphasises that 'to ensure that social value objectives are delivered, it must be possible to measure and quantify the outcome they pursue'.

The Wales Community Benefits Measurement Toolkit is the outlier in its aim to balance quantitative outcomes with intangible and hard-to-measure outcomes, as it is designed to 'capture the full range of community benefits outcomes, not just those aspects that can be easily monetised and to provide a consistent way of measuring Community Benefit objectives'. However, it is limited in its application by its narrow focus on the impact made locally (that is, regional and national impact are not included). Additionally, the tool has garnered much criticism: it is time consuming, it has difficult-to-implement quality control, and it has a relatively simplistic understanding and application of Keynesian multipliers. In addition, it is biased in favour of the promotion of localism.

5.7 Conclusion

The concept of social value is a difficult one to grasp; its evolution from a rich and complex concept with political, moral and ethical aspects has slowly been stripped down to fit through the prism of the market. No one definition exists, and so variations emerge, reflecting differing sectoral requirements. In the context of social procurement, what emerges is that social value broadly refers to soft, intangible outcomes that include the effects an activity has on the wider community and the environment, and not only on the individual. These outcomes are sought as an 'additional benefit', above and beyond core requirements of the contract, as a way of maximising the public spend. The added value or benefits can be economic value, social value or environmental value. In practice, social value is often produced by the indirect impact of activities; for example, services delivered by employees recruited from disadvantaged groups create new skill sets and

⁴⁹⁰ London Borough of Camden, 'VCS Funding Implementation Update, Report to the Culture and Environment Scrutiny Committee' (1 April 2008).

social inclusion for those delivering the services as well as for those for whom the services are intended⁴⁹¹. The definition and measurement of social value is unique to every organisation and depends on the services and products produced and the community stakeholders affected. Overall, I would argue that this emphasis on specific outcomes is a limitation. This focus can be linked to the influence of neoliberal economic norms and the trend towards the inclusion of social and environmental impacts in decision-making across a number of areas of policy and programming. Numerous diverse standards and frameworks have been developed to measure social value, mainly intended for third-sector and social enterprises, structured around a series of overlapping approaches such as social CBA, social accounting and audit, and SROI. These are mainly preference-based valuation methods which have come under increased criticism, resulting in alternative ways of valuing benefits, such as the SWV method. A critical analysis of the available toolkits and frameworks for evaluation of social procurement shows the wide variety in their level of detail and guidance. Some focus on high level principles for evaluation of social value, alongside legal and governance advice, while others focus exclusively on evaluation and provide detailed guidance, templates, calculators and accompanying resources such as training programmes. Three key trends were identified across the toolkits and frameworks: frameworks are often co-developed, they tend to emphasise tangible outcomes and they highlight evaluation across the procurement life. However, the overall the approaches to social value evaluation seem aspirational: they lack detailed guidance for the later stages of procurement, they rely on vague language and they avoid addressing the difficulties and drawbacks of these static cost-benefit methods, which contain internal inadequacies for use in making decisions which will inevitably have many indirect consequences. A much more dynamic analysis is required, one which can capture more of what is important to society. At issue is still the question of what is social value and whether this question be resolved politically and democratically, not economically, through moral reflection and public deliberation. This concept of value must be placed at the centre of economic thinking. It is difficult to ignore the profound incompatibility between the needs for protecting our environment, creating more fulfilling jobs, and ensuring inclusiveness and equal pay on the one hand and an economic system predicated upon the pursuit of profit and efficiency in a free market on the other. If we accept democratic control over politics, why should we not exercise the same control over economics, so that production becomes subordinate to what we as a society value rather than to global markets?

⁴⁹¹ Arvidson and Kara 'Putting evaluations to use' (n 387).

Chapter 6: Social Clauses in EU Public Procurement Regulation - A Comparative Analysis

6.1 Introduction

The use of public procurement contracts by the state to tackle social inequalities has a long history which McCrudden helpfully groups into five socioeconomic goals: stimulating economic activity; protecting national industry against foreign competition; improving the competitiveness of certain industrial sectors; remedying regional disparities and helping to realise particular social policy goals.⁴⁹² Until the mid-1980s, this use of procurement by Member States was largely ignored by the EC. However, as detailed in chapter 3, it became a subject of debate in the EU legislative process within the emerging policy context of neoliberalism, with the Commission taking a hostile position to such use. The demise of the social use of procurement was widely predicted, and EC legal instruments were used as a reason to limit or suppress it in several jurisdictions.⁴⁹³ Yet, despite these developments, social procurement did not disappear. Through the intervention of the ECJ in a number of cases, notably, *Beentjes*⁴⁹⁴ *Du Pont de Nemours*⁴⁹⁵ and *Concordia (Helsinki) Bus Finland*,⁴⁹⁶ as detailed in chapter 3, clarification of the legal position was provided regarding what was allowed by the Treaties and Directives. This greater space allowed to Member States set the stage for how social clauses developed and flourished with the acceptance that regional preferences were no longer allowed, and a concentration on the use of social clauses to tackle the issue of unemployment.

So, what then are social clauses? Generally, they are legal requirements within a procurement contract that stipulates that the contract must provide added social value and are the most common means of implementing social considerations within the EU procurement process.⁴⁹⁷ Despite their widespread use, there is still legal uncertainty regarding their inclusion in the procurement process.⁴⁹⁸ In this chapter, we begin by defining the regulatory space in which social clauses are allowed. First, we examine the issue of social considerations and whether they are an 'excluded buying decision' or a 'hindrance to trade' and require 'justification' in order to be included in the procurement contract. We then place social clauses within Arrowsmith's taxonomy of horizontal policies to determine how they fit into the EU regulatory framework⁴⁹⁹ We then turn to the 2014 procurement directives to identify the stage of the procurement process in which they are permitted and how are they restricted. The chapter then turns to how social clauses are used in the UK, Wales, Scotland, Northern Ireland, Ireland, and the Netherlands. In each of the selected Member States, we conduct a comparative analysis of

⁴⁹² Christopher McCrudden, *Buying Social Justice* (Oxford University Press 2013) Chapter 4 on Roots.

⁴⁹³ *ibid* chapter 11 on race and disability considerations in the UK; on gender clauses in Germany; and on unemployment clauses in France.

⁴⁹⁴ *Gebroeders Beentjes BV v State of the Netherlands* (C- 31/87) [1988] ECR 04635, para 30.

⁴⁹⁵ *Du Pont de Nemours Italiana SpA v. Unita Sanitaria Locale No 2 Di Carrara* ('Du Pont de Nemours') (Case C-21/88) [1990] ECR I-889.

⁴⁹⁶ *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ('Concordia Bus') (Case C-513/99) [2002] ECR I-7213.

⁴⁹⁷ Walter Kahlenborn and others, 'Strategic Use Of Public Procurement In Europe, Final Report To The European Commission' (2010)14.

⁴⁹⁸ Abby Semple, *A Practical Guide To Public Procurement* (Oxford University Press 2015).

⁴⁹⁹ Sue Arrowsmith, 'Horizontal Policies In Public Procurement: A Taxonomy' (2010) 10 *Journal of Public Procurement* 149.

the transposition of the 2014 procurement directives, the relevant national legislation and policy framework, and the methods of evaluation in relation to social clauses. This then forms the context for chapter 7 on the use and evaluation of social clauses in the selected Member States from 1988 to 2017 with an emphasis on those with social value outcomes and impacts.

6.2 Defining the Regulatory Space

6.2.1 ‘Excluded Buying Decisions’

Before we begin defining the regulatory space in which Member States can use horizontal policies, we can first exclude a category of policies from consideration, those which Arrowsmith refers to as ‘excluded buying decisions’. These are policy measures implemented by the state regarding the decision whether to make a purchase and what exactly to purchase, and they should not be treated as ‘*hindrances to trade*’.⁵⁰⁰ They include the initial decision on whether to go ahead with a purchase, for example, the decision to build a public library in the home state rather than use the funds to purchase new computers that could be manufactured outside the home state. This also applies to decisions on what exactly to purchase, for example, whether to purchase cars rather than bicycles for the police force, when cars are not manufactured in the home state but bicycles are. These decisions *may* benefit domestic industry more than foreign industry, and, indeed, states often undertake programmes of public works to provide employment and a consequent economic boost in times of high unemployment or recession; in such a case, both the desire for the buildings and the boost to employment may influence the decision to go ahead with the project. However, the decision does not restrict access to the market; rather, it establishes what that market is, and thus does not constitute a *hindrance to trade* as there is no discrimination or other unequal treatment; this therefore does not involve ‘*excluded buying decisions*’. Decisions concerning the features of products procured and measures concerning the commercial terms on which those products are supplied also fall into the category of ‘excluded buying decision’ as they establish the market rather than restrict access to it; they are thus not hindrances to trade and there is no discrimination or unequal treatment, an argument that is supported by *Concordia Bus Finland*.⁵⁰¹ However, the CJEU clarified in the more recent *Roche Lietuva UAB v Kauno Dainavos Poliklinika*⁵⁰² case that while the Directive does allow broad discretion to the contracting authority in setting technical specifications, that the more detailed the specification, the greater the risk of favouring products of a particular manufacturer and artificially narrowing competition. So, while it is possible to refer to a specific make or source, or a particular process, which describes the products or services provided by a specific economic operator, or to trade marks or patents, if this is justified by the subject matter. Any such reference should be accompanied by the words ‘or equivalent’. Additionally, the level of detail of the technical specifications must comply with the principle of proportionality, meaning the detail is necessary to achieve the desired objectives.

⁵⁰⁰ See Sue Arrowsmith and Peter Kunzlik, *Social And Environmental Policies In EC Procurement Law* (Cambridge University Press 2009) Chapter 2.

⁵⁰¹ *Concordia Bus Finland v. Helsingin Kaupunki* (‘Concordia Bus Finland’) (Case C-513/99) [2002] ECR I-7213.

⁵⁰² *Roche Lietuva UAB v Kauno Dainavos Poliklinik* (Case C-413/17) [2018] ECLI:EU:C:2018:865

6.2.2 Hindrances to Trade

So, what then is a hindrance to trade? Arrowsmith states that it is simply a hindrance to suppliers wishing to access the European market⁵⁰³—examples are procurement policies that aim to support national industry against foreign competition in order to preserve employment and profits, that is, protectionism. This applies to preferential treatment at both the main contractor level and subcontractor level, and to preferences for national labour or products. Thus, in *Storebaelt*⁵⁰⁴, the ECJ ruled that it was a hindrance to trade to include a ‘Danish content’ clause in the contract for building a bridge requiring the greatest possible use of Danish materials, goods, labour, and equipment. While most provisions motivated by protectionism are distinctly applicable, they can also be indistinctly applicable—for example, preferences for contractors whose main activity is in the awarding state.

6.2.2.1.1 Derogation in terms of Article 34

When a measure is found to violate the free movement requirement of Article 34 of the TFEU, it may be saved if it is justifiable in terms of a treaty exception in Article 36 of the TFEU⁵⁰⁵ or as an *objective justification* (mandatory or general interest requirement), as recognised by the ECJ.⁵⁰⁶ Additionally, the measure must not discriminate ‘arbitrarily’ or be a ‘disguised restriction on trade’.⁵⁰⁷ Furthermore, in terms of the principle of proportionality, the measure must not go beyond what is necessary to achieve its aim.⁵⁰⁸

6.2.2.2 Objective justification

In *Cassis de Dijon*, the ECJ held that it is possible to justify indistinctly applicable national measures which are based upon certain additional ‘mandatory requirements’ for goods and ‘objective justifications’ for services and establishments.⁵⁰⁹ As a general rule, for a measure to be justifiable, it must be intended to fulfil a genuine social aim of the contracting authority, be suitable for attaining its objective, and must not go beyond what is necessary to achieve that objective.⁵¹⁰ A non-exhaustive list of such mandatory requirements was provided by the Court in *Cassis de Dijon*; the courts may add to this at any time. It was previously thought that directly discriminatory measures could only be justified by treaty exceptions; however, since *Preussen-Elektra*, where environmental concerns (a court-based justification), were used to justify a directly discriminatory measure, this no longer seems to be the case.⁵¹¹ Many of the horizontal considerations promoted through public procurement have been, or are likely to be, recognised grounds

⁵⁰³ Arrowsmith and Kunzlik, *Social and Environmental Policies* (n 20).

⁵⁰⁴ Case C-243/89, *Commission v. Denmark* (*‘Storebaelt’*) (C-243/89) [1993] ECR I-3353, para. 23.

⁵⁰⁵ Article 36 TFEU constitutes an exhaustive list of derogations, asserting that national measures can be justified on grounds of ‘public morality, public policy or public security, the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial policy’.

⁵⁰⁶ See, for example, *Alpine Investments BV v Minister van Financien* (C-384/93) [1995] ECR I-1141, 540; *Gebroeders Beentjes BV v Netherlands* [1988] (C-31/87) ECR 4635 para. 30. See also *Commission v France* (C-225/98) [2000] ECR I-7445.

⁵⁰⁷ Article 36 TFEU.

⁵⁰⁸ *Officier van Justitie v De Peijper* (Case 104/75) [1976] ECR 613.

⁵⁰⁹ *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein* (*‘Cassis de Dijon’*) (C-120/78) [1979] ECR 649.

⁵¹⁰ *Contse SA, Vivisol Srl & Oxigen Salud SA v Instituto Nacional de Gesti n Sanitaria* (Ingesa) (C-234/03) [2005] ECR I-9315, (*‘Contse’*) at para. 25.

⁵¹¹ *Preussen-Elektra AG v Schleswag AG* (C-379/98) [2001] ECR I-2099, (*‘Preussen-Elektra’*).

for justification. This could include promoting equal opportunities (a fundamental principle of EU law), worker protection,⁵¹² addressing long-term unemployment,⁵¹³ or reducing pollution by promoting energy from renewable sources.⁵¹⁴ While, in *Du Pont de Nemours*, regional development was rejected as an objective that can be justified, it is not clear whether this reasoning on justification still applies. Following *Preussen-Elektra*, the ECJ accepts that distinctly applicable requirements may be justified, hence, there is an argument that measures for placing contracts with firms with a certain proportion of their business activity in the particular region, regardless of nationality, may be justified, as in *Du Pont de Nemours*, by the analogy of state aid: if national state aid that distorts competition specifications are hindrances to trade that authorities must justify, then each case must be assessed on its own merits.

6.2.2.3 Areas of uncertainty

One area of difficulty is whether Member States may justify measures that regulate activities undertaken in another member state or in a third-country. Such policies are generally justified only when workers' interests are not adequately protected by the home state's rules.⁵¹⁵ Furthermore, in *Stadt Dortmund*,⁵¹⁶ the Court ruled that a measure requiring tenderers to guarantee that their subcontractors pay their employees the minimum wage as laid down in the regional law of the relevant regional government, cannot be justified in the interests of worker protection when the work is conducted in a country where the minimum wage rates are lower than the home state. This was because the court found that it failed the proportionality test by going beyond what is necessary to protect employees' interests. The minimum wage was fixed at what was considered reasonable in Germany in light of the costs of living there, not in consideration of the lower cost of living in Poland, where the work was to be undertaken. However, workforce policies relating to contract work conducted outside the home state are not ruled out in principle as in the *Stadt Dortmund* judgement;⁵¹⁷ social clauses promoting the employment of persons with disabilities or the long-term unemployed may still be permitted regardless of the location of the work.

In relation to posted workers, they are covered by the Posted Workers' Directive which provides employment protection to workers sent to work temporarily in a different member state. Article 3 (1) of the Posted Workers' Directive requires Member States to ensure that workers who are posted to a territory are covered by local laws and collective agreements that have been declared 'universally applicable' in relation to working conditions, including measures that fix minimum rates of pay, including for those working on public contracts. The Posted Workers' Directive precludes Member States from imposing a higher level of requirements for these posted workers than is set in national measures. This means that Member States cannot require that posted workers be

⁵¹² *Criminal Proceedings against Jean-Claude Arblade* (C-369/96 and C-376/96) [1999] ECR I-8453; *Rush Portuguesa v. Office national d'immigration* (C-113/89) [1990] ECR 1417.

⁵¹³ Commission, 'Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement' COM (2001) 566 suggests that such a condition is justified as long as it does not *require* recruitment from a local unemployment office.

⁵¹⁴ Arrowsmith and Kunzlik, *Social and Environmental Policies*(n 20) 166.

⁵¹⁵ See Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms*, (5th Edition, Oxford University Press 2016) 309-310 & 422-424.

⁵¹⁶ *Bundesdruckerei GmbH v* (C-549/13) EU:C:2014: 2235.

⁵¹⁷ *ibid* para 31.

paid a living wage above the legally required minimum wage of the home state, as established in *Ruffert*.⁵¹⁸

The final issue to consider regarding justification is whether Member States can directly purchase social benefits, such as job opportunities for disadvantaged people, for their own citizens. For example, regarding the reservation of contracts for disadvantaged groups, could a Member State restrict the contracts to organisations within it? The European Commission has suggested this is not allowed;⁵¹⁹ however, Arrowsmith argues that it is now justified on the basis that this policy area is a matter for Member States and they should not be deprived of the use of procurement as a tool to pursue it.⁵²⁰ While there is little jurisprudence from the court on how they apply justification in this context, Arrowsmith submits that the equal status of horizontal policies with commercial policies,⁵²¹ the principles of subsidiarity and equality, and the status of environmental and social objectives within the EU treaties mean that the courts must recognise a significant amount of discretion on the part of EU Member States to use procurement as a policy tool. From a legal perspective, the outcome of this discussion can be summarised as follows, as set out in Table 2.

Table 2 The Impact of EU free movement on social clauses

Policy measures relating to contract performance	Hindrance to trade if direct discrimination occurs?	Hindrance to trade if there is a greater impact on other Member States?	Hindrance to trade if non-discriminatory?
1. Consumption	Yes (<i>Fagún</i>)	No ('Excluded buying decision')?	No ('Excluded buying decision' <i>Concordia Bus Finland</i>)
2. Production and delivery	Yes (<i>Du Pont de Nemours</i>)	?	No
3. Disposal	Yes	?	No
4. Workforce doing contract work	Yes (<i>Storebaelt</i> ⁵²²)	Yes (<i>Beentjes, Nord Pas de Calais</i>)	No

6.3 Social Clauses Within Arrowsmith's Taxonomy of Horizontal Measures

When establishing the regulatory space in which social clauses are permitted, it is useful to ascertain where social clauses fit into the taxonomy of all horizontal policies. Arrowsmith created such a taxonomy for understanding the practical phenomenon of

⁵¹⁸ *Dirk Ruffert v Land Niedersachsen* (C-346/06) EU:C:2008:189.

⁵¹⁹ European Commission, 'Interpretative Communication on the Community law Applicable to Public Procurement and the Possibilities For Integrating Social Considerations into Public Procurement' COM (2001) 566, 18

⁵²⁰ Arrowsmith and Kunzlik, *Social and Environmental Policies*(n 20) 747 para 20-68.

⁵²¹ *ibid.*

⁵²² *Commission v Denmark* ('Storebaelt') (C-243/89) [1993] ECR I-3353, para. 23.

horizontal policies and their constitutional and policy implications.⁵²³ It is used for this purpose in the present chapter and for providing a framework for analysing the legal and policy rules in the selected Member States in the following chapters. So, where exactly do social clauses fit into Arrowsmith's taxonomy of horizontal policies? The taxonomy is based on three key distinctions. The first is a distinction between policies that are limited to securing compliance with general legal requirements, for example, the requirement for the contractor to pay their workers on the contract the minimum wage applicable by law to all firms and, on the other hand, policies that go beyond this—for example, a requirement to pay a living wage that exceeds the national legal minimum. A second distinction is one between policies concerned only with performance of the contract—such as a requirement to pay a living wage to workers on the contract—and policies that are more general, such as a requirement for contractors to pay living wages to all their employees. Third, the taxonomy distinguishes between nine mechanisms for implementing horizontal policies, such as set-asides, whereby contracts are reserved solely for certain groups and award criteria (for example giving credit to tenderers for the environmental or social benefits of their tenders).

6.3.1 Policies Limited to Compliance with General Legal Requirements and Policies That Go Beyond Legal Compliance

The first distinction is between policies that are limited to securing compliance with general legal requirements and policies that go beyond this. An example of the former is a contractual clause requiring compliance with legislative requirements regarding work conducted in terms of the contract (such as environmental or worker protection legislation). The 2014 directives now require Member States to take appropriate measures to ensure compliance with obligations in the fields of environmental, social, and labour law.⁵²⁴ This obligation is presented as one of the 'general principles' of public procurement set out in Article 18 of the 2014 Public Procurement Directive. It is not clear how far the principle goes in *requiring* Member States to act in specific ways and in specific areas of the procurement process rather than leaving such matters to national discretion. The directives do contain provisions that *allow* Member States to take specified measures in this area, most notably the ability to exclude firms that fail to comply with these obligations, and provisions for refusing to award the most economically advantageous tender where there is non-compliance.⁵²⁵ Regarding general legal obligations laid down by the awarding states themselves, provided that it is lawful for that state to require compliance with national legislation the first place, then, in general, it is lawful. With respect to those requirements that are allowed EU law also appears to adopt a further distinction between certain requirements that we will call 'technical' and requirements concerning other matters: with the former group, purchasers may exclude in advance suppliers they consider cannot meet the requirement, whereas with the latter group they may not.

More common are policies that go beyond compliance with the general law. The justification for using procurement in this way is to ensure that the government is associated with the highest possible standards, both to set an example to encourage wider acceptance of the standards and to avoid public criticism. Another justification concerns the effectiveness of using procurement as a policy instrument compared to the alternatives, such as criminal or administrative sanctions, thus justifying a decision to

⁵²³ The taxonomy follows the structure of analysis set out in Arrowsmith and Kunzlik, *Social and Environmental Policies* (n 20).

⁵²⁴ 2014 Directive Art.18(2).

⁵²⁵ 2014 Public Procurement Directive Article 56 (1).

focus limited resources on enforcing the policy in this limited field. As Morris states (in the context of equal opportunities policies): ‘the individual complaint and adjudication model of tackling discrimination is fundamentally flawed by problems of legalism, tortuous procedure and satisfying the legal burden of proof. Contract compliance, in contrast, is not handicapped by these problems. It evades the inherent deficiencies of individual adjudication or institutional investigation’.⁵²⁶ In addition, the relationship between the state and those undertaking the contract can help to ensure the effective monitoring of policies. Under EU law, policies that go beyond compliance with the general law must be limited to work done on the contract being awarded. The types of social clauses that are used in the UK are an example of this, for instance, where a contract requires engaging a certain proportion of long-term unemployed to work on the contract.

6.3.2 Policies Confined to Performance of the Contract Being Awarded and Policies That Go Beyond Contract Performance

A further distinction can be made between policies concerned only with performance of the contract and those that are more general in nature. An example of the former are social clauses. These can seek to ensure that the contractor complies with the law in undertaking the contract work, for example, by ensuring the contractor complies with health and safety laws when doing so. However, they may also seek to realise benefits from the work that go beyond those provided for by law, for example, requiring a specified proportion of the contract work to be undertaken by persons with disabilities or by the long-term unemployed. While the decision as to whether to purchase and what to purchase falls into this category, this is also categorised as an excluded buying decisions, and so we do not need to expand on it. Next, we consider the categories of policies implemented through other mechanisms during the performance of the contract. These mechanisms are as follows:⁵²⁷

- i) the effect of the products, works, or services when consumed, such as those relating to maximum emission levels for buses or the requirement that there be wheelchair access to buildings,
- ii) the impact of production or delivery of the products, works, or services,
- iii) the impact of the disposal of the products, works, or services, and
- iv) the contract workforce, for example, to provide work for the long-term unemployed.

Policies may relate to more than one group: for example, when an award criterion takes account of the environmental impact of a product across its whole life-cycle to include production, delivery, consumption, and disposal. However, the EU treats these categories differently, a position which has been criticised in light of the need for rational and effective policy across all of these categories in light of the requirement to embrace the whole life-cycle of the products, works, and services.⁵²⁸

⁵²⁶ P.E. Morris, 'Legal Regulation Of Contract Compliance: An Anglo-American Comparison' (1990) 19 *Anglo-American Law Review* 88.

⁵²⁷ Sue Arrowsmith, *The Law Of Public And Utilities Procurement* (Sweet & Maxwell 2018).

⁵²⁸ such as special conditions, a group of contractual requirements that can be legally be included in a contract but which are treated differently regarding the options for enforcing them from technically requirement - in 2014 Public Procurement Directive Art. 70. They are also referred to as ‘conditions for the

Policies that go beyond contract performance can be divided into three main groups:

1. Policies regulating a firm's behaviour across its whole business, for example, excluding firms that do not adapt a proactive policy of insuring balance in their workforce, even though such a requirement is not imposed on firms in general. Such policies have been adopted by the United States federal government, for example,⁵²⁹ though they are not allowed under EU law.
2. Policies that support or develop undertakings with particular characteristics, for example, the reservation of contracts undertaking to provide employment for disadvantaged persons, which is expressly provided for in the EU procurement directives.
3. Policies in terms of which governments require contractors to provide benefits, often of a social nature, which not directly connected with the contract, such as building community facilities; these are often referred to as offsets and are traditionally important in the defence industry.⁵³⁰

6.3.3 The Mechanisms for Implementing Horizontal Policies in Procurement

As mentioned above, a third element of Arrowsmith's taxonomy of horizontal procurement policies is the distinction between the mechanisms for implementing these policies. Many of these mechanisms are appropriate for all types of policies—both those that are limited to compliance with the law and those that are not, and both those that are limited to contract performance and those that are not. However, this is not always the case—for example, a contractor's ability to comply with external legal requirements is unlikely to be suitable as an award criterion. Arrowsmith identifies nine discrete mechanisms for implementing horizontal policies in procurement processes: the decision to purchase (or not); the decision on what to purchase; the packaging and timing of orders; set-asides; the exclusion of firms from tendering; preferences regarding inviting firms to tender; measures for improving access to contracts; technical specifications, the award criteria; and contract conditions. While all of these mechanisms can be and are used by contracting authorities in terms of the EU procurement rules, it is the final two that are of the greatest relevance to this thesis as they apply to social clauses.

Contractual requirements generally relate to performance of the contract itself and deal with one or more of the various impacts already named, that is, consumption, production, delivery, disposal, and workforce matters. Contractual requirements and award criteria are not necessarily alternatives; they can be combined in the same public procurement procedure. When they are combined, it is referred to as a 'core' approach, as used and promoted by the Welsh government. This approach is recommended by Arrowsmith as a way to establish the cost of social requirements in relation to commercial considerations in order to take advantage of the economic operators' market knowledge of the most cost-effective way to meet these objectives; in this way, the proposals in the winning tender are incorporated into the final contract terms.⁵³¹ Finally, we can say that, when we apply the taxonomy to social clauses that are allowed under EU law, they generally fit into the following categories:

- 1) going beyond compliance with the general law,

performance of the contract'.

⁵²⁹ The programme also extends to matters of religion, disability and veteran status. Federal contractors (and subcontractors) are prohibited from discriminating on the basis of race, colour, religion, gender, national origin, disability, or protected veteran status, and must also take affirmative measures to ensure equal employment opportunity in their workplaces: see Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212.

⁵³⁰ Arrowsmith *The Law Of Public And Utilities Procurement* (n 519)see paras 15-16.

⁵³¹ Arrowsmith *The Law Of Public And Utilities Procurement* (n 519)para 20-76 752.

- 2) being concerned only with the ‘performance of the contract’, and
- 3) using the mechanisms of the contractual requirements laid down by the purchaser and/or award criteria.

6.4 Social Clauses in the 2014 Public Procurement Directive

So, where are social clauses dealt within the 2014 Public Procurement Directive? In terms of the directive, there are five main stages in a procurement regime: (1) the pre-procurement stage in which the contracting authorities identify whether and what to purchase and which procedure to apply; (2) the specification stage in which the contracting authorities set out technical specifications in the contract documentation; (3) the stage involving the identification of suitable potential suppliers; (4) the contract award stage; and (5) the performance stage.

6.4.1 Special Conditions

It is in the performance stage that social clauses are normally used as a condition of the contract; in the directive, these are referred to as ‘special conditions’.⁵³² The existence of the specific category of special conditions was first recognised by the courts in *Beentjes*. It was expressly included into the 2004 directives⁵³³ and is now included in Article 70 of the 2014 Public Procurement Directive, which states:

Contracting Authorities may lay down special conditions relating to the performance of the contract, provided that they are linked to the subject matter of the contract within the meaning of Article 67(3) and indicated in the call to competition or in the procurement documents. Those conditions may include economic innovative - related, environmental, social or employment related considerations.

The ‘special conditions’ must relate to the performance of the contract awarded and be linked to the subject matter. By referring to Article 67(3) for the meaning of ‘linked to the subject matter of the contract’, we can see that the special conditions are considered to be linked to the subject matter of the public contract when they relate to the works, supplies, or services to be provided in terms of that contract in any respect and at any stage of their life-cycle, which comprises all factors involved in the specific process of production, provision, or commercialisation. Article 67(3) is concerned with contract award criteria and indicates that ‘special conditions’ and award criteria are to be treated in the same way. This is further dealt with in this chapter in the section on contract awards. The requirement that ‘special conditions’ be linked to the subject matter is new; in the 2004 directives, it was merely required that ‘special conditions’ be related to the performance of the contract. It seems that their inclusion emerged from the court’s case law on award criteria, in which the application of the subject matter link to special conditions was likely included to rule out the use of terms setting general corporate responsibility requirements in public contracts. For example, the contracting authority cannot include a condition that the contractor must ensure that the workforce as a whole contains a certain percentage of long-term unemployed persons, even if this is only for the duration of the contract, or that the business operations in the contract are conducted to certain environmental standards. Following ECJ case law, in particular the *Dutch Coffee* case, the 2014 directives adopted a broader view of what is considered to be linked to the subject matter of the contract: this

⁵³² 2014 Procurement Directive Art. 70, they are also referred to in the Directive as ‘conditions for the performance of contracts’.

⁵³³ In 2004 Public Sector Directive Article 26.

can now include matters related to how a product is produced which do not directly affect the product's characteristics.⁵³⁴

The recitals state that contract performance conditions constitute fixed objective requirements which have no impact on the assessment of tenders, unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders. What is considered a 'special condition' is dealt with in Recital 98 of the 2014 Public Procurement Directive, where it states the following:

Contract performance conditions might also be intended to favour the implementation of measures for the promotion of equality of women and men at work, the increased participation of women in the labour market and the reconciliation of work and private life, the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation.

Recital 99 provides the following:

Measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups among the persons assigned to performing the contract or training in the skills needed for the contract in question can also be the subject of award criteria or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions might refer, among other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded.

Requirements that are special conditions must, like other contractual requirements, comply with the free movement rules of the TFEU;⁵³⁵ this is unaffected by the explicit recognition of such conditions in the directives. They must be indicated in the contract notice, the prior information notice used as a means of calling for competition in the procurement documents.⁵³⁶

There is a distinction between special conditions and technical requirements; this is important as there is a more limited scope for ensuring compliance with special conditions. An economic operator can be excluded under the rule that allows procuring entities to reject economic operators that lack the technical professional ability to perform the contract. However, in *Beetjes*, the ECJ indicated that the contracting authority cannot reject economic operators because they cannot meet the 'special conditions.' Arrowsmith argues that *Beetjes* no longer applies in this respect due to the developments in both the underlying principles of the law and in the procurement directives, including the enhanced recognition of the status of horizontal policies.⁵³⁷ However it is clear that if the tenderer refuses in its tender to accept a contractual requirement that is a special

⁵³⁴ *Commission v Kingdom of the Netherlands* (Case C-576/10), judgment of 11 July 2013.

⁵³⁵ *Beetjes* para.20 of the judgement.

⁵³⁶ *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* (C-115/14) [2016] IRLR 125, paras 57-60.

⁵³⁷ Arrowsmith *The Law of Public and Utilities Procurement* (n 519)p759.

condition, a procuring entity can and must refuse to contract with that tenderer since the tender would not comply with the fundamental conditions set for competitors.⁵³⁸

6.4.2 Compliance

There are various means available to secure compliance with contract conditions. Contractual remedies may be available for a violation. Often, the remedies are simply those available under general national contract law. These may include a right to terminate the contract, an order to compel performance, and/or a right to compensation for violations. The remedies may depend on how the parties choose to treat a particular requirement. General contractual remedies may, however, be difficult to exercise; for example, a damages remedy may require that there was specific and quantifiable damage to the government, which is difficult to prove for a breach of social conditions, while terminating the contract may be inconvenient in practice because of the costs and delay. For this reason, it may be useful to provide for suitable remedies directly in legislation (such as specific financial penalties) as has been done, for example, in South Africa, to enforce contract specifications concerned with the employment of disadvantaged groups.⁵³⁹ In addition, contract performance clauses may be strengthened by explicitly providing that compliance with these clauses is a requirement for participating in the tender or for awarding the contract, which would allow authorities to reject in advance tenders that do not meet the requirements. They may even also wish to exclude tenderers which are willing to accept the requirement when the authority considers that the tenderer cannot, or will not, actually comply with it; this is especially the case because of the practical difficulties that may exist in exercising remedies for an actual violation.

6.4.3 Award Criteria

Another common mechanism for implementing horizontal policies is through award criteria, that is, by taking account of industrial, social, or environmental considerations when comparing what different bidders can offer. As with contractual requirements, award criteria too will often be limited to the performance of the contract. It has long been accepted that environmental and social award criteria that are linked to the subject matter of the contract may be used since they may be relevant to determining which is the MEAT.⁵⁴⁰ Award criteria do not have to provide a direct benefit to the procuring entity and may reflect any concern that the entity has regarding environmental and social matters.⁵⁴¹

As a mechanism for implementing horizontal policies, award criteria are limited to some degree by the directives. However, contrary to what the EU has suggested, the requirement that award criteria are linked to the subject matter is not due to considerations of value for money, as is explained in chapter 4, as this is for Member States to control. It is clear, as illustrated by *EVN*, that it is not possible to include award criteria that go beyond anything to do with the way the specific contract is performed, including all criteria that relate to the nature of the tender per se rather than what the tenderer does in carrying out the contract. There seems to be a broad view on what the limits of this concept are, as was endorsed by the ECJ in the *Dutch Coffee case*, and as

⁵³⁸ Confirmed in *Regiopost* in which the ECJ ruled that the contracting authority can refuse to accept a tender that does not accept a lawful requirements laid down in the tender documents.

⁵³⁹ Preferential Procurement Regulations 2001 pertaining to the Preferential Procurement Policy Framework Act: No 5 of 2000, Regulation 15.

⁵⁴⁰ *Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne* ("Concordia Bus") (Case C-513/99) [2002] ECR I-7213.

⁵⁴¹ *Commission v Kingdom of the Netherlands* (Case C-576/10), judgment of 11 July 2013.

adopted in the text of the 2014 procurement directives. Award criteria are considered to be linked to the subject matter of the contract when they are concerned with what is provided in terms of the contract or with the way in which the contract is carried out in relation to the consumption effects of what is provided; the impact of production; the delivery of what is provided; the effect of the disposal of what is provided; and the impact on the workforce in the course of providing goods, works, and services.

The 2014 directives contain explicit provisions for the operation of life-cycle costing (LCC). Directive 2014/24/EU devotes a whole article (67) to LCC to determine which are the relevant costs, how the data should be provided, and which methods are to be used. The main points relevant to the understanding of the specific provision on LCC are as follows: There is only one award criterion, the MEAT. The MEAT⁵⁴² may offer the lowest price; the best quality for a given price; the best price–quality ratio (the old MEAT in Directive 2004/18/EC)⁵⁴³ which may include LCA;⁵⁴⁴ and costs-effectiveness (including LCC).⁵⁴⁵ Contracting authorities have wide discretion in choosing the relevant quality aspects, including, but not limited to, design for all users⁵⁴⁶ and social, environmental and innovative characteristics;⁵⁴⁷ however, the criteria chosen must be linked to the subject matter of the public contract in question. Article 67(3) departs from the doctrine previously adhered to by the commission by clarifying that criteria are so linked:

where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life-cycle, including factors involved in: (a) the specific process of production, provision or trading of those works, supplies or services; or (b) a specific process for another stage of their life-cycle, even where such factors do not form part of their material substance. This implies that ‘the link between the award criteria and the subject matter of the contract has been relaxed’.⁵⁴⁸ The award criteria:

shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

As Recital 90 clarifies:

Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non discrimination and equal treatment, with a view to ensuring an objective comparison of the

⁵⁴² According to Recital 92, it is not possible to have recourse to award criteria not having a price or cost component; it does not however specifically refer to fixed price.

⁵⁴³ Tobias Indén, 'Article 67. Contract Award Criteria', *EU Public Procurement Law* (Hart 2018)716.

⁵⁴⁴ See Recital 89.

⁵⁴⁵ See also Recital 90.

⁵⁴⁶ Recital 92.

⁵⁴⁷ Recital 91 refers to Article 11 TFEU, which requires that environmental protection requirements is integrated into the definition and implementation of the Union policies and activities, and indicates the directive ‘clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts’; see Marta Andrecka, ‘Corporate Social Responsibility and Sustainability in Danish Public Procurement’ (2017) 3 *EPPPL* 341; Anja 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* 105.

⁵⁴⁸ Tobias Indén, ‘Article 67’ (n 535) 74.

relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender.⁵⁴⁹

Finally, the contracting authority must specify in the procurement documents the relative weighting of each of the criteria chosen or, if this is not possible, their decreasing order of importance.

⁵⁴⁹ See also Recital 9.

Chapter 7: Comparative Analysis on the Use of Social Clauses - Law, Policy, and Practice

Thus far, the regulatory hurdles that must be cleared for social clauses to be allowed have been clarified and the position of social clauses both within Arrowsmith's taxonomy of horizontal policies and the 2014 procurement directives have been identified. We know now the space that Member States must occupy to use social clauses in their procurement decision-making and the *factors* that set the parameters of this space. In this chapter, we compare how selected Member States (the UK, Scotland, Wales, Northern Ireland, Ireland, and the Netherlands) implement social clauses within their national legal and policy frameworks.

7.1 The UK: Legal and Policy Framework for Public Procurement

The UK's unique administrative structure, comprising one legal regime for England, Wales, and Northern Ireland and another for Scotland, has a significant impact on its procurement system. In addition, Northern Ireland, Wales, and Scotland have devolved legislatures and administrations, with the responsibility for public procurement policy resting with the devolved administrations.⁵⁵⁰ This also has impacted on how procurement is conducted, resulting in a more ambitiously socially focused centrally lead policy and practice in Scotland, Wales, and Northern Ireland compared to Westminster. In the UK, procurement has traditionally been undertaken on a decentralised basis by individual government departments and agencies and by individual local authorities. Such bodies have both enjoyed broad freedom to make their own purchases to meet their requirements and have wide discretion in establishing their own procurement policies in doing so.⁵⁵¹ The most common form of social clause used in the UK is targeted training and recruitment clauses. This is a type of social clause that allows contracting authorities to specify in the contract that the labour used must be sourced from particular groups, usually the long-term unemployed or young people, though it can also be used to target other vulnerable groups. The widespread use of social clauses in the UK⁵⁵² can be traced to Richard Macfarlane's groundbreaking report, 'Achieving Community Benefits through Contracts: Law, Policy and Practice'. It highlights the possibility of including social clauses (or community benefit clauses) to add what the author terms 'community benefit' to a procurement contract, particularly in relation to apprenticeships and employment. The aim of the report was to clarify exactly what was permissible in a contract in relation to community benefit. It advocated including social and environmental considerations in the core purpose of projects from the tendering stage onwards as a way of providing legal certainty, ensuring that the social clause was directly relevant to subject matter of the contract, and ensuring that social considerations were included into the award criteria. It concluded that 'contrary to common perceptions, the inclusion of community benefits in procurement contracts can be permissible under UK public procurement policy and EU treaties, articles and directives'.⁵⁵³

⁵⁵⁰ This was done originally under the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998. The provisions applying to Wales are now largely contained in the Government of Wales Act 2006, which conferred further powers on the Welsh government.

⁵⁵¹ Arrowsmith, *The Law of Public and Utilities Procurement* (n 519) 12.

⁵⁵² A report credits the authors with triggering 'the recent wave of interest in the potential to deliver wider social benefits through procurement' Haringey SME Procurement Pilot, *Community Benefit Clauses in Tenders and Contracts* (5 April 2005) 4.

⁵⁵³ Richard McFarlane and Mark Cook, 'Achieving Community Benefits through Contracts: Law, policy and practice' (Bristol, The Policy Press 2002) 5.

7.1.1 The National Framework

The Public Contracts Regulations 2015⁵⁵⁴ (the 2015 regulations) transpose the EU law in England and in part in Wales and Northern Ireland. Parts 1 to 3 and 5 of the 2015 regulations, which concern the rules for implementing the 2014 Directive, apply across England, Wales, and Northern Ireland. Part 4 of the 2015 regulations, which deals with access to public sector contracts by smaller businesses, does not apply in Northern Ireland or Wales.

The explanatory note to the 2015 regulations explains that:

‘Part 4 [...] does not apply to public bodies in Wales or Northern Ireland whose functions are wholly or mainly devolved functions in those jurisdictions. This recognises the fact that these devolved administrations already have their own arrangements in place for ensuring smaller businesses have better access to public sector contracts which reflect the particular circumstances of devolved procurement matters in those areas.’⁵⁵⁵

The equivalent Scottish regulations are the Public Contracts (Scotland) Regulations 2015, The Utilities Contracts (Scotland) Regulations 2016, and the Concession Contracts (Scotland) Regulations 2016.⁵⁵⁶

7.1.2 Value for Money⁵⁵⁷

Achieving value for money is the responsibility of public bodies in the central and local government, the National Health Service, and the devolved administrations.⁵⁵⁸ Within the Westminster government, the Treasury exercises overall responsibility for public procurement policy, as part of its role of managing government expenditure. In this capacity, the Treasury has set out basic policies for central government procurement to achieve value for money and prevent corruption in ‘*Managing Public Money*’. The overriding procurement policy requirement is that all public procurement must be based on value for money, defined as ‘the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought’. The Treasury advises that this should be achieved through competition, unless there are compelling reasons to the contrary. In the central government, the Cabinet Office is the department with the responsibility for ‘promoting efficiency and reform across government through innovation, better procurement and project management, and by transforming the delivery of services’.⁵⁵⁹ It aims to:

deliver improved cross-government commercial capability, advice and services, and through the Crown Commercial Service, help central government and the wider public sector achieve commercial benefits from the procurement of common goods and services worth up to £2bn over the spending review period to 2020. Public sector procurement is subject to a legal framework which encourages free and open competition and value for money, in line with internationally and nationally agreed obligations and regulations. As part of its strategy, the

⁵⁵⁴ The Public Contracts Regulations 2015.

⁵⁵⁵ UK Cabinet Office, ‘Explanatory Memorandum To The Public Contracts Regulations 2015’ No. 102, 6.

⁵⁵⁶ The devolved legislatures in Scotland and Wales can legislate on procurement to implement EU directives in their areas.

⁵⁵⁷ UK Treasury, *Managing Public Money* (September 2019).

⁵⁵⁸ Lorna Booth, ‘Public Procurement and contracts’ (Briefing Paper, No 6029 House of Commons, 19 September 2018).

⁵⁵⁹ Cabinet Office Website, ‘About Us’ <https://www.gov.uk/government/organisations/cabinet-office/about> accessed 8 January 2018.

government aligns procurement policies with this legal framework, as well as with its wider policy objectives.⁵⁶⁰

The National Audit Office conducts VfM audits of the administration of public policy.⁵⁶¹ Their definition of VfM is based on the ‘3Es’: effectiveness, economy, and efficiency. Economy refers to minimising the cost of the resources used or required (inputs); Efficiency refers to the relationship between the output from goods or services and the resources used to produce them. Effectiveness refers to the relationship between the intended and actual results of public spending (outcomes). Value for money auditing has its origins in NPM⁵⁶² and VfM. Combining aspects of cost and benefit, conceptually it draws on economic appraisal—which, for the UK government, is formally outlined in the Treasury’s Green Book.⁵⁶³

7.1.3 Local Government

At the local level, local authorities in England undertake procurement procedures according to the standing orders adopted by each authority.⁵⁶⁴ These are adopted within a broad statutory framework to achieve ‘best value’ in local authority functions.⁵⁶⁵ Within the central government, responsibility for local government policy issues in England lies with the Department for Communities and Local Government.

The Local Government Act 1988 (Sect. 17: 5[a]) stated that local authorities could not include ‘non-commercial’ reasons in their grounds for deciding which supplier received a public contract. This included ‘the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces’. However, the Local Government Act 1999, which introduced the current ‘best value’ regime, relaxed the restriction on including the terms of employment of contractors, provided that these are relevant to achieving best value. This was also modified by both the Equality Act 2010 and Public Services (Social Value) Act 2010. This was undertaken to prevent the prohibition acting as an impediment to policies which authorities might wish to adopt in pursuance of the duties imposed in the two Acts. The Local Government Act 2000 placed a duty on English and Welsh local authorities to prepare a community strategy for promoting or improving the economic, social, and environmental *well-being* of their areas and for contributing to the achievement of sustainable development in the UK. This must, however, be consistent with best value requirements and EU law. The well-being power is a key provision for local government as it relaxes the doctrine of *ultra vires* and offers the opportunity for innovative partnerships between local governments and their partners. On 18 February 2012, the general power of competence was brought into force in respect of principal local authorities and the well-being power was repealed in respect of England. The general power of competence significantly enhances the powers of local authorities in England. The well-being power continues to apply to Welsh authorities.

7.1.4 National Framework: Procurement As a Social Policy Tool

⁵⁶⁰ Cabinet Office, *Single Departmental Plan*, updated 23 May 2018.

<https://www.gov.uk/government/publications/cabinet-office-single-departmental-plan/cabinet-office-single-departmental-plan--2> Accessed 4 October 2019.

⁵⁶¹ Booth, ‘Public Procurement and Contracts’ (n 550).

⁵⁶² Michael Power, *The Audit Explosion* (Demos 1994).

⁵⁶³ HM Treasury, *The Green Book: Appraisal and Evaluation in Central Government*, (London, TSO 1995)

⁵⁶⁴ See Helen Randall, *Local Government Contracts And Procurement* (Bloomsbury Professional 2011).

⁵⁶⁵ Arrowsmith, *The Law of Public and Utilities Procurement* (n 519)2-15.

While the UK had been at the forefront of social procurement, the rise of Thatcherism in Britain brought it to a halt on a centralised level and instead the privatisation of publicly owned enterprises, the deregulation of utilities, and the contracting-out of public services to private sector organisations were promoted. However local governments continued to support the use of social procurement. Notably, large metropolitan areas such as London and Birmingham used social clauses to reinforce statutory prohibitions in the areas of race and sex discrimination and the hiring of local labour.⁵⁶⁶ This became a prominent component of local government activity in England and Wales during the 1980s, particularly among Labour Party-controlled local authorities.⁵⁶⁷ Research has indicated that approximately 20% of local authorities adopted formal contract compliance policies during that period.⁵⁶⁸ The Local Government Act 1988 substantially restricted the use of public procurement for social policy purposes by local authorities. The new Labour government reversed this policy to some extent, in particular regarding what should be considered ‘non-commercial matters’ for the purposes of the Local Government Act 1988 and in statutory guidance that was published in 2003. The latter states that local authorities ‘may take account of the practices of potential service providers in respect of equal opportunities (e.g. race, gender, disability, religion, age, and sexual orientation) where it is relevant to the delivery of the service under the contract’.⁵⁶⁹ From this point, it was local authorities who again attempted to incorporate community benefits into procurement contracts, and not Westminster.⁵⁷⁰

7.1.4.1 Public sector duty under the Equality Act (2010)

While domestic legislation restricts some public bodies in their use of procurement as a policy tool, in some areas it imposes positive duties. One of these areas is the promotion of equality: in terms of the Equality Act 2010, public authorities have a duty to consider quality in procurement. The Act, introduced by the Labour government, applies to England and to the non-devolved public authorities in Scotland and Wales. Section 149 of the Act imposes a positive duty on public authorities to have ‘due regard’ for various equality issues when they undertake their functions. This is referred to as the Public Sector Equality Duty. The Act consolidates duties that existed in relation to race, gender, and disability and extends them to cover the other ‘protected characteristics’.⁵⁷¹ In the context of procurement, the duty is relevant to decisions relating to the content of the supplies, works, or services to be procured and in relation to workers on the contracts and the supply chain. The Act contains both a general power for ministers to make regulations that impose duties for the purpose of enabling the better performance of the basic public sector equality duty⁵⁷² and a specific power to make regulations in

⁵⁶⁶ Barbara Bagilhole, 'Managing To Be Fair: Implementing Equal Opportunities In A Local Authority' (1993) 19 *Local Government Studies*.

⁵⁶⁷ McCrudden, *Buying Social Justice* (n 485) 336.

⁵⁶⁸ Report cited in PE Morris, 'Legal Regulation of Contract Compliance: An Anglo-American Comparison' (1990) 19 *Anglo-American Law Review* 87, 93.

⁵⁶⁹ Statutory Guidance (2003) para 38 (emphasis added). As regards the use of local labour clauses, there is a somewhat surprising reference. In a separate note to the Guidance, which is specifically stated not to constitute part of the statutory guidance, the Deputy Prime Minister's Department's 'views on the use of social clauses' are set out. This states: 'Individual local authorities may wish to use local labour clauses in contracts particularly in the interest of wider regeneration objectives. However, this needs to be done within the scope of the EC Treaty and the European Public Procurement legislation.' Annex C, 46.

⁵⁷⁰ Richard Macfarlane, 'Tackling Poverty Through Procurement' (Joseph Rowntree Foundation (JRF) 2014).

⁵⁷¹ See Equality Act s149(7).

⁵⁷² S.153(1).

connection with public procurement.⁵⁷³ The Act states that regulations may impose duties on any public authority that, in relation to its public procurement functions, is a contracting authority within the meaning of the 2014 Public Procurement Directive. However, no specific duties have been adopted in this section.

The Equality and Human Rights Commission has, however, produced guidance on implementing the Act in relation to the area of procurement. Guidance⁵⁷⁴ is also provided by a 2013 procurement policy note from the Cabinet Office.⁵⁷⁵ In 2013, a review of the public sector equality duty concluded that, in relation to public procurement, many authorities had adopted a formulaic, tick-box approach, which was not varied regardless of the size or nature of the contract, and requested equality impact statements as a matter of routine, which was viewed as a burdensome red tape exercise.⁵⁷⁶

7.1.4.2 England and Wales: The Public Services (Social Value) Act 2012

The second piece of domestic legislation that imposes a duty to engage in procurement that promotes horizontal policies is the Public Services (Social Value) Act 2012.⁵⁷⁷ The private members bill was supported by the Conservative government as it aligned with its policy programme of increasing the role of charities and social enterprises in the delivery of public services.⁵⁷⁸ The Act requires public authorities, including local and central government, NHS commissioning bodies, and housing associations, to consider the ‘economic, social and environmental well-being of the relevant area’ before they procure major public service contracts. A note published alongside the Act clarifies that commissioners should ‘consider how what is to be procured may improve the social, environmental and economic well-being of the relevant area, and how they might secure any such improvement and consider the need to consult’.⁵⁷⁹ The legislation does not impose an obligation to act upon these considerations, relying instead on light-touch drafting (authorities are merely exposed to a legal duty ‘to consider’ seeking social value); it includes a number of provisions that restrict its scope. The Act applies to England and, to a more limited extent, to Wales, as Welsh public bodies that exercise wholly or mainly devolved functions are excluded from its remit.⁵⁸⁰

7.1.4.2.1 Evaluation of the Social Value Act

⁵⁷³ s.155 (2).

⁵⁷⁴ Equality and Human Rights Commission, *Buying Better Outcomes: Mainstreaming Equality Considerations in Procurement Guide for Public Authorities in England* (2013).

⁵⁷⁵ Cabinet Office, *Procurement Policy Note—Public and the Public Sector Equality Duty* (PPN 01/13).

⁵⁷⁶ Government Equality Office, *Review of the Public Sector Equality Duty: Report of the Independent Steering Group* (6th September 2013).

⁵⁷⁷ Information published by the Cabinet office on the act and related initiatives can be found at <https://www.gov.uk/government/publications/social-value-act-information-andresources/soaicl-value-act-information-and-resources>; and see also various resources relating to the act, including various case studies available at the social value hub website <https://www.socialvaluehub.org.uk/> accessed 10 October 2019.

⁵⁷⁸ Cabinet Office and Crown Commercial Service, *EU Procurement Directives and the UK Regulations*, updated 1 March 2017; HC EU Procurement Directives and the UK Regulations Debate, 15 February 2011, col 913

⁵⁷⁹ A Guide to the Act has been produced by Social Enterprise UK, available at: http://www.socialenterprise.org.uk/uploads/files/2012/03/public_services_act_2012_a_brief_guide_web_version_final.pdf accessed 3 October 2019.

⁵⁸⁰ The Act will not apply to Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government, the National Assembly for Wales and those organisations whose functions are wholly or mainly Welsh devolved functions (i.e. functions that are within the legislative competence of the National Assembly for Wales or are imposed or conferred on an authority by the Welsh Ministers)

The Act was generally welcomed as legislation that provides a legal stimulus to focus on social value and the practical advantages of a light-touch regime which provides commissioners with room for flexible and responsive decision-making on social value. The Act has inspired many local councils to introduce their own measures. For example, the Liverpool City Council gives preference to social enterprises and organisations with the smallest gap between the lowest and highest paid earners.⁵⁸¹ Nottingham City Council, already the subject of a case study in the original Macfarlane report,⁵⁸² published guidance on community benefits for SMEs.⁵⁸³

Criticism of the Act includes the weakness of the requirement to only *consider* how procurement should promote social value and the failure to require evidence of considering or achieving social value.⁵⁸⁴ The restriction to service contracts only (i.e. goods and works contracts are excluded) has also been criticised.⁵⁸⁵ In 2015, Lord Young reviewed awareness of the Act, its use, and impact. Although he found that the Act had positive effects where it had been used, the predominant finding of the review was that the incorporation of social value into actual procurements appeared to be relatively low when considered in relations to the number and value of procurements across the whole public sector. The following barriers were identified: lack of awareness and understanding of the Act; confusion about the definition of social value; the need for more guidance on how to apply social value within a legal framework and the need to measure and quantify social outcomes.⁵⁸⁶ Evaluation of the impact of social procurement lacked consistency and rigour and a stronger social value framework was required. The report recommended improving understanding of how to define social value, how and when to include it in the procurement process, and how to apply it within a legal framework and procurement rules. The report further recommended measures to strengthen the framework for measuring and evaluating social value and developed a framework and principles for the current state of social value measurement. Suggested measurement frameworks included SROI, cost-benefit analysis, well-being and satisfaction measures, and sector-specific measures.

The difficulties with the concept of social value were echoed in Temple and Wigglesworth's survey of 77 local authorities and 123 housing associations which found that one-third of housing associations and local authorities do not yet consider social value in the services and products they procure and that 56 percent of respondents reported a low impact for their procurement practices. The most common barrier to implementation was the measurement of social value⁵⁸⁷. These findings are repeated in Harlock's 2013 research on adult social care commissioners in six local authorities in England; difficulties in defining and measuring social value were reported by all the

⁵⁸¹ Nottinghamshire County Council, 'Procurement and equality of opportunity' <http://www.nottinghamshire.gov.uk/living/business/businesswiththecouncil/procurementpoliciesandprocedures/> accessed 1 August 2019.

⁵⁸² Richard McFarlane and Mark Cook, 'Achieving Community Benefits through Contracts: law, policy and practice' (Bristol, 2002 The Policy Press).

⁵⁸³ Nottinghamshire County Council, 'Procurement and community benefits, Guidance for Nottinghamshire-base small to medium enterprises (SMEs)' <<http://www.nottinghamshire.gov.uk/living/business/businesswiththecouncil/procurementpoliciesandprocedures/>> accessed 1 August, 2019.

⁵⁸⁴ Local Government Information Unit, *Public Services (Social Value) Act 2012: Policy Briefing*(2012).

⁵⁸⁵ For example in Social Enterprise UK, UK Transposition of new EU Procurement Directives: Public Contracts Regulations 2015 Consultation response from Social Enterprise UK (October 2014).

⁵⁸⁶ Cabinet Office, *Social Value Act review* (February 2015).

⁵⁸⁷ Nick Temple and Charles Wigglesworth, 'Communities Count: The Four Steps Of Unlocking Social Value' (Social Enterprise UK 2014).

interviewees. The key challenge was found to be the lack of a universally accepted definition of social value.⁵⁸⁸

Lord Young's review was followed up by Social Enterprise UK's report, 'Procuring for Good',⁵⁸⁹ which found that 33 percent of councils make use of the Act but only 24 percent had a social value policy in place. Healthy Commissioning⁵⁹⁰ (2017) found that 57 percent of clinical commissioning groups included the term social value in their procurement processes but only 13 percent of them had included them as social clauses and had evidence of their use. Power to Change, reporting on the Act, found that defining and measuring social value effectively remains one of the largest barriers to the Act having greater traction. Commissioners and contractors alike struggled to identify suitable tools for capturing the social impact that did not limit the diversity and innovation of social value initiatives. Measurement was a particular challenge for community businesses who were feeling the pressure to demonstrate and communicate their impact but had limited knowledge of or expertise in how to do it, especially as regards demonstrating softer and longer term outcomes.⁵⁹¹

7.1.4.2.2 Civil society strategy

In August 2018, the UK government published its civil society strategy which committing it to using its buying power to drive social change by applying the principles of the Social Value Act to all government spending and decision-making, including goods and works as well as services. Furthermore, social value will be an explicit requirement in central government contracts with the private and third sectors (but not for local government or other public sector commissioners); the strategy proposes a minimum weighting of 10 percent for social value in contracts 'to ensure that all major procurements explicitly evaluate social value, where appropriate, rather than just consider it'.⁵⁹² All departments in the central government will be required to regularly report on the social impact of new procurements, and they have made a commitment to train all 4,000 of the government's commercial buyers about how to take account of social value.⁵⁹³

In March 2019, the UK Cabinet Office launched a 12-week consultation on an evaluation model for social value for central government buyers.⁵⁹⁴ The model comprises a set of themes, a set of priority policy outcomes grouped under each theme, standard award criteria, and a menu of specific metrics for departments to use in contract management and reporting. From this menu of options, departments can select relevant policy outcomes; however, they will not be required to. Each policy outcome has standard award criteria, and a suggested set of evaluation questions for departments to consider. Bidders' responses will be scored against the qualitative aspects using a standard scoring methodology. Each policy outcome will also have a corresponding set of proposed metrics that should be used by departments to performance-manage the delivery of the

⁵⁸⁸ Jenny Harlock, 'Impact Measurement Practice In The UK Third Sector: A Review Of Emerging Evidence' (Third Sector Research Centre 2013).

⁵⁸⁹ Social Enterprise UK, *Procuring for Good How the Social Value Act is being used by local authorities* (2016).

⁵⁹⁰ James Butler and Don Redding, 'Healthy Commissioning: How The Social Value Act Is Being Used By Clinical Commissioning Groups' (National Voices and Social Enterprise UK 2017).
<<https://www.nationalvoices.org.uk/publications/our-publications/healthy-commissioning-how-social-value-act-being-used-clinical>> accessed 3 December 2019.

⁵⁹¹ Naomi Jones and Alice Yeo, 'Community Business And The Public Services (Social Value) Act 2012' (Power to Change 2018).

⁵⁹² *ibid.*

⁵⁹³ HM Government, *Civil Society Strategy: building a future that works for everyone* (August 2018)

⁵⁹⁴ Cabinet Office, *Social Value in Government Procurement*, (11 March 2019).

contract. Bidders that have been selected will need to submit quantitative information based on these metrics.⁵⁹⁵

7.1.4.2.3 Reaction to the civil society strategy

There has been broad support among think tanks and campaign organisations for the objectives set out in the government's civil society strategy.⁵⁹⁶ However, Graells finds the draft policy restrictively narrow as it solely concentrates on the design of award criteria that seek to account for social value, limited to the implementation of rules concerned with regulation 67 of the Public Contracts Regulations 2015 (PCR2015). It is unclear why the policy does not cover other mechanisms, such as the use of social labels (reg. 43 PCR2015) or the imposition of contract performance conditions (reg. 70 PCR2015). Among other problems, the draft policy fails to take into account existing legal requirements for the selection and use of award criteria linked to social value in particular, the prohibition on using criteria that refer to general corporate policies that raise the risk of illegality for some of the evaluation questions, and the metrics included in the document. Additionally, some metrics are unlikely to capture any social value.⁵⁹⁷

⁵⁹⁵ HM Government, *Civil Society Strategy* (n 585) 115.

⁵⁹⁶ Third Sector, *Civil Society Strategy: Reaction on Social Media*, (9 August 2018).

⁵⁹⁷ Sanchez-Graells, A , 'Response to the Cabinet Office's consultation on Social Value in Government Procurement' 23 April 2019.

7.2 Wales: Legal and Policy Framework for Public Procurement

In Wales, the policy position and the commitment to using procurement to help achieve social justice are stronger than in England, with a particular focus on boosting the local economy.⁵⁹⁸ Community benefits clauses have been used since 2004, with the first two pilot projects publishing reports in 2006.⁵⁹⁹ The findings from these reports were further developed to create a policy approach with guidance that was published for the public sector in 2010 together with a benefits measurement tool to capture outcomes and calculate a local economic multiplier based on those outcomes.⁶⁰⁰

7.2.1 Value for Money

The Wales Procurement Policy Statement adopts a definition of procurement that ensures that value for money is considered in the very widest sense when contracting in the public sector in Wales:

Procurement is the process whereby organisations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organisation but also to society and the economy, while minimising damage to the environment.⁶⁰¹

The community benefits approach is Principle 4 of the Wales Procurement Policy Statement and seeks to act upon this wider definition of value for money by delivering the very widest social, economic, and environmental benefits in the course of securing the goods, services, or works required by the public sector in Wales.

7.2.2 National Framework: Procurement As a Social Policy Tool

At the devolved level, there is not a statutory requirement to include social, environmental, or economic considerations and requirements in public contracts. The Welsh government's published guidance suggests that, for central government activities, Welsh ministers may rely on the so-called 'power of well-being'⁶⁰² contained in Section 60 of the Government of Wales Act 2006. Section 60 states:

(1) The Welsh Ministers may do anything which they consider appropriate to achieve any one or more of the following objectives—

- (a) the promotion or improvement of the economic well-being of Wales,
- (b) the promotion or improvement of the social well-being of Wales, and
- (c) the promotion or improvement of the environmental well-being of Wales.⁶⁰³

The Act is underpinned by the sustainable development principle: development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The Act requires specified public bodies, including the Welsh government, to set and publish objectives designed to maximise their contribution to the seven national well-being goals. They are also required to take all reasonable steps to meet those objectives. The Act identifies five ways of working which can support the well-being of future generations—integration, collaboration, long-term thinking, involvement, and prevention.

⁵⁹⁸ See the Wales Centre for Public Policy, *Sustainable Public Procurement* (March 2019) 7 - 8.

⁵⁹⁹ Dina Grazer, 'Community Benefits In Practice And In Policy' (Atkinson Foundation 2016).

⁶⁰⁰ Constructing Excellence in Wales, *Community Benefits Policies in Construction: Evaluating the Impact* (2012).

⁶⁰¹ Auditor General for Wales, *Public Procurement in Wales* (October 2017).

⁶⁰² Government of Wales Act 2006, Section 60.

⁶⁰³ *ibid.*

The Welsh government issued its first procurement policy statement on the use of public procurement as a policy tool in 2012. This was as a result of the McClelland review, commissioned by the Welsh government to consider the overall effectiveness of the Welsh public sector procurement policy and how its impact could be maximised. The review found that good progress has been made in public procurement in general and in particular with regards the ‘community benefits’ policy. However, it found the quality of deployment of the policy disappointing, and it recommended that the Welsh government procurement policy be consolidated into a single ‘Policy and Practices’ document. Following the McClelland Report, the Wales Procurement Policy Statement (WPPS), which includes a principle dedicated to community benefits,⁶⁰⁴ was launched. The Welsh public sector was expected to ‘apply community benefits to all public sector procurements where such benefits can be realised’ and to report outcomes to the Welsh government for all contracts worth over £2 million. The Welsh government’s Programme for Government 2011–16, Principle 4, made the delivery of community benefits an integral part of procurement processes in the region.⁶⁰⁵ Community benefits were to be applied to all public sector procurement and a measurement tool was to be applied to all such contracts over £2m where such benefits could be realised to capture and report outcomes to the Welsh government.

The Welsh government updated and reissued its policy on community benefit clauses in 2015.⁶⁰⁶ Part 4 of the report provides further evidence for the extent to which public bodies are adopting procurement practices consistent with the policy statement, including the community benefits approach.⁶⁰⁷ Adherence to the policy statement is voluntary, although the Welsh government expects it to form the basis for procurement policy in all public bodies. The Welsh government has developed detailed guidance for defining what it considers to be within the scope of community benefits.

The Welsh government⁶⁰⁸ has taken a wide interpretation of community benefits and direct procurers in order to identify one or more of the following benefits during the course of the contract:

- job opportunities for the economically inactive,
- training opportunities for the economically inactive,
- retention and training opportunities for the existing workforce,
- promotion of open and accessible supply chains that provide opportunities for SMEs to bid for work, and promotion of social enterprises and supported businesses,
- contributions to education in Wales through engagement with school, college, and university curricula,

⁶⁰⁴ Welsh Government, *Wales Procurement Policy Statement* (December 2012).

⁶⁰⁵ Welsh Government, *Community benefits: Delivering Maximum Value For The Welsh Pound* (2014).

⁶⁰⁶ Welsh Government, *Welsh Procurement Policy Statement*, (June 2015).

⁶⁰⁷ *ibid* paragraph 4.30 to 4.36.

⁶⁰⁸ Welsh Government, *Community Benefits Policy Maximising Value For The Welsh Pound*

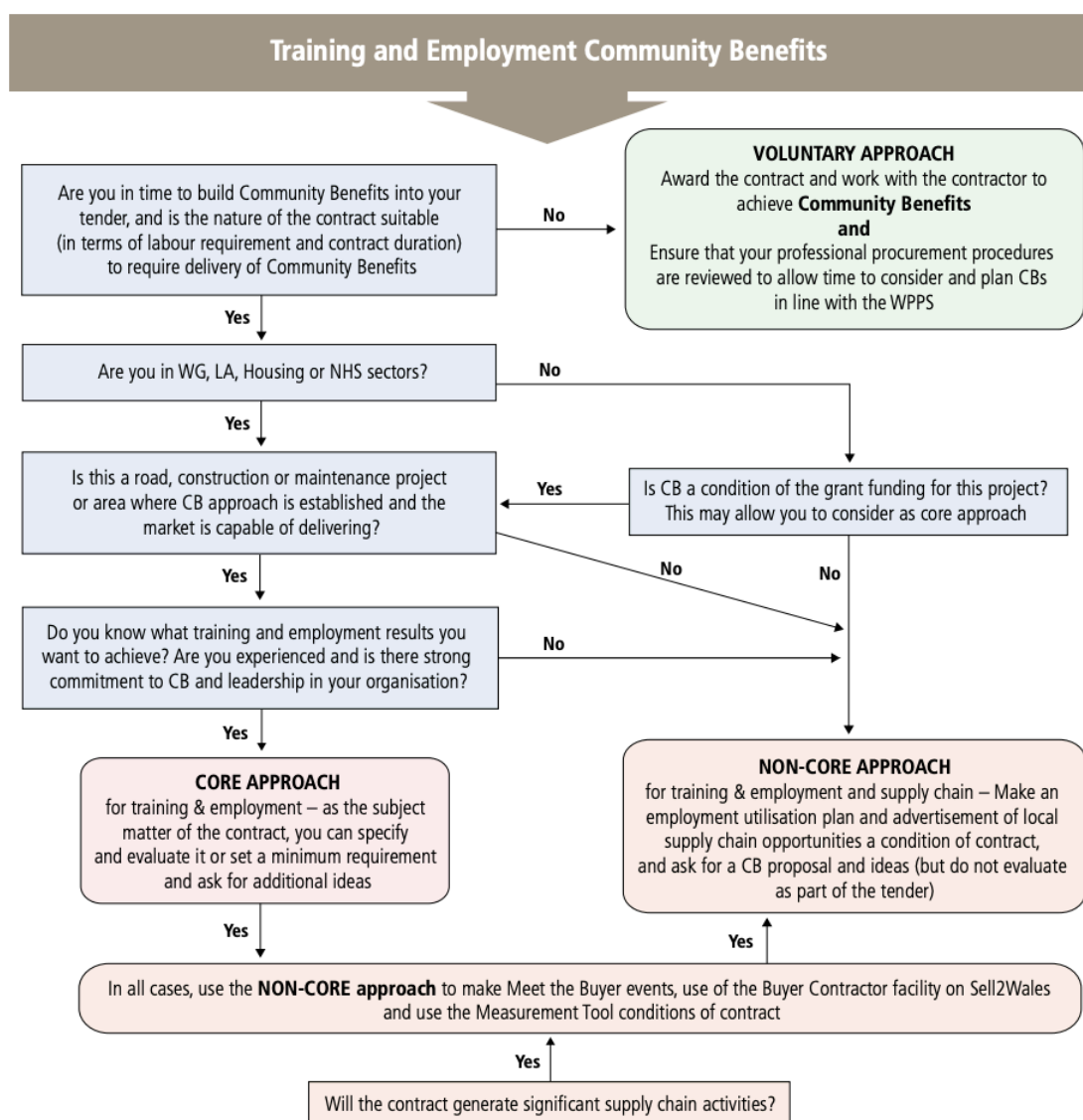
<https://gov.wales/sites/default/files/publications/2019-09/community-benefits-policy-maximising-value-for-the-welsh-pound.pdf> accessed October 2019.

- contributions to community initiatives that support tackling poverty across Wales and leaving a lasting legacy within the community, and
- opportunities to minimise the environmental impact of contracts and to promote environmental benefits

The Welsh government's guidance advises using the 'core' approach over the non-core approach to procure community benefit, as devised by Macfarlane. As described above, the core approach involves the inclusion of community benefit objectives in the subject matter of the contract; the non-core approach involves using 'special conditions' or inviting community benefits proposals. With the core approach, community benefits have been identified as a core component of the subject matter of the contract, therefore they can be specified. As the public body is seen as purchasing the community benefit outcomes as well as the goods, services, or works, the award criteria should address levels of quality or performance connected to the specified requirement.

To assist buyers to consider the viability of the core approach in the first instance, before they move to the non-Core approach, the Welsh government published a flow chart (Figure 3).

Figure 3 Flow chart for Welsh government's procurement router⁶⁰⁹



Compliance is monitored by the Welsh government's Value Wales team. The Welsh Community Benefits Tool—effectively a monitoring report—has to be completed for contracts valued at or above £2 million. This tool collects output data for 10 sustainable development measures from clients and contractors/suppliers and uses a local multiplier to measure the impact of the contract on the economy of Wales.⁶¹⁰

In August 2015, the UK government granted Welsh ministers permission to legislate on public procurement. The then Welsh Minister for Finance issued a statement setting out the Welsh government's intention to use the new powers to, among other things, maximise the impact of the WPPS and promote collaborative procurement.⁶¹¹ In April 2016, the Welsh government launched a consultation on the prospect of new public

⁶⁰⁹Welsh Government, *Community Benefits Delivering Maximum Value for the Welsh Pound – 2014* (2014).

⁶¹⁰Welsh Government, *Community Benefits Measurement Tool: Delivering Maximum Value for the Welsh Pound*. Available at: <http://gov.wales/topics/improving-services/better/fm/publications/community-benefits-2014/?lang=en>. Accessed January 09, 2017.

⁶¹¹Auditor General for Wales, *Public Procurement in Wales* (October 2017) 24.

procurement legislation. The topics under consideration included the use of community benefit clauses in contracts. The Welsh government received responses to the consultation from a mix of public bodies, third-sector organisations, businesses, and trades unions. The government is considering its options, taking account of the feedback to the consultation and any potential impact of the UK's planned withdrawal from the EU.⁶¹²

⁶¹² *ibid.*

7.3 Scotland: Legal and Policy Framework for Public Procurement

Scottish policies on horizontal considerations in public procurement are, as with Wales', more ambitious than those of their Westminster counterparts, with community benefits clauses having been used in major contracts in Scotland for some time. The 1999 creation of a parliament in Scotland, with responsible for the delivery of domestic public policy and services, meant that public procurement devolved from Westminster under the devolution settlement. The catalyst for the revolution in the Scottish public procurement system was the publication in 2006 of John McClelland's 'Review of Public Procurement in Scotland',⁶¹³ which set out an ambitious and challenging agenda for change. Since then, the Scottish government put in place a proactive implementation plan, which includes structures, resources, and high level ministerial commitment to the reform process. In 2008, the Scottish government published a report on community benefits in public procurement which presented the findings of a pilot programme which was intended to promote the use of community benefits. This use of the term 'community benefit' by the Scottish National Party government, as opposed to 'social value' was deliberate, and aimed to achieve their policy goal of maximising local employment in order to reduce social exclusion.⁶¹⁴

7.3.1 Value for Money

The Scottish model of procurement defines value for money as the appropriate balance of cost, quality, and sustainability,⁶¹⁵ ensuring that public money is spent in a way that can 'deliver the most benefit to society'.⁶¹⁶ The Procurement Reform Act, Section 15(5)(a)(ii) requires contracting authorities to set out how they intend to deliver value for money, while considering the whole life cost and evaluating community benefits in a manner similar to other sustainability aspects of the requirement.⁶¹⁷

7.3.2 National Framework: Procurement As a Social Policy Tool

In 2014, the government formalised the requirement for Scottish commissioners to consider community benefits in the Procurement Reform (Scotland) Act 2014,⁶¹⁸ which extends beyond the basic transposition of the 2014 EU Directive. According to the Scottish government, it places procurement 'at the heart of Scotland's economic recovery'.⁶¹⁹ For example, the Scottish government has made it a legal requirement for public bodies which have an estimated procurement spend of £5 million or more (excluding VAT) in a financial year to publish annual procurement strategies. The Scottish government has also introduced lower thresholds above which the regulations must be followed. The Act places an obligation on public sector bodies and lays the foundations for the systematic delivery and reporting of social value in the Scottish public

⁶¹³ John McClelland, 'Review of Public Procurement in Scotland - Report and Recommendations' (Scottish Executive, March 2006).

⁶¹⁴ Richard MacFarlane and Mark Cook 'Community Benefits in Public Procurement' (The Scottish Government 2008).

⁶¹⁵The Scottish Government, *The Scottish Model of Procurement*, <https://www.webarchive.org.uk/wayback/archive/20180529233014/http://www.gov.scot/Topics/Government/Procurement/about/spd-aims> accessed 3 October 2019.

⁶¹⁶ *ibid.*

⁶¹⁷ The Scottish Government, *Guidance under the Procurement Reform (Scotland) Act 2014* (March 2016) 42.

⁶¹⁸Procurement Reform (Scotland) Act 2014.

⁶¹⁹ The Scottish Government, *The Public Procurement Reform Programme 2006–2016, Achievements and Impact* (November 2016).

sector. Unlike in England, social value in Scotland is explicitly part of a broader agenda. The Act establishes the expectation that community benefit requirements will be used in all cases where there is a legal basis.

The 2014 Act describes a community benefit as:

a contractual requirement imposed by a contracting authority—(a) relating to—(i) training and recruitment, or (ii) the availability of subcontracting opportunities, or (b) which is otherwise intended to improve the economic, social or environmental well-being of the authority's area in a way additional to the main purpose of the contract in which the requirement is included.

In the policy note that accompanied the Act, a non-exhaustive list was compiled of what may be included as a community benefit:

- generating employment and training opportunities for priority groups,
- vocational training,
- up-skilling the existing workforce,
- equality and diversity initiatives,
 - making subcontracting opportunities available to SMEs, the third-sector, and supported businesses,
- supply chain development activity,
- building capacity in community organisations,
- educational support initiatives,
- working with schools, colleges, and universities to offer work experience and
- minimising negative environmental impacts, for example, those associated with vehicle movements and/or associated emissions and impacts on protected areas, buildings, or sites.⁶²⁰

In addition, it advised that contracting authorities should access the Scottish Index of Multiple Deprivation to focus the application of community benefits on particular disadvantaged areas.⁶²¹ While Scotland indicates that community benefit requirements can be included in the specification or in the conditions of contract performance or both, but does not advocate one over the other, unlike Wales which advocates for the core approach.

The legislation also introduces a sustainable procurement duty that requires public contracting authorities to consider how the procurement process can facilitate the involvement of SMEs, third-sector bodies, and supported businesses with the aim of making it easier for them to tender for public contracts. Under the Act, the concept of value for money is extended beyond cost and quality to include 'the best balance of cost, quality and sustainability.' The government requires public contracting authorities to produce an annual procurement report detailing their performance and achievements in delivering their strategy and specific community benefits. Specifically, the Act (s. 15[5bi]) requires contracting authorities to include a policy statement in their procurement strategy which describes the use of the community benefit requirement and explains how they will measure progress. It also specifically requires public bodies to consider imposing community benefit requirements as part of a major contract; these might relate to, for example, employment opportunities or to subcontracting opportunities. The vision is to 'deliver procurement that improves public services for a

⁶²⁰ The Scottish Government, *Guidance under the Procurement Reform (Scotland) Act 2014*, (March 2016) 44.

⁶²¹ *ibid* 43

prosperous, fairer and more sustainable Scotland'.⁶²² The Scottish government's policy note that accompanies the draft Public Contracts (Scotland) Regulations 2015 highlights how, in the new rules, discretion is being exercised to provide strong support for a social procurement agenda. The blacklisting of workers, for example, is described in the policy note as 'an unacceptable practice', with the consequence that the Scottish government 'has decided to use the flexibility offered by the public procurement Directive to make it mandatory for contracting authorities to exclude businesses from procurement exercises which have been found to have committed [blacklisting]'.⁶²³

The procurement policy note also explains the functionality of the web portal, Public Contracts Scotland, in relation to the use of community benefit clauses. The key point is that, where no community benefit clause is to be used, the contracting authority must provide an explanation in the box provided on the web portal. This information is then available to the Scottish government to help it assess the impact of the community benefit policy.⁶²⁴

7.3.3 Implementation of Social Procurement

Various sustainable procurement tools have been developed on behalf of the government to ensure a structured approach to implementation.

The Sustainable Public Procurement Prioritisation Tool⁶²⁵ has been designed to help all procuring organisations in Scotland structure an approach to the valuation of spending categories. The tool specifically concentrates on the government's principles of increasing sustainable economic growth and maintaining the outcomes-based approach to procurement.

The Sustainability Test is used to incorporate relevant sustainability conditions into frameworks and contracts.⁶²⁶

The Life-Cycle Impact Mapping Tool helps users identify and assess their sustainability risks and opportunities. A contractor could use this tool to identify the social, economic, and environmental impacts of individual procurements and to identify points of opportunity for good working practice.⁶²⁷

The Flexible Framework Assessment Tool is used to support procuring organisations evaluate their present level of performance and the measures they need to undertake in order to improve. These tools have been developed by Sustainable Procurement Limited and are all self-assessment tools—they require answering a number of questions in Excel to allow organisations to plan and track their progress in sustainable procurement.

7.3.4 Reporting

Public authorities in Scotland now have an obligation to report on their sustainable procurement. The first annual report was published in April 2019 and provides an overview of information from the 115 annual procurement reports published in 2018 by

⁶²² Scottish Government, *Publication – Factsheet, Public Procurement: Governance* <https://www.gov.scot/publications/public-procurement-governance/> accessed 10 October 2019.

⁶²³ Scottish Government, *Changes to the Procurement Rules in Scotland, Scottish Procurement Policy Note SPPN 6/2015*, 18 December 2015, 4.

⁶²⁴ Scottish Government, *Scottish Procurement Scottish Procurement Policy Note, Delivering community benefits in public procurement SPPN 6/2014* Date 20 November 2014.

⁶²⁵ The Scottish Government, *The Sustainable Public Procurement Prioritisation Tool* <https://www2.gov.scot/About/Performance/scotPerforms/partnerstories/SustainablePublicProcurementPrioritisationTool> accessed 4 October 2018.

⁶²⁶ *ibid.*

⁶²⁷ *ibid.*

public bodies in Scotland, together with data from Public Contracts Scotland (the national advertising website for public sector contract opportunities in Scotland) and from the Scottish Procurement Information Hub, a tool that enables over 100 Scottish public bodies to examine procurement spend by analysing accounts payable data.⁶²⁸

⁶²⁸ Scottish Government, *Annual report on procurement activity in Scotland*, (SG/2019/18) 9.

7.4 Northern Ireland: Legal and Policy Framework for Public Procurement

In Northern Ireland, social clauses⁶²⁹ have been in use since 2001, mainly in construction contracts, in the form of employment and training requirements, such as apprenticeships and providing placement opportunities for the long-term unemployed.⁶³⁰ This innovative use of public procurement can be explained by Northern Ireland's unique history and the discretion that became available when procurement became a devolved responsibility of the Northern Ireland Executive and Assembly under the Northern Ireland Act 1999.⁶³¹ The shift to the pursuit of socioeconomic goals resulted from a number of factors rooted in Northern Ireland's troubled history of sectarian conflict and resulting economic disadvantage: pressure from local politicians and interests to help local businesses and areas of particular disadvantage; the requirement under Section 75 of the Northern Ireland Act 1998 to 'pay due regard to the need to promote equality of opportunity'; and the need to review Northern Ireland's procurement policy following devolution, as no policy existed for the devolved administration.⁶³² By February 2001, the Northern Ireland Executive committed itself 'to develop [by June 2001] proposals for implementing improvements in public procurement, ensuring that the equality dimension of cross-departmental policy and practice in relation to the procurement of goods and services by the public sector is addressed through equality impact assessment.'⁶³³ Responsibility for public procurement policy rests with the Procurement Board, which is supported by the Central Procurement Directorate (CPD), a branch of the Department of Finance and Personnel. In addition, eight Centres of Procurement Expertise (CoPEs) are responsible for procurement policy in specific areas.⁶³⁴

7.4.1 Value for Money⁶³⁵

Value for money is defined as the most advantageous combination of cost, quality, and sustainability to meet customer requirements. In this context, cost means consideration of the whole life cost; quality means meeting a specification which is fit for purpose and sufficient to meet the customer's requirements; and sustainability means economic, social, and environmental benefits, considered in the business case, in support of the Programme for Government.

7.4.2 National Framework: Procurement As a Social Policy Tool

⁶²⁹ This is the term used by the Northern Ireland Assembly defined as: 'requirements within contracts or the procurement process which allow the contract to provide added Social Value through fulfilling a particular social aim. For example, a social clause in a public contract could prioritize the need to train or give jobs to the long term unemployed in the community as part of the contracting workforce'. This definition is from http://www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx and as set out in the Northern Ireland Assembly Research Paper, *On Social Clauses in Public Contracts* (2009).

⁶³⁰ Other social requirements were agreed in June 2008 by the CoPEs in conjunction with the Construction Industry Forum for Northern Ireland (CIFNI). For example, these include promoting equality of opportunity in the workplace, promoting respect for people and promoting best practice in Health and Safety.

⁶³¹ Christopher McCrudden, 'Country Legal And Policy Review For SRPP In Northern Ireland' (Directorate General for Employment, Social Affairs and Equal Opportunities 2008).

⁶³² Andrew Erridge and Sean Hennigan. 'Public procurement and social policy in Northern Ireland: the unemployment pilot project' in G. Piga and KV Thai (Eds) *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (2006) 280.

⁶³³ Northern Ireland Executive, *Programme for Government* (February 2001), para 2.2.1, 16.

⁶³⁴ Northern Ireland Executive, *Programme for Government 2011-15* (March 2012)15, 16, 20.

⁶³⁵ NI Department of Finance, <https://www.finance-ni.gov.uk/articles/definition-best-valueN-money> accessed 5 October 2019.

The Programme for Government for Northern Ireland (2011–2015) stated that the Northern Ireland Executive should include social clauses in all public procurement contracts for supplies, services, and construction.⁶³⁶ This was updated in 2014 to include the concept of ‘Best Value for Money’ as the ‘most advantageous combination of cost, quality and sustainability to meet customer requirements’,⁶³⁷ along with the recommendation that the ‘wider economic, social and environmental strategies and initiatives of the Executive should be more closely integrated into procurement policy.’⁶³⁸ In September 2016, the CPD issued updated guidance, PGN 01/13 (as amended) *Integrating Social Considerations into Contracts*, which outlines the benefits of including social considerations in public procurement and is applicable to all Northern Ireland Public Procurement Policy users.⁶³⁹ This guidance only relates to construction and services contracts; the amended guidance refers to the detail provided in the procurement regulations⁶⁴⁰ document, which shares ways to incorporate ‘Buy Social’ into specifications, contract performance clauses, selection criteria, and award criteria. The Northern Ireland Procurement Board has adopted a revised model for the delivery of social value on procurement known as ‘Buy Social’.⁶⁴¹ ‘Buy Social’ is a means of maximising personal well-being, social cohesion and inclusion, and the equal opportunity elements of sustainable development from all public procurement. The Strategic Investment Board’s Buy Social Unit was set up to assist Northern Ireland government departments and their agencies to design, implement, and monitor social clauses in public contracts. The Buy Social approach focuses on ‘delivering employment with training and support for new entrant trainees for building contracts with a value above £2m, and infrastructure projects with a value over £4m’.⁶⁴² ‘Buy Social’ refers to the core approach but does not promote it over the non-core approach; it presents both as possible options.⁶⁴³ The guidance outlines that departments should note that the definition of best value for money requires sustainability, including social considerations, to be defined in the business case. Although the current Buy Social approach had initially focused on the construction sector, the CPD highlights that departments have the opportunity to add their own social or economic goals and extend the inclusion of the approach to any contract, irrespective of value. This includes services contracts valued at over £500,000 per annum. Guidance on Buy Social specific to the purchase of services can be found in the Buy Social Model for Services.⁶⁴⁴

⁶³⁶ NI Programme for Government (n 626) 54.

⁶³⁷ NI Public Procurement Policy, Version 11, August 2014, 3

⁶³⁸ *ibid.*

⁶³⁹ NI Procurement Guidance Note (PGN) 01/13 As Amended, September 2016.

⁶⁴⁰ *ibid.* 5.

⁶⁴¹ *ibid.* 5.

⁶⁴² *ibid.* 9.

⁶⁴³ Strategic Investment Board, *Buy Social Training Toolkit: Targeted Recruitment & Training* <https://buysocialni.org/download-the-toolkit/> accessed 4 October 2019.

⁶⁴⁴ Buy Social, *Case Studies* www.buysocialni.org/case-studies accessed 3 October 2019.

7.5 Ireland: Legal and Policy Framework for Public Procurement

The European Union (Award of Public Authority Contracts) Regulations 2016 (SI 284/2016) (Public Contracts Regulations) transposed the EU law in Ireland. The Office of Government Procurement (OGP), created in 2014, takes full responsibility for procurement policy and procedures in Ireland and for sourcing all goods and services on behalf of the public service and the health, defence, education, and local government sectors. It operates as an office of the Department of Public Expenditure and Reform. The creation of the OGP constitutes a move from a decentralised to a centralised model of procurement.⁶⁴⁵ Local authorities in Ireland are responsible for adhering to the procurement policy framework and for the individual procurement decisions they make. In terms of adopting a consistent approach to public procurement, the Local Government Management Agency provides advice and assistance to local authorities regarding national and EU procurement regulations and contract management issues affecting their activities and monitors legislative and case law developments to ensure its processes remain current in light of these developments and other best practice initiatives.⁶⁴⁶

7.5.1 Value for Money

Under the Public Spending Code, government departments and public bodies have a duty and a responsibility to the taxpayer to secure value for money in the use of public resources. Under the Public Service Management Act,⁶⁴⁷ responsibility for ensuring value for money outcomes rests with individual departments and offices. In terms of Section 4(f) and (g) of the Public Service Management Act 1997,⁶⁴⁸ departments and scheduled offices are required to provide cost-effective public services, achieve better use of resources, and comply with the requirements of the Comptroller and Auditor General (Amendment) Act 1993. Similar rules which require value for money outcomes apply to bodies which are audited by the comptroller and the auditor general. The Act must be read in conjunction with the Public Spending Code Central Technical References and Economic Appraisal Parameters.⁶⁴⁹ This consists of:

1. The Department of Public Expenditure Circular 13/2013, The Public Spending Code: Expenditure Planning, Appraisal and Evaluation in the Irish Public Service—Standard Rules and Procedures⁶⁵⁰
2. The Department of Public Expenditure and Reform Circular 06/2018: The Public Spending Code: Publication of Post Project Reviews 651 and

⁶⁴⁵ Office of Government Procurement, *National Public Procurement Policy Framework* (June 2018).

⁶⁴⁶ Irish Local Government, <https://www.lgma.ie/en/irish-local-government/> accessed 3 October 2019.

⁶⁴⁷ Public Service Management Act 1997.

⁶⁴⁸ This states that Secretary Generals or the head of a Scheduled Office are, subject to the determination of matters of policy by the Minister of the Government, tasked with ‘... (f) ensuring that the resources of the Department or Scheduled Office are used in a manner that is in accordance with the Comptroller and Auditor General (Amendment) Act 1993 with a view to enabling the matters referred to in paragraphs (a) to (d) of Section 19(1) of that Act to be appropriately addressed by the Department or Scheduled office; (g) examining and developing means that will improve the provision by the Department or Scheduled Office of cost effective public services.

⁶⁴⁹ Department of Public Expenditure, *The Public Spending Code*, <https://publicspendingcode.per.gov.ie/technical-references/> accessed 4 October 2019.

⁶⁵⁰ DPE S 431/10/2011.

⁶⁵¹ DPE 022/007/2018 26 March 2018.

3. The Department of Public Expenditure and Reform, Circular 18/2019: Technical References and Economic Appraisal Parameters Circular.⁶⁵²

However neither the Act nor the circulars provide a clear definition of value for money. While Circular 13/13 states that the public spending code is based on employing good practices at all stages of the expenditure life-cycle and that economic costs and benefits are not always the only factors influencing policy decisions regarding public expenditure, no further guidance is offered. The circular directs requests for information on value for money requirements and related guidance covering all public expenditure to the Public Financial Procedures, published by the Government Accounting Unit, which outlines the principles of government accounting, including the financial frameworks, rules, and procedures which apply to public expenditure, including value for money requirements. Here value for money is defined as:

concerned with the efficient and effective use of resources. Efficiency involves ensuring the optimum use of resources in developing and delivering programmes and services, while effectiveness involves ensuring that the objectives of programmes and services are actually achieved for the resources available.⁶⁵³

7.5.2 National Framework: Procurement As a Social Policy Tool

Until recently, Ireland has had no evidenced history of including social clauses in public procurement contracts. While efforts were made by trade unions and community groups to include them in regeneration projects in the Docklands, Fatima, and Ballymun in the 1980s and 1990s, they were not successful and only voluntary employment charters⁶⁵⁴ were permitted. This difference in approach may be the result of Ireland's unique development as a nation state. In contrast to the UK, the Netherlands, and the majority of countries in Europe, Ireland did not develop a Keynesian welfare state; lacking the resources of longer established states, it depended on voluntary provision in key policy domains such as education and health.⁶⁵⁵ As a result, the Irish state has concentrated on promoting enterprise and creating a competitive economy and, to a much lesser degree than other western European countries, provided welfare state public services and infrastructure.⁶⁵⁶ In response to the 2008 international financial crisis, the imposition of austerity policies resulted, inter alia, in fundamental, systemic reductions in public expenditure.⁶⁵⁷ While it has been stated that the financial crisis has increased enthusiasm for the use of public procurement to achieve wider social policy goals in Ireland,⁶⁵⁸ this is not evident in legislation or published policy. Indeed, Ireland's overall public

⁶⁵² DPE 022/006/2019 25th July 2019.

⁶⁵³ Department of Public Expenditure and Reform, *The Public Spending Code, E- Technical References* <https://publicspendingcode.per.gov.ie/technical-references/> accessed 3 March 2019.

⁶⁵⁴ Exodea Europe, *Study of the Employment Opportunities Arising from the Grangegorman Development of Dublin's North Inner City* (February 2009); Grangegorman, Labour & Learning Forum, *Coordinator's End of Year Report* (September 2012).

⁶⁵⁵ Kieran Allen, *The Corporate Takeover Of Ireland* (Irish Academic Press 2007).

⁶⁵⁶ *ibid.*

⁶⁵⁷ Rosalind Pritchard and Maria Slowey, 'Resilience: A High Price For Survival? The Impact Of Austerity On Irish Higher Education, South And North', *Debating Austerity in Ireland: crisis, experience and recovery* (Royal Irish Academy 2017) 175.

⁶⁵⁸ Catherine Donnelly 'Republic of Ireland' in Neergaard, Ulla B., Catherine Jacqueson, and Grith Skovgaard Ølykke, *Public procurement law: limitations, opportunities and paradoxes* (Djøf Forlag 2014).

procurement policy lacks a central focus: it is set out piecemeal in 11 circulars issued by the Departments of Finance and Public Expenditure and Reform.⁶⁵⁹

The government has stated in the Dáil that it supports the principle of social clauses and sees significant merit in developing an effective approach to their use. In 2018, the OGP published the information note, 'Incorporating Social Considerations into Public Procurement',⁶⁶⁰ to help policymakers and practitioners understand how procurement can be used to facilitate the advancement of existing social policy objectives and the wider context and implications of including them in particular procurement projects. While this note indicates a move towards facilitating the process of incorporating social consideration, it does not indicate any policy decision at a government level to influence contracting authorities as to what social considerations should be included. Ireland's primary policy focus is stated to be 'on the delivery of public services in a sustainable manner by ensuring value for money and access to public procurement opportunities for businesses'.⁶⁶¹ Ireland's advice regarding social considerations as a core requirement is conservative, indicating that these are possible but advising against including 'social objectives which are not essential elements of the contract' as requirements or reflected as such in the specifications as 'these secondary requirements that are not related to the subject of the contract can add costs, and increase the risk of legal challenge'.⁶⁶² On 27 February 2014, the government launched its Action Plan for Jobs 2014,⁶⁶³ which included the goal of including social impact clauses in public procurement.⁶⁶⁴ It subsequently launched a social clauses project⁶⁶⁵ using the Devolved Schools Programme⁶⁶⁶ as a pilot programme to trial their use. This has been administered by the National Treasury Management Agency (NTMA), the agency that manages the assets and liabilities of the government of Ireland.⁶⁶⁷ In summary, the pilot clause required that at least 10% of those working on the sites be drawn from the live register and be unemployed for more than 12 months and that at least 2.5% of workers on the sites be engaged in an approved registered apprenticeship, training, or educational work placement scheme. The aggregate capital value of the contracts was €70m. In total, the three contracts covered 14 sites, with the works comprising both stand-alone new buildings and extensions/refurbishment works. If targets were not reached a financial penalty was imposed. The most recent monthly progress reports⁶⁶⁸ provided by each of the main contractors involved indicate that they are on target to achieve the cumulative percentages set out in the pilot clause. Across the three contracts, the contractors' reports

⁶⁵⁹ Office of Government Procurement, *National Public Procurement Policy Framework* (2018).

⁶⁶⁰ OGP, *Incorporating Social Considerations into Public Procurement* (2018).

⁶⁶¹ OGP, *Social Considerations Information Note* (2019).

⁶⁶² *ibid* 25.

⁶⁶³ See para. 7.2 Maximising Procurement Opportunities in Department of Jobs, Enterprise and Innovation *Action Plan for Jobs 2014* (2014).

⁶⁶⁴ *ibid*.

⁶⁶⁵ Press Release, 'Minister for Public Expenditure and Reform, Mr. Brendan Howlin, TD, announces establishment of Social Clauses Project group' 9 June 2014 <http://www.per.gov.ie/minister-for-public-expenditure-and-reform-mr-brendan-howlin-td-announces-establishment-of-social-clauses-project-group/> accessed 4 October 2019.

⁶⁶⁶ This is a major school building projects which was announced in March 2012 as part of a €2 billion capital investment programme, procured and developed by the National Development Finance Agency (N DFA) for the Department of Education and Skills (DoES) <http://www.ndfa.ie/TenderCompetitions/DevolvedSchoolsProgramme.htm> accessed 12 January 2015.

⁶⁶⁷ Michael Byrne, "'Asset price urbanism' and financialization after the crisis: Ireland's National Asset Management Agency." (2016) 40 (1) *International Journal of Urban and Regional Research* 31.

⁶⁶⁸ This is referred to below but is not publicly available.

indicate that there are 50 employees who had been unemployed for more than 12 months, 17 further employees who are either apprentices or trainees, and overall good compliance with the pilot clause.⁶⁶⁹ The pilot has shown that contractors are having no difficulty fulfilling the requirement regarding the long-term unemployed, with Intreo⁶⁷⁰ providing support to contractors. However, they state that meeting the requirement for apprentices has proven more challenging due to the collapse in the number of people undertaking apprenticeships.⁶⁷¹ The NTMA have continued to include social clauses in their procurement contracts, but have adapted their targets downwards in response to the difficulties in securing apprentices and have removed the financial penalty.⁶⁷² In response to the success of the UK's Social Value Act, a number of similar bills have been attempted in Ireland. The first was a private members bill, the Social Clauses in Public Procurement Bill 2013,⁶⁷³ put forward by Sinn Fein, which would require the inclusion of social clauses in all public procurement contracts in excess of €1,000,000. While the government has supported in principle the second stage of the bill, they would not support the contracting authorities being compelled to use social clauses.⁶⁷⁴ This was followed by the Public Services and Procurement (Social Value) Bill 2015,⁶⁷⁵ put forward by members of Fianna Fail, which requires public bodies to have regard for economic, social, and environmental well-being in relation to public services contracts. This passed the second stage and was referred to the select committee on 22 February 2017; it was unopposed by the government in the Dáil, but it has since lapsed. Currently, there are three private members bills. First, the Public Services and Procurement (Social Value) Bill 2017 introduced by Fianna Fail TDs which requires that public bodies must consider how the delivery of the contract will meet community benefit requirements and might improve the economic, social, and environmental well-being of the relevant area. Second, the Public Services and Procurement (Workers' Rights) Bill 2017, sponsored by Deputies Bríd Smith, Richard Boyd Barrett, and Gino Kenny, which is a broad bill to promote workers' rights;⁶⁷⁶ and third, the Public Services and Procurement (Social Value) Bill 2017, a private's member bill sponsored by Deputies Frank O'Rourke and Darragh O'Brien, to increase competition in the public procurement tendering process by enhancing SMEs ability to compete for public procurement tenders by allowing public bodies to have regard for economic, social, and environmental well-being in relation to public services contracts.⁶⁷⁷

⁶⁶⁹ Written Answer 293 by Minister Brendan Howlin TD (3 February 2015)

<https://www.kildarestreet.com/wrans/?id=2015-02-03a.428> accessed 4 October 2018.

⁶⁷⁰ Intreo is part of the Department of Employment Affairs and Social Protection. It offers employment services and supports to employers and to jobseekers, <https://www.welfare.ie/en/Pages/Intreo-Employers.aspx> accessed 7 December 2019.

⁶⁷¹ *ibid* 173-174.

⁶⁷² Interview with David Powers, NTMA 9th September 2019.

⁶⁷³ Social Clauses in Public Procurement Bill 2013

⁶⁷⁴ Written Answer 240 by Minister Brendan Howlin TD (16 December 2014)

<https://www.kildarestreet.com/wrans/?id=2014-12-16a.353&s=bill+%22Social+Clause%22#g355.r> accessed 5 October 2019.

⁶⁷⁵ <https://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2015/715/document1.htm> accessed 5 October 2019.

⁶⁷⁶ <https://www.oireachtas.ie/documents/bills28/bills/2017/8317/B8317D.pdf> accessed 5 October 2019.

⁶⁷⁷ <https://www.oireachtas.ie/documents/bills28/bills/2017/417/b0417d.pdf> accessed 5 October 2019.

7.6 The Netherlands: Legal and Policy Framework for Public Procurement

In the Netherlands, public procurement contracts are considered civil law agreements and are generally enforced through private law as decisions taken in preparation of a private law juridical act, that is, concluding a contract. Article 8:3 of the Algemene Wet Bestuursrecht (the Dutch Administrative Law Act) stipulates that judicial review of such decisions⁶⁷⁸ does not fall within the scope of competence of the administrative courts. As a consequence, the civil courts have jurisdiction. Breaches of the procurement rules are mostly dealt with by national civil courts,⁶⁷⁹ but tenderers can also submit complaints to the National Public Procurement Expert Commission (Commissie van Aanbestedingsexperts) for informal resolution. Public⁶⁸⁰ procurement in the Netherlands is relatively decentralised among the central government, the twelve provinces, and municipalities. The Ministry of Economic Affairs has the primary responsibility for procurement policy, but various other ministries are involved in strategic public procurement, notably the Netherlands Enterprise Agency (Rijksdienst voor Ondernemend Nederland), which also provides information about sustainable procurement.⁶⁸¹

7.6.1 National Framework

On 1 July 2016, the amended Dutch Public Procurement Act entered into force, implementing the latest EU procurement directives (2014/23/EU, 2014/24/EU and 2014/25/EU). The Public Procurement Act applies to both national and European procurement procedures. The Act is further detailed in the Public Procurement Decree (Aanbestedingsbesluit).⁶⁸² This designates the Proportionality Guide (Gids Proportionaliteitsgids) as mandatory guidance, non-compliance with which requires advance notice in tender documentation and justification ('comply or explain'). The Proportionality Guide⁶⁸³ contains 'best practices' in relation to, inter alia, sustainability and social requirements; elaborates on the principle of proportionality; and contains a series of obligations and restrictions for contracting authorities. It clarifies what is considered to be proportionate in a particular procurement phase, for example, in paragraph 3.5.6, it explains that if only a few undertakings can meet certain sustainability requirements, it is unwise to mention those in the technical specifications, as this might invoke a risk of lack of competition. In such a case, it is better to mention the sustainability criteria as sub-criteria of the award criteria. Other examples from the guide include that as evidence of the economic operator's technical ability to perform the contract, contracting authorities may require only one reference project per core capability and only reference projects with a maximum value of 60% of the estimated value of the contract.⁶⁸⁴ Risks must be allocated where they are best managed or best

⁶⁷⁸ The conclusion of an agreement or any preparatory acts – such as an award decision – in order to conclude a public procurement agreement. This kind of decisions are not deemed to be challengeable decisions within the meaning of article 1.3 of the Awb.

⁶⁷⁹ Article 8.3 Algemene Wet Bestuurrecht (Dutch General Administrative Law Act).

⁶⁸⁰ P. Brouwer, A. Smit and E. van Wijk, 'Social Return Bij Het Rijk: Effecten Op Arbeidsmarkt- En Reintegratiebeleid Arbeid.' (TNO Arbeid 2010).

⁶⁸¹ <http://english.rvo.nl/home/about-rvonl/what-is-rvonl> accessed 4 October 2019.

⁶⁸² See Article 10.1 Procurement Decree and Article 1.10 sub 3 Public Procurement Act 2016.

⁶⁸³ Contracting authorities may deviate from the rules in the Proportionality Guide, if they state this in advance in the tender documentation and explain why the deviation is proportionate.

⁶⁸⁴ Rule 3.5G Proportionality Guide.

influenced.⁶⁸⁵ Unlimited liability may not be required.⁶⁸⁶ The rules (voorschriften) of the Proportionality Guide are mandatory and are legally binding on contracting authorities. Contracting authorities must comply with these rules or explain in the tender documents why they choose to deviate from them. The proportionality principle laid down in the Public Procurement Act 2016 and the Proportionality Guide, in combination with the duty of contracting authorities to ‘comply with the Public Procurement Act 2016 or explain in case of non compliance’ is remarkable, as it is more far-reaching than is required in terms of the 2014 Directive or can be found in other national legislation.

In 2005, PIANOo, the Dutch Public Procurement Expertise Centre, was established. PIANOo sits within the Ministry of Economic Affairs and was created to professionalise procurement processes, with the goal of improving efficiency and legal compliance by providing information and sharing expertise. PIANOo also administers TenderNed, the Dutch online tendering system. Among some of the specific support tools and services offered by PIANOo are an online helpdesk, various online and hard-copy guidelines, sample templates for contracts, and research and practical examples.⁶⁸⁷ Another important actor in the field of social procurement is the Centre for Research on Multinational Corporations (SOMO), an organisation that supports the implementation of sustainable and ethical procurement policies.⁶⁸⁸

7.6.2 Value for Money

The Dutch government defines procurement as an important instrument for the *quality* of government services,⁶⁸⁹ linking the act of purchasing directly to policy objectives. To prevent contracting authorities focusing on lowest price, the Dutch Public Procurement Act stipulates that contracting authorities, in principle, must award contracts based on the best price–quality ratio. The contracting authority may award the contract based solely on price or life-cycle costs only if the contracting authority expects that factors concerning quality will not be of influence in its choice between the tenderers; it must then substantiate this decision in the tender documents.⁶⁹⁰

7.6.3 National Framework: Procurement As a Social Policy Tool

An EU funded study of the strategic use of public procurement across the EU described the Netherlands as a ‘front-runner’ in the use of procurement to further social policy objectives.⁶⁹¹ Although there is a lack of empirical studies on the application of social procurement policies in the Netherlands, evidence suggests that compliance with existing social procurement policy is high among Dutch contracting authorities.⁶⁹²

In 2005, clear goals for sustainable public procurement were established for the national government, municipalities, provinces, and district water boards in the Netherlands. Methods were developed to include sustainability as an aspect in government tenders. Initially, the policy focused only on the environment; however, social criteria, which include internationally accepted labour standards and human rights, were added in 2012.

⁶⁸⁵ Rule 3.9A Proportionality Guide.

⁶⁸⁶ Rule 3.9D Proportionality Guide.

⁶⁸⁷ PIANOo Website, <https://www.pianoo.nl/nl> accessed 5 October 2019.

⁶⁸⁸ Somo, *Sustainable Public Procurement* <https://www.somo.nl/topic/sustainable-public-procurement/> accessed 5 October 2019.

⁶⁸⁹ PIANOo <https://www.pianoo.nl/nl/over-pianoo>.

⁶⁹⁰ Dutch Public Procurement Act.

⁶⁹¹ W Kahlenborn, C Moser and J Frijdal, 'Strategic Use Of Public Procurement In Europe, Final Report To The European Commission' (2010).

⁶⁹² KPMG, *Monitor duurzaam inkopen 2010* 15 June 2011 www.denhaag.nl/en/residents/to/Monitor-Duurzaam-Inkopen.htm accessed 5 October 2019.

Since 1 January 2013, ‘Social Conditions’ must be included in all central government tenders with values exceeding the EU threshold.⁶⁹³ Pursuant to Article 1.4(2) of the 2016 Act, contracting authorities or special sector companies should aim to secure as much societal value (‘maatschappelijke waarde’) as possible for the public resources to be used when they conclude a public contract, where ‘societal value’ refers to the proper allocation and possible saving of public funds.⁶⁹⁴ In addition, the Public Procurement Act 2016 provides for sustainability requirements to be taken into account in all phases of the procedures: the selection (Article 2.93), award (Articles 2.114 and 2.115), and execution phases (Articles 2.80 and 2.82). Furthermore, technical specifications can be used to achieve environmental or social goals (Articles 2.75 and 2.76).⁶⁹⁵

To promote the use of Social Conditions, on 11 September 2015, the central government submitted to the House of Representatives the *Action Plan for Responsible and Sustainable Procurement*,⁶⁹⁶ in which it is stated that stipulating new goals for Social Conditions will be formulated in consultation with municipalities, water authorities, and provinces. In the Sustainable Procurement Manifesto over 200 (Dutch) public organisations pledged to actively incorporate societal goals into their procurement processes.⁶⁹⁷ This Sustainable Procurement Manifesto builds on previous agreements that various municipalities, water authorities, and provinces have made in ‘participation statements’ and in the Manifest Professioneel Duurzaam Inkopen (Professional Sustainable Procurement Manifesto, 2012),⁶⁹⁸ which replaces these previous statements. Sustainable procurement Maatschappelijk Verantwoord Inkopen, MVI) means that effects on people, planet, and profit/prosperity are taken into account when procuring products, services, and works. With this Sustainable Procurement Manifesto (Manifest MVI), the cabinet aims to support the momentum in society and use sustainable procurement to contribute in a practical way to the achievement of policy objectives, such as preventing climate change, achieving a circular economy, stimulating innovation, preventing human rights violations, stimulating minimum living wages and improving working conditions in worldwide value chains, and social return.

All public bodies must use the manifesto and, in parallel, the Dutch central government commits to providing support to the public authorities via communities of practice, an expert pool, monitoring, and PIANOo.⁶⁹⁹

7.6.3.1 Social return/social value

The Public Procurement Act does not provide much clarity about the interpretation of the concept of ‘social value’. Nor has it been defined what ‘as much as possible’ means. Janssen has noted that the courts attribute a symbolic value to the former phrase.⁷⁰⁰

⁶⁹³ Stichting Onderzoek Multinationale Ondernemingen (SOMO), *A Review of Dutch Policy for Socially Responsible Public Procurement*, (March 2014) 2.

⁶⁹⁴ Gert-Wim van de Meent & Elisabetta R. Manunza, ‘The Netherlands’ in Ulla B. Neergaard, Catherine Jacqueson, and Grith Skovgaard Ølykke, *Public procurement law: limitations, opportunities and paradoxes* (Djøf Forlag, 2014).

⁶⁹⁵ PIANOo, The Expertise Center Procurement of the Ministry of Economic Affairs and Climate, offers information, advice, instruments and practical tips to everyone involved in the public sector with the procurement and tendering of works, supplies and services <https://www.pianoo.nl/> accessed 5 October 2019.

⁶⁹⁶ Rijksoverheid, *Action plan for socially responsible procurement 2015-2020* (11 September 2015).

⁶⁹⁷ Green Deal Circular, *Purchasing Sustainable Procurement manifesto 2016-2020* https://wegwijzer.gdci.nl/sites/default/files/2019-06/sustainable_procurement_manifesto.pdf accessed 4 October 2019.

⁶⁹⁸ Parliamentary paper 30 196, No 184, Session 2011-2012.

⁶⁹⁹ Sustainable Procurement Manifesto (n 690).

⁷⁰⁰ M Emmerik, MT van Jong and P de Brouwer, ‘Inventarisatie Social Return Bij Gemeenten’ (TNO 2014)

Today, the Netherlands uses the label social return (SR) and not social value to describe their community benefit conditions.⁷⁰¹ PIANOo defines SR as a matter of creating more employment opportunities for people in the labour market who are disadvantaged.⁷⁰² When a government contains a requirement for a social return, the agreement is referred to as SROI, often abbreviated to ‘social return’. According to PIANOo, because there is no generic definition or guidance in government policy, organisations give their own interpretation to the SR policy. Central government applies SR in its procurement policy for tenders within the ‘work’ and ‘services’ category.

The Dutch government has strayed far from the original concept of SROI (which is focused on output and outcome) and has developed a rather different set of policy tools to enforce the inclusion of people with a distance from the labour market in the execution of public contracts (focused on input). Although, originally, SROI was developed as a measurement method for social value achieved in economic terms, in implementation in Dutch public procurement policy, the government has converted SROI, under the label ‘social return’ (omitting ‘on investment’), to a range of social conditions applied in public contracts. Today, local governments use the labels SR and SROI interchangeably for their community benefit conditions.⁷⁰³ According to Schotanus, SROI has not been much embraced by the Netherlands; rather, they have just borrowed the name.⁷⁰⁴ The central government uses two types of application of SROI within its procurement policy: the classic SROI application and the new working method, as of January 1, 2018, customisation for people.⁷⁰⁵

7.6.3.2 The classic SROI method

The classic SROI method is when social return is included as a contract condition. A common example of SR is that tenderers should spend a minimum percentage of the contract sum or contract staff wages on increasing employment among people who are among the long-term unemployed or disabled. The inclusion of a SR component is mandatory for national government contracts that have a value exceeding €250,000 and a minimum contract term of 6 months. Most commonly, 5% of the wage bill or of the total contract value must be spent on people who are at a distance from the labour market; this is known as the ‘5% rule’. It means that the contractor is obliged to use people who are at a distance from the labour market for the execution of the assignment, for 5% of the wage component (or, sometimes, of the total value) of the assignment.⁷⁰⁶ The target groups that can benefit from SR are described below:

<https://www.gemeente.nu/blog/duurzaam-aanbesteden-een-nationale-verplichting/> accessed 5 October 2019.

⁷⁰¹Jane Lynch and others, 'Community Benefits Of Public Procurement: A Comparison Between Local Governments In Wales (UK) And The Netherlands' *25th Annual IPSEERA Conference 2016* (2016).

⁷⁰² PIANOo, *Social return on investment (SROI)* <https://www.pianoo.nl/en/sustainable-public-procurement/spp-themes/social-return-investment-sroi> accessed 5 October 2019.

⁷⁰³ Lynch et al., 'Community benefits of public procurement' (n 694).

⁷⁰⁴ N Uenk and F Schotanus, 'Steering On Social Output Offers Opportunities In The Netherlands' (Cobouw 2016).

⁷⁰⁵ PIANOo, *Social Return with the Central Government*

<https://www.pianoo.nl/nl/themaPians/maatschappelijk-verantwoord-inkopen-duurzaam-inkopen/mvi-themas/social-return/aan-de-slag-0> accessed 10 October 2019.

⁷⁰⁶ BU [Construction and Implementation (B + U)] website; *Social value through a new perspective on tendering* (January 11, 2016)

https://bouwenuitvoering.nl/politiek_en_economie/maatschappelijke-waarde-door-nieuwe-kijk-op-aanbesteden/ accessed 3 October 2019.

- beneficiaries of unemployment benefits and people who have been unemployed for more than 12 months and/or are 50 years or older
- those on Disability Benefits, Resumption of Work for Partially Disabled Persons or Disability Insurance for the Self-Employed
- Income Provision for Older or Partly Incapacitated Former Self-Employed Persons / Income Provision for Elderly and Partly Incapacitated Unemployed Employees)
- job-seekers not entitled to benefits
 - people at a greater distance from the labour market, such as those who have been unemployed for a longer period of time (longer than 12 months, or people aged 50 years or older and/or those who cannot find work independently without reintegration support or other guidance), and
 - early school leavers and young people with insufficient qualifications.

This condition can be included three ways:

1) SR can be included in the tender as a minimum requirement in the order specification. For example, as a percentage of the wage bill of the contract, a percentage of the contract sum, or a number of working hours. It is not clear whether this is as a technical specification or as a condition of the contract. While it is uncertain whether social and labour conditions are permitted as specifications in the supply chain,⁷⁰⁷ McCrudden advises making the conditions part of the subject matter of the contract; compliance will then be a matter of technical capacity.⁷⁰⁸

2) SR can be imposed via a ‘special implementation condition’. This is known as ‘special conditions’ or a social clause. Here, contracting authorities oblige tenderers to use a certain percentage of (for example) the wage bill of an assignment to deploy people at a (greater) distance from the labour market for the execution of a government assignment. The method of completion is the responsibility of the contractor. Implementation conditions, other than the minimum requirements in the contract specification and award criteria, are only checked during implementation.

3) Finally, SR can be applied as a (sub) award criterion. A (sub) award criterion is part of the best price-quality ratio. In this instance, a contracting authority can award more points to a tender in which a larger percentage of SR is used in the execution of the contract. Another possibility is to award points to a plan of approach in which the tenderer describes how the SR will be applied. Piana notes that accepted bids must be verified pursuant to Article 2.113 of the Public Procurement Act 2012.⁷⁰⁹

While, in principle, SR is possible with all procurement procedures below and above the European procurement threshold that have a proportional labour component, in practice services and works are better for SR than goods due to the low labour component of the latter. It is noted that, in certain situations, it is not possible or desirable to apply SR. The (limited) exclusion grounds are as follows: If, as a result of SR, existing jobs are

⁷⁰⁷ Abby Semple, *A Practical Guide To Public Procurement* (Oxford University Press 2015).

⁷⁰⁸ Christopher McCrudden, *Buying Social Justice* (Oxford Univ Press 2013) 538–543.

⁷⁰⁹ PIANOo, *Social Return with Central Government*, <https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen-duurzaam-inkopen/mvi-themas/social-return/aan-de-slag-0> accessed 5 October 2019.

displaced; if there is no suitable offer in the regional labour market due to the nature of the work (to be assessed by the municipality/UWV); if local and regional labour market characteristics make it impossible to coordinate supply and demand (at the discretion of the municipality/UWV); or if the application of SR involves disproportionate efforts or costs. In the event that SR is not applicable or achievable on the basis of (one of) the grounds for exclusion, it can be decided in consultation with the client/director not to apply SR.⁷¹⁰

7.6.3.3 SROI 2.0–Custom Work for People

On January 1, 2018, a new government-wide approach to SR was introduced under the heading ‘Custom Work for People’ (MvM). This was established in order to offer government buyers more support and opportunities to get started with SR. The method is described as form-free, with SR no longer comprising a checklist but rather a goal. This means that a broader target group (of people at a distance from the labour market) can be used, and a form-free interpretation and/or serving of broader social objectives. The Interdepartmental Commission for Procurement offers and organises space and support for category managers and buyers for the implementation of new SR testing grounds with maximum social added value.

The central government is conducting case studies⁷¹¹ on SROI 2.0 using a method in which SR can be experimented with before, during, or after a tendering process. Examples are traineeships for higher educated refugees⁷¹² and a focus on reintegrating women who have a greater distance to the labour market. These are, for example, women with a low level of education, single mothers, women with a non-Western background, or studying mothers; and (former) top athletes, both individually and in groups, who can use their qualities, experience, and winning sport mentality for a career.⁷¹³ KPMG offers a scholarship, of a maximum of four years, that offers them the opportunity to obtain a diploma,⁷¹⁴ and USG Professionals focuses on former cancer patients with a distance to the labour market, offering work with intensive coaching and guidance with the aim of sustainable employability.⁷¹⁵

7.6.4 The Participation Act

As part of the decentralisation of the Dutch central government, the Participation Act was passed on 1 January 2015; it provides for an expansion of the tasks of municipalities. The aim of the Act is to get people with some form of labour limitation back to work. Municipalities are now responsible for supporting those facing limitations in relation to work and for their integration into the labour market. Municipalities are responsible for providing and organising counselling, support, additional training, supported employment, reintegration trajectories, and employment subsidies in order to provide

⁷¹⁰ PIANOo, *Maatwerk voor Mensen*, <https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen-duurzaam-inkopen/mvi-themas/social-return/aan-de-slag> accessed 5 October 2019.

⁷¹¹ *ibid.*

⁷¹² ‘Custom Work For People, AEF & VKA’ (*Maatwerkvoormensen.nl* 2019)

<<https://www.maatwerkvoormensen.nl/praktijkvoorbeelden/a/aef--vka>> accessed 4 December 2019.

⁷¹³ Customization for People, *Practical* <https://www.maatwerkvoormensen.nl/praktijkvoorbeelden/e/eiffel> accessed 4 October 2019.

⁷¹⁴ Customization For People *EIFFEL* <<https://www.maatwerkvoormensen.nl/praktijkvoorbeelden/e/eiffel>> accessed 5 December 2019.

⁷¹⁵ Custom Work For People *USG Professionals*

<<https://www.maatwerkvoormensen.nl/praktijkvoorbeelden/u/usg>> accessed 5 December 2019.

better and more tailored support at a local level and to help coordination between different organisations involved in different types of support.⁷¹⁶

⁷¹⁶ European Parliament Briefing 'The Social and Employment Situation in the Netherlands and Outlook on the Dutch EU Presidency 2016' (2015) PE 563.473.

Chapter 8: Social Clauses in Practice - A Case Study

8.1 Introduction

In the previous chapter, a comparative analysis was conducted on the background, national legislation, and policy framework in relation to social clauses in the UK, Wales, Scotland, Northern Ireland, Ireland, and the Netherlands. That analysis provides the context for this chapter and the case study on the use and evaluation of social clauses and social value in the selected Member States from 1988 to 2017, with an emphasis on those that discuss social outcomes and social impacts. The findings of the systematic review, categorised according member state, are then reported. A critical examination of the legal, political, economic, and practical factors at play when implementing, defining, measuring, and evaluating social value is undertaken, a number of findings are made, and key themes are identified. By means of this process of identifying and evaluating the forces at play, the thesis aims to assist in understanding the difficulties in finding the appropriate balance between market and non-market objectives in public procurement regulation within the EU. The aim is to clarify the role of the free market economics, EU institutions, and the state in resolving the balance between the market and the state in allocating resources, determining social outcomes, and creating social value in policy and practice.

8.2 Social Clauses in Practice: A Case Study

In referring to this section as a case study, I am using it to describe a research approach that is used to generate an in-depth, multi-faceted understanding of a complex issue in its real life context.⁷¹⁷ This is an example of a *collective* case study, which involving studying multiple case studies to generate a still broader appreciation of a particular issue. Here, the research focuses on the social clause and its corollary, social value, and the methods that various Member States of the EU implement and evaluate them. The purpose is to understand the broader area of social procurement in the EU. The case study approach lends itself well to capturing information on explanatory *how*, *what* and *why* questions.⁷¹⁸ In this case, *how* are social clauses implemented by the individual Member States? The case study approach can offer additional insights into why one implementation strategy might be chosen over another.⁷¹⁹ It takes a critical approach, using the adapted framework of Trepte's conceptual models of procurement regulation to help interpret both the limiting and assisting conditions in relation to the use of social clauses. The data that inform the analysis have been obtained from a combination of publicly available government reports and other 'grey literature' (written in English or translated), alongside discussions with policymakers, practitioners, businesses, and academics in the relevant EU Member States.

The UK, Wales, Scotland, Northern Ireland, Ireland, and the Netherlands were selected as good representatives of various political and economic contexts. All are (currently) members of the EU and have transposed the 2014 procurement directives. The Netherlands represents a civil law country that adopts a private law approach to public procurement⁷²⁰ and has demonstrated a long-standing policy commitment to the use of

⁷¹⁷Robert K Yin, *Case Study Research* (Sage Publications 2009).

⁷¹⁸ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 939.

⁷¹⁹ Michael McConville and Wing Hong Chui, *Research Methods For Law* (Edinburgh University Press 2007).

⁷²⁰ G.-W. Van de Meent 'The Netherlands' in Neergaard, Ulla B., Catherine Jacqueson, and Grith

procurement as a tool for social policy. The UK, Wales, Scotland, Northern Ireland, and Ireland are all common law countries, with Scotland's national legislation and supporting rules on public procurement being similar to what occurs in the Netherlands by going beyond the minimum level of harmonisation required by the EU procurement directives and enacting proactive legislation to support the use of social procurement. The UK and Ireland are also similar in their legislative approach, with minimum regulation in the area of procurement often translated as a 'cut and paste' or 'copy-out' implementation mode based on the EU directives.⁷²¹ Finally, Wales and Northern Ireland share a common policy approach which is embedded at all levels of government, providing guidance, support, and case studies.

Skovgaard Ølykke, *Public Procurement Law: Limitations, Opportunities and Paradoxes* (Djøf Forlag 2014).

⁷²⁰ OGP, *Incorporating Social Considerations into Public Procurement* (2018).

⁷²¹ Brian Doherty 'United Kingdom' in Neergaard, Ulla B., Catherine Jacqueson, and Grith Skovgaard Ølykke, *Public Procurement Law: Limitations, Opportunities and Paradoxes* (Djøf Forlag, 2014).

8.2.1 Overview

This collective case study focuses on social clauses, their use, and evaluation in the following EU Member States: the UK, Scotland, Northern Ireland, Wales, Ireland, and the Netherlands. Published data, mainly in the form of ‘grey literature’⁷²² was collected. Following the guidance of Adams et al.,⁷²³ the literature was categorised in tiers, beginning with publications similar to those accepted in academic reviews, then moving outward to material with the potential to add more novel insights but more challenging to assess in terms of source expertise and outlet oversight. In this way, the publications that were selected for inclusion were either 1) published by a government department, 2) written for a government department, 3) supported by independent foundations with input from government bodies, or 4) research undertaken by researchers in universities. Following Denyer and Tranfield,⁷²⁴ I applied a structured case study approach to reporting the findings of the systematic review organised by country. The publications included in the literature review are provided in Appendix 1, broken down by jurisdiction, source of data, research findings.

8.2.2 The UK

The report, ‘Achieving Community Benefits through Contracts, Law, Policy and Practice’, was funded by the Joseph Rowntree Foundation and was supported by HM Treasury, the UK’s Office of Government Commerce, and the Scottish Executive. In the UK, it remains the key text for providing the legal and policy basis for maximising the impact of public expenditure to benefit disadvantaged communities by using community benefit clauses.⁷²⁵ The legal position of including community benefit clauses was clarified: community benefits can be one component of ‘the core requirements’ of a contract when a contracting authority has adopted appropriate policies, and they can be reflected in the specifications and, in some cases, in the selection and award criteria. This ‘core’ approach was adopted to provide legal certainty in the context of EU regulations. It ensures that the social clause is directly relevant to subject matter of the contract and allows social considerations to be included in the award criteria. Linking the policy of the contracting authority to the social clause is also advocated to make it easier to argue its centrality to the subject of the contract. The report argues that by adopting or possessing a policy that includes the promotion of the social or community benefit in question, the procuring body will have the power to procure the social or community outcome. For example, if a public body has a policy to combat disadvantage, it would be able to specify employment or training matters in its procurement and define the aims of the authority in the contract specification design. The UK government’s guidance at the time stated that only matters that are ‘core requirements’ (also termed ‘central to the subject of the contract’ and ‘the subject of the contract’) should be used in the awarding of the contract.⁷²⁶ Macfarlane points out that this guidance did not clarify that public

⁷²² Andrew Lawrence and others, ‘Where Is The Evidence? Realising The Value Of Grey Literature For Public Policy And Practice.’ (Swinburne Institute for Social Research 2014).

⁷²³ Richard J. Adams and others, ‘Shades Of Grey: Guidelines For Working With The Grey Literature In Systematic Reviews For Management And Organizational Studies’ (2016) 19 *International Journal of Management Reviews* 432.

⁷²⁴ David Denyer and David Tranfield, ‘Producing a systematic review’ in David A Buchanan, *The SAGE Handbook Of Organizational Research Methods* (SAGE 2011).

⁷²⁵ Richard Macfarlane and Mark Cook, ‘Achieving Community Benefits Through Contracts Law, Policy and Practice’ (Policy Press 2002)

⁷²⁶ Office of Government Commerce, *Explanatory memorandum to the Public contracts regulations 2006*,

bodies have the power to decide on the core requirements based on their powers, their legal obligations, and their policies and concludes that this gap in guidance has created confusion which has had a restricting effect on the inclusion of social or community benefits in procurement within UK government contracts and has created legal uncertainty.⁷²⁷

The guide points out that a contracting authority may still include community benefits in its contract conditions even though this is not a ‘core requirement’; however, in this situation, it must not include the community benefits in the award procedure. In addition, the guide points out that community benefit clauses do not have to provide a monetary benefit to the contracting authority, though they must relate to the subject matter of the contract. The need to monitor, measure, and evaluate outcomes is noted as important: the legal framework requires the output of a community benefit clause to be clearly stated and to be capable of comparative evaluation.⁷²⁸ The report also advises that the use of community benefit requirements needs to be supported by ‘supply side’ actions and monitoring and emphasises the importance of post facto evaluation arrangements. The terms social value and social clauses are not used; instead the focus is on what are termed ‘community benefits’. While it was legitimate for public bodies to include local employment in their policy statements, in terms of EU equality and anti-discrimination requirements, this could not be part of the wording of a public procurement contract. The term seems to have been conceived as a compromise in order to enable public bodies to include community or social benefits while adhering to the 2001 EC guidance on social considerations. The EC had identified three categories of ‘social consideration’:

1. measures that will ensure compliance with fundamental rights and the principle of equality of treatment and non-discrimination;
 2. measures that will ensure compliance with national legislation on social affairs and community directives in the social field; and
 3. measures for the integration of disadvantaged or unemployed people with a view to combatting unemployment and social exclusion.⁷²⁹
- The Macfarlane approach to community benefits was initially adopted by both Scotland and Wales, with a focus on increasing opportunities for the most socially disadvantaged, requiring a need for the clarification of social objectives, requiring a firm policy commitment by the public body to make community benefit clauses work for the intended beneficiaries, and the implementation of a systems approach in which legal and procurement issues are merely one of several elements of the process.

In 2008, the Office of the Third-Sector was tasked with examining the use of social clauses, including barriers to their use and the potential for template clauses. A report was published identifying the barriers with the intention of investigating ways of evaluating the outcomes and costs associated with their use in the future. However, the office was abolished in 2010 during the UK’s quango reforms⁷³⁰, and no further work was done on this project.

SI 2006/5 (2006) sections 4.2 and 6.3 .

⁷²⁷ Richard Macfarlane, 'Tackling Poverty Through Procurement' (Joseph Rowntree Foundation (JRF) 2014).

⁷²⁸ Richard Macfarlane and Mark Cook, ‘Achieving Community Benefits Through Contracts Law, Policy And Practice’ (Policy Press 2002).

⁷²⁹ Commission, ‘Interpretative Communication on the Community Law Applicable To Public Procurement And The Possibilities For Integrating Social Considerations Into Public Procurement’ COM (2001) 566.

⁷³⁰ Cabinet Office, *Public bodies reform reports*, ‘Public Bodies Reform – Proposals for Change’ (14 December 2010).

Despite the implementation of the Social Value Act, community benefits or social clauses have not been adopted by Westminster. While isolated cities in England were among the first to experiment with community benefits in the 1980s, it is now primarily local authorities that are working to incorporate community benefits. Camden Council is an example of this and has been engaged in social value procurement at least since 2005.⁷³¹ Supported by HM Treasury and funded by the Invest to Save Budget (ISB) initiative, Camden Council teamed up with the New Economics Foundation (NEF) to develop outcome based procurement SCM, which is used by several other councils. The SCM contains two key elements: an outcomes framework, which incorporates impacts in the tendering stage, and a valuing model to track outcomes. The focus on outcomes, rather than on activities and outputs, means that it is up to providers (and service users) to demonstrate how they provide social value to allow providers to innovate.⁷³²

8.2.3 Scotland

Following the Macfarlane report, the Scottish government operated a pilot programme across five authorities to examine the operation of community benefit issues in a practical context.⁷³³ The findings of the pilot scheme, together with legal and policy analysis, case studies, and a toolkit of appropriate clauses were published in the 'Community Benefits in Public Procurement' report.⁷³⁴ These findings were presented as a basis for creating future best practice and were the driver for the 2008 introduction by the Scottish government of a community benefits requirement for public procurement. Community benefit clauses (CBCs) have been a key strand of procurement policy and practice in Scotland since then and are one of principal goals of the Scottish National Party. In December 2011, Scotland awarded a £1.5 million contract to Ready for Business LLP to raise awareness of community benefits in procurement and to provide support to contracting authorities wishing to use CBCs.⁷³⁵

Despite the advice of Macfarlane that it was impractical to collect the range of data that is required to implement SROI in the routine monitoring of contracts,⁷³⁶ in 2010, the Scottish government developed its own framework to assess SROI and, in 2012, commissioned a report⁷³⁷ to examine the views of public sector commissioners and procurement professionals in Scotland on sustainable procurement, social value, and the SROI approach. The findings show that of those who were familiar with the concept, the most commonly held view was that SROI was 'fairly' helpful (49% of respondents). Many also held a neutral view on the issue (38%), perhaps reflecting their lack of full knowledge of the framework.

A 2015 report by the University of Glasgow for the Scottish government to assess the use of CBCs and the impact they have on employment and skills development further

https://webarchive.nationalarchives.gov.uk/20121003173331/http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191543.pdf accessed 5 October 2019.

⁷³¹ Tessa Hebb and Heather Hachigian, 'Social Value Procurement Measurement And Evaluation' (Carleton Centre for Community Innovation 2017).

⁷³² New Economics Foundations, 'Equality Outcomes Social Return On Investment Analysis' (Equality and Human Rights Commission and Local Government Improvement and Development 2013).

⁷³³ The Scottish Government, *Community Benefits in Public Procurement* (2008) 5.

⁷³⁴ *ibid.*

⁷³⁵ The Scottish Government News Release, 'Scotland's Third Way' 23 December, 2011

<http://www.scotland.gov.uk/News/Releases/2011/12/23120206>

accessed on 4 January, 2013.

⁷³⁶ MacFarlane, 'Tackling Poverty Through Public Procurement' (n 719).

⁷³⁷ The Scottish Government, *Research Report: Embedding Social Value through Sustainable Procurement Survey of Public Sector Commissioners and Procurement Professionals* (2012)

illustrates the difficulties faced in this field.⁷³⁸ The authors found that a lack of monitoring data and data on the additionality and sustainability of CBC outcomes presented a significant constraint on assessing the impact of CBCs, despite a strong increase in their use. The research strongly recommended a more comprehensive evidence base be developed pertaining to the longer term impact of CBCs, necessitating a more systematic monitoring of CBCs and their impact in future contracts. The report makes recommendations on how the monitoring and evaluation of CBCs in public sector procurement can be improved. Among their recommendations are that four different types of CBC activity indicators be collected for monitoring purposes and that a select number of headline indicators be collected to demonstrate the use and impact of CBCs. These recommendations are in line with those of Macfarlane and are similar to the Wales Community Benefits Measurement Tool.⁷³⁹

In April 2019, the first annual report by Scottish ministers on the procurement activity of higher-spending public bodies in Scotland was published, as required in terms of the Procurement Reform (Scotland) Act 2014. The government committed itself to the report in the Programme for Government for 2018/19. The report primarily focuses on procurement activity that contributes to the use of community benefit requirements and the payment of a real living wage. The report takes data from the 115 annual procurement reports published in 2018 by public bodies in Scotland, from Public Contracts Scotland (the national advertising website for public sector contract opportunities in Scotland), and from the Scottish Procurement Information Hub (a tool that enables over 100 Scottish public bodies to examine procurement spending by analysing accounts payable data). For the period 2015 to 2019, the report finds that significant improvements have occurred in the uptake of community benefits. Figures from the Public Contracts Scotland advertising portal show large increases in the number of contracts with community benefit requirements. These also show a significant shift in the types of contracts that include a community benefit requirement. In total, 635 contracts with community benefit requirements were awarded in the reporting period, with a total value of over £588 million. Seventy-four contracts valued at or above £4 million included community benefit requirements, with a total value of £342 million.⁷⁴⁰ However, it is notable that the report failed in its aim of demonstrating the impact of community benefits, despite the statutory guidance indicating the need for indicators that demonstrate the impact of community benefits. The report found that there was significant variation in the level and type of information provided in individual annual procurement reports and concludes that stakeholders will consider how to improve management information and data on the use of community benefit requirements. This is significant and shows the difficulty, despite the availability of tools and the requirements of legislation, of ensuring the reporting required to demonstrate social impact.

8.2.4 Wales

While Wales does not have separate legislation as is implemented in Scotland, it does have a strong commitment to the use of CBCs—they have been used since 2004 and have been a key element of procurement policy since 2012.⁷⁴¹ The Welsh government has adopted a policy that requires social or community benefits as a core requirement as their ‘default position’. Their position is that as the public body is purchasing the community

⁷³⁸ Victoria Sutherland and others, 'Analysis Of The Impact And Value Of Community Benefit Clauses In Procurement' (Training and Employment Research Unit (TERU), University of Glasgow 2015).

⁷³⁹ Value Wales, *A Guide to the Community Benefits Measurement Tool Version 6.6* (July 2014).

⁷⁴⁰ The Scottish Government, *Annual Report On Procurement Activity in Scotland*, SG/2019/18 2019.

⁷⁴¹ Dina Grazer, 'Community Benefits In Practice And In Policy' (Atkinson Foundation 2016).

benefit outcomes as well as the goods, services, or works, and that the award criteria should therefore address levels of quality or performance pertaining to the community benefit outcomes, as compared with the specified requirements.⁷⁴²

The Welsh Community Benefits Tool⁷⁴³—effectively a monitoring report—uses a local multiplier to measure the impact of CBCs on the economy of Wales. As discussed in chapter 5, this derives from a Keynesian economic approach: rising income levels through new or increased employment opportunities are expected to lead to a rise in other areas, such as disposable income and local wealth. This increase in local capital expenditure should then lead to an increase in employment in firms which produce capital goods. Wales’ political focus has consistently been on the positive impact that local sourcing can have,⁷⁴⁴ despite the EU’s procurement rules preventing contracting authorities from selectively placing contracts with local firms. The tool is an Excel spreadsheet which includes specific metrics based on the community benefit requirements. Suppliers are responsible for collecting data, which is then inputted into the tool. The contracting authority is instructed to be clear on their objectives so that businesses understand what is required of them to meet their community benefit obligations. The policy also recommends regular progress reports during contract management meetings. The government now provides training to contracting authorities to implement the tool.⁷⁴⁵

In 2012, the Council for Economic Renewal published ‘Community Benefits through Procurement’ in which research demonstrated that there was a 30% greater local multiplier effect when CBCs were applied using the Wales Community Benefits Measurement Tool.⁷⁴⁶ During the 2009 to 2011 period, the community benefits approach was applied to £3.4 billion of contracts, ranging from £5m to £300m—most, but not all, in construction. The Community Benefits Measurement Tool was used to track six projects worth a combined £146m through to delivery. This demonstrated that following the awarding of the contract, £56m went directly in salaries to Welsh citizens and £68m was spent with Wales-based subcontractors, 82% of which were Welsh SMEs. In addition, 140 disadvantaged people received a combined 8,500 weeks of work experience, and 44 apprentices received a combined 7,000 weeks of training. The report concluded that, overall, an estimated 2,200 jobs in Wales were ‘protected or created’ as a result, and that almost 85% of the total spend remained in Wales.

In 2014, Jane Hutt, the Minister for Finance and Government Business, stated that returns from the Community Benefit Measurement Tool had increased by 70%⁷⁴⁷ as a result the impact that had been made on public procurement since the launch of the WPPS in December 2012. Fifty-six projects incorporated community benefits with an overall value of over £600 million, with 85% of the expenditure having been reinvested in Wales, and 700 disadvantaged people having received 20,000 weeks of training. The tool also

⁷⁴² Welsh Government, *Community Benefits Delivering Maximum Value for the Welsh Pound – 2014* (2014) 29.

⁷⁴³ *ibid.*

⁷⁴⁴ Ana Maria Esteves and Mary-Anne Barclay, 'Enhancing The Benefits Of Local Content: Integrating Social And Economic Impact Assessment Into Procurement Strategies' (2011) 29 *Impact Assessment and Project Appraisal* 205.

⁷⁴⁵ Welsh Government, *Community Benefits* (n 734).

⁷⁴⁶ Value Wales, *A Guide* (n731).

⁷⁴⁷ National Assembly for Wales, *The Record of Proceedings, The Impact of Procurement Policy in Wales Jane Hutt 16.20* (2 December 2014).

<http://www.assembly.wales/cy/bus-home/pages/rop-nolinks.aspx?meetingid=2767&language=en&c=Record+of+Proceedings&startDt=03%2F11%2F2014&endDt=31%2F12%2F2014> accessed 4 December 2019.

captured the amount of waste saved from landfill, the amount of water saved, the recycled materials used, travel impacts, and how much renewable energy had been used. For a study conducted by Lynch and Uenk in conjunction with the Welsh government, data from 36 contracts from 22 local governments in Wales was analysed looking at how and why community benefits policies are formulated and enacted, with data was extracted from local governments via spreadsheets which had been shared by the Welsh government for the purpose of the research. The Wales measurement tool requires contractors to input eight pages of data which is grouped as either cash benefits or non-cash benefits. Cash benefits include items such as the ratio of direct investment to total contract value, the share of income to Welsh residents, treasury savings against contract value, and landfill benefit. In terms of cash benefits, of the total local government contract values analysed (£310,268,443 from schools and regeneration projects), 61.68% (£191,382,737) of the revenue was awarded to Welsh based businesses, 23.54% (£73,021,716) of the share of income went to Welsh residents, and 5.29% (£16,402,692) contributed to landfill fees saved and benefit gained. The non-cash benefits included 490 disadvantaged people being helped back into employment, 12,474 training weeks being delivered, and 10,937 apprenticeship weeks as a direct result of the contracts being awarded. For every pound spent by public procurement, the dataset indicated that an average total of 81% was reinvested in Welsh based businesses and salaries.⁷⁴⁸ The report concludes that while this appears to represent a positive contribution to sustainable development, compliance with using the measuring tool was low. After analysing the data, one problem was the lack of skilled suppliers within a specific sector, such as construction, from the local area, which means suppliers are contracted from outside Wales.

The Welsh government continues to challenge many of the oft-cited barriers to local sourcing in four pilot projects that aim to establish enterprises and create jobs in areas of high unemployment in the South Wales Valleys. These ‘Better Jobs Closer to Home’ pilot projects will reserve contracts for specific types of suppliers believed to be well placed to support the social aim of increasing long-term employability in 2019.⁷⁴⁹

8.2.5 Northern Ireland

In Northern Ireland, social clauses⁷⁵⁰ have been in use since 2001, mainly in construction contracts, in the form of employment and training requirements, such as apprenticeships and providing placement opportunities for the long-term unemployed.⁷⁵¹ This innovative use of public procurement was due to Northern Ireland’s unique history—in 1998, the Northern Ireland Act established a devolved legislature for Northern Ireland and public procurement became a devolved responsibility.⁷⁵² This required a total review of the

⁷⁴⁸ Lynch and others, ‘Community Benefits’ (n 693).

⁷⁴⁹ National Assembly for Wales, *James J, Oral Statement - Update on the Better Jobs, Closer to Home Programme* (5 June 2018) paragraph 4.30 to 4.36 <http://record.assembly.wales/Plenary/4987#A43887> assessed 3rd August 2018.

⁷⁵⁰ This is the term used by the Northern Ireland Assembly defined as: ‘requirements within contracts or the procurement process which allow the contract to provide added Social Value through fulfilling a particular social aim. For example, a social clause in a public contract could prioritize the need to train or give jobs to the long term unemployed in the community as part of the contracting workforce’. This definition is from http://www.cabinetoffice.gov.uk/third_sector/public_services/social_clauses.aspx and as set out in the Northern Ireland Assembly Research Paper, *On Social Clauses in public contracts* (2009).

⁷⁵¹ Other social requirements were agreed in June 2008 by the CoPEs in conjunction with the Construction Industry Forum for Northern Ireland (CIFNI). For example, these include promoting equality of opportunity in the workplace, promoting respect for people and promoting best practice in Health and Safety.

⁷⁵² Christopher McCrudden, ‘Country Legal And Policy Review For SRPP In Northern Ireland’ (Directorate

Northern Ireland procurement policy as no public procurement policy existed for the new, devolved administration.⁷⁵³ By February 2001, the Northern Ireland Executive committed itself 'to develop [by June 2001] proposals for implementing improvements in public procurement, ensuring that the equality dimension of cross-departmental policy and practice in relation to the procurement of goods and services by the public sector is addressed through equality impact assessment.'⁷⁵⁴ In 2003, a pilot project was undertaken by Construction and Procurement Delivery of Northern Ireland⁷⁵⁵ to recruit and train people who had been unemployed for at least 3 months. The initiative involved 15 government contracts from seven departments ranging in value from £700 000 to £8.5 million.⁷⁵⁶ The tender documentation required prospective bidders to provide an employment plan that set out the firm's social policy and to detail specific proposals offered in the contract. Tenderers were also required to provide details of their experience and of their capacity to implement their proposals. The plan would also include work undertaken by subcontractors. The pilot project was monitored over a two-year period from July 2003 to July 2005, and a final evaluation report was submitted to the Northern Ireland Procurement Board in September 2005. The monitoring of the project involved a two-year process of interviews at project initiation with the project sponsor, the collection and scrutiny of tender documentation and employment plans, interviews with the client contract manager and contractor project manager, and the collection of data on the costs and benefits of the pilot project. In June 2005, questionnaires were distributed to all the winning contractors for the pilot project and to the 15 client contract managers. The final report concluded that, in relation to social goals, public procurement policy can achieve benefits 'economically, efficiently and effectively'.⁷⁵⁷ The report used the 'Treasury Evaluation Model', which aimed to calculate the inputs, throughputs, outputs, and outcomes of the project and concluded that, overall, the pilot project had demonstrated that the public procurement policy could achieve social goals, specifically a reduction in unemployment, economically, efficiently and effectively. There was no indication of any substantial increase in costs or workloads for contractors as a result of the pilot project. The initial cost of the pilot project was £30,000 for the University of Ulster to monitor and evaluate it. A simple CBA was conducted. In relation to the costs per employee recruited, 51 people had been employed through the project. The total value of the 15 contracts was £45.9 million; therefore, approximately one person was employed for every £900,000 spent. However, as people from the target group had only been employed in 10 contracts with a total value of £31.2 million, the breakdown works out at one person employed for every £610,000 spent.

The main concern of contractors when interviewed was the difficulty in gaining suitably qualified personnel for the contracts. In total, 51 long-term unemployed people were employed, with 90% of participants remaining in employment at the time of the research. One of the recommendations of the report was that monitoring arrangements required of winning contractors should be clarified and that monitoring and evaluation of the policy

General for Employment, Social Affairs and Equal Opportunities 2008).

⁷⁵³ Andrew Erridge and Sean Hennigan 'Public procurement and social policy in Northern Ireland: the unemployment pilot project' in G. Piga, G. and KV Thai (eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (2006) 280.

⁷⁵⁴ Northern Ireland Executive, *Programme for Government* (February 2001) para 2.2.1, 16.

⁷⁵⁵ is responsible for disseminating advice and guidance to the NI public sector on public procurement policies and for monitoring implementation <https://www.finance-ni.gov.uk/articles/procurement-guidance-notes-pgns> accessed 4 October 2019.

⁷⁵⁶ Andrew Erridge and others, 'Pilot Project On Utilizing The Unemployed In Public Contracts: Final Evaluation Report' (University of Ulster 2005).

⁷⁵⁷ *ibid* 6.

should continue for at least a further one or two years to provide the opportunity for all projects within the pilot project to be completed.⁷⁵⁸ Overall, they concluded that achieving social policy objectives, in this case increasing employment, through public procurement is possible within the constraints of cost, value for money, and compliance. The financial costs were lower than other similar job creation schemes, and transaction costs.

The same pilot project was used as part of a study commissioned by the Department for Environment, Food and Rural Affairs (Defra) in November 2005, undertaken by SQW in association with Professor Ken Willis of the University of Newcastle. The aim was to provide a CBA of a sample of sustainable public procurement initiatives to evaluate their efficacy as a policy tool. Part of the study conducted a CBA on the pilot project, which using unemployed people in Northern Ireland. They found that the value of benefits of employing the previously unemployed amounted to £264,785; while the costs amounted to £167,615, at a 3.5% discount rate. Thus, the sustainable procurement project generated a small social gain, with a net present value of £97,170. The report concluded that the benefits were relatively small because the procurement policy reduces the average period of unemployment by only a few weeks. They surmised that benefits are reduced, compared to what they might otherwise have been, by the possibility of skilled workers being displaced by the unemployed and themselves becoming temporarily unemployed. The first link between social clauses and the challenge of valuing important 'social impacts that do not have market values' was to be found in a research paper by the Research And Library Service of the Northern Ireland Assembly for the first minister on public procurement practice in Northern Ireland. This paper provided an overview of the development and use of SROI and followed it with a number of examples of the use of social clauses that did not, however, involve the use of SROI. The paper notes that only a limited number of SROI analyses had been conducted in the UK or Ireland, and, furthermore, a smaller number still had involved SROI in a procurement process.⁷⁵⁹ In November 2012, the Northern Ireland Council for Voluntary Action's Centre for Economic Empowerment commissioned a report to research social clauses.⁷⁶⁰ It concludes that Northern Ireland has made progress in implementing social clauses. However, it advises that in order to maximise the impact to be gained from including social clauses in contracts, there needs to be a focus on the actual outcomes rather than on the level of activity being generated. It advises that more innovative use of social clauses should be promoted to deliver positive social benefits and that apprenticeships other than trade apprenticeships should be considered.

In response to a request by the government of Northern Ireland in 2016, the Organisation for Economic Co-operation and Development (OECD)⁷⁶¹ conducted a number of interviews with stakeholders on the use of social clauses in Northern Ireland. They indicated that, in cases where planning was undertaken carefully from the beginning to integrate social considerations, successful outcomes were achieved. Other interviewees indicated that, in addition to the planning phase, a detailed and hands-on approach during contract management was also essential to success. The interviews also indicated that this success is not yet consistent across departments or projects. The interviewees suggested that, in many cases, the social clauses appeared to be nothing more than an additional

⁷⁵⁸ Andrew Erridge, 'Public Procurement, Public Value And The Northern Ireland Unemployment Pilot Project' (2007) 85 *Public Administration* 10.

⁷⁵⁹ Northern Ireland Assembly, *Social Clauses and Valuing Social Impacts Briefing Note* (16/09 2009).

⁷⁶⁰ NICA, 'Social Clauses In Northern Ireland A Research Paper' (2012).

⁷⁶¹ OECD, 'Northern Ireland (United Kingdom): Implementing Joined-Up Governance For A Common Purpose' (2016).

contractual requirement that must be met and not an integrated element of a project, making them difficult to satisfy. Others indicated a need to recognise that there is no one-size-fits-all approach that is appropriate to social clause inclusion and that this needs to be considered in the development of standardised clauses. The role of political leadership was also highlighted in a number of interviews. One of the reasons cited for the success of the implementation of social clauses in projects conducted by the Department of Culture, Arts and Leisure included a high level of support from the minister who viewed such social outcomes as central to the projects being delivered by the department. This focus translated into planning and procurement processes that integrated the social objectives, providing both government officials and contractors with better resources for successful outcomes during contract performance. A lack of consistency in the use of social clauses and the expectations for their fulfilment is also cited by industry, according to interviewees both inside and outside government. This inconsistency takes a number of forms, including:

- creating only short-term opportunities that do not provide a genuine change of circumstance for the participants,
- lack of coordination among colleges, employment agencies, and contractors in identifying appropriate candidates as good fits for particular procurement projects, and
- lack of sophistication in setting targets for social outcomes (arbitrary determination of x number hired per y value of contract).

Interviews with a variety of stakeholders indicated a general sense of lost opportunity for these reasons.

Following the OECD report, the Procurement Board of Northern Ireland then requested an independent review of the initial guidelines for social clauses by the Strategic Investment Board and CPD, resulting in the production of new guidelines: 'Buy Social'.⁷⁶² 'Buy Social' targets new entrant trainees (NETs), who included the long-term unemployed, unemployed youth, apprentices, and students.⁷⁶³ The 'Buy Social' website hosts a number of case studies demonstrating successful projects which incorporated social clauses, including construction projects, such as stadia and arenas, as well as contracts for services such as for security guards. In each example, the social clause requirements included in the project are listed along with the current status or final outcome. In some cases, performance targets were exceeded. For example, in the Regional Stadia Programme–Ravenhill/Kingspan Stadium–the award criteria encouraged tenderers to commit to delivery beyond minimum social clause requirements, and more than three times the number of apprentices were recruited (13 as compared with the required 4), twice as many student placement opportunities were provided (from 2 to 4), and more than double the number of practical proposals for social returns for the local community were achieved (13 distinct proposals with a number of sub-proposals were identified, with only 5 having been required).⁷⁶⁴

A study undertaken by Ulster University examined the benefits to participants (NETS) and compared the benefits accrued relative to the previous guidelines.⁷⁶⁵ An online survey was conducted that gathered responses from all eight of the pilot construction projects, collecting information on benefits to organisations and NETs. The findings

⁷⁶² Buy Social Website, Broker FAQs, <https://buysocialni.org/brokers/broker-faqs/> accessed March 2019.

⁷⁶³ Strategic Investment Board, *Buy Social, A practical guide to socially responsible public procurement* (Edition 3, April 2016).

⁷⁶⁴ Buy Social Website, *Case Study*, www.buysocialni.org/case-studies, accessed 4 October 2019.

⁷⁶⁵ Robert Eadie and others, 'An Analysis Of Social Clause Impacts Between Various Options Tested In Government Construction Contracts', IXth International Scientific Conference On Architecture And Civil Engineering (2019) 10.

indicate that 63% of organisations would voluntarily adopt social clauses. A large number of social clause impacts on NETs were documented, the most positive being that after being involved in social clauses, 88% were considered more employable.

8.2.6 The Netherlands

As of July 2011, the Dutch government has made the use of SROI mandatory for public contracts for both works and services with a minimum value of €250,000⁷⁶⁶. However,⁷⁶⁷ right from the start, the Dutch government was straying from the original concept of SROI (which was focused on output and outcome), as discussed in chapter 5, and developed a different set of policy tools that focused on input in order to benefit what are termed 'people with a distance to the labour market' in the execution of public contracts. Social return on investment was then converted to 'SR' (omitting 'on investment') to apply to a range of social conditions applied in public contracts. It was found that Dutch municipalities use SROI as an instrument to enable social sustainability in terms of financial impact rather than to attempt to capture its social impact.⁷⁶⁸ Today, the Netherlands use the labels SR and SROI interchangeably for their community benefits conditions. A report for the Ministry of Social Affairs and Employment in 2011 found that 52% of all municipalities have experience with SR and that 70% of this group had a specific policy on SR in place.⁷⁶⁹ A follow up report in 2014 found that the number of municipalities that applied SR had risen sharply to 79%, with 86% of these having a policy in place.⁷⁷⁰

A case study on the use of SROI by municipalities in the Netherlands found that it did not always result in measurable and reportable SROI results.⁷⁷¹ The authors found that many municipalities used a different approach to SROI as SROI policies greatly differ between municipalities: some policies are strict, while others are loose. Large municipalities tended to have developed their policy themselves, whereas smaller municipalities copied existing policies and aimed to optimise the use of available resources. The differences in policy design are reflected in the way SROI is organised and lead to different standards among municipalities. The research found that policies that were flexibility regarding how to execute the policy were more useful, as a strict policy approach provided difficulties on a practical level.

A good example is the Noord-Holland Noord region, which is affiliated with the SROI Regional Platform for Labour Market Policy Noord-Holland Noord (RPA_NHN). The RPA_NHN is a strategic and executive partner for employers, employees, education, and government.⁷⁷² The municipalities in this region have opted for one common SROI policy with the objective of ensuring a concrete social return by the contracting authority, in addition to the 'normal' return, by ensuring agreements between a client and a contractor regarding the participation of people who are at a distance from the labour market in the purchase and tendering of works, services, or supplies. When tendering, specific agreements are made with contractors about, among other things, workplaces, learning

⁷⁶⁶ PIANOo, *Social Return* <<https://www.pianoo.nl/themas/maatschappelijk-verantwoord-inkopen-duurzaam-inkopen/mvi-thema-s/social-return>> accessed 3 October 2019.

⁷⁶⁷ P Brouwer, S Andriessen and E van Wijk, 'Social Return Bij Het Rijk Inkooptechnische Haalbaarheid.' (TNO Arbeid 2011).

⁷⁶⁸ Lynch and others, 'Community Benefits' (n 693).

⁷⁶⁹ Brouwer et al, 'Social return bij' (n 759).

⁷⁷⁰ *ibid.*

⁷⁷¹ Relus Kuijpers, 'Implementing Social Sustainability In The Public Sector - Social Return on Investment as an Instrument To Achieve' (Open Universiteit Nederland 2016).

⁷⁷² RPA <https://www.rpa-nhn.nl/> accessed 4 October 2019.

workplaces, and internships for the target groups. A toolkit was developed for this purpose which outlines the possibilities for concretising the implementation.⁷⁷³ The Toolkit SROI 2017–2019 applies to all procurements in the Noord-Holland Noord region from the municipalities where an SROI provision is included, is primarily intended for contractors who have been awarded a contract from the municipality, and describes the frameworks within which the SROI obligation can be filled. It is downloadable via www.rpa-nhn.nl.

To fulfil an SROI obligation, the options are as follows:

- 1) Offering a paid job to candidates that receive social benefits. The candidate is paid at least the minimum wage, in accordance with the law or collective agreement.
2. Offering a work placement or apprenticeship to students or beneficiaries.
3. In consultation with, and after prior written approval from, the municipality, the training and extra costs incurred by the contractor can be included in the fulfilment of the SROI obligation. The costs incurred must increase the chances of the candidate on the labour market and/or reduce the distance to the labour market.
4. If it appears that the SROI obligation cannot be entered into within the aforementioned categories, then the contractor may submit a proposal, in consultation with and after permission from the municipality itself, on how it wants to fulfil its obligation in a different, creative way.

For the fulfilment of the SROI obligation through employment, calculations are made using standard amounts according to the so-called SROI Noord-Holland Noord building block model.⁷⁷⁴ As the distance to the labour market of a candidate increases (in other words, the greater the difficulty the candidate has in engaging in paid work), the standard amount used for the calculation increases.

⁷⁷³Noord-Holland Noord, *SROI in Noord-Holland Noord, Toolkit 2017-2019*
https://www.rpa-nhn.nl/download_file/view/208/247 accessed 3 October 2019.

⁷⁷⁴Here are several variants of the building block model in circulation in the country.

Figure 4 Excerpt from SROI Noord-Holland Noord building block

Category	Standard amount (full-time annual basis)	How long count in ?
WW <1 year	€ 10,000	1 year
WW > 1 year or WW in the last three months	€ 15,000	1 year
Participation Act <2 years (not disabled)	€ 30,000	2 years
Participation Act > 2 years (not disabled)	€ 35,000	2 years
WIA / WAO with new employer ³	€ 30,000	5 years
WSW posting	€ 35,000	5 years
Hiring a WSW employee	€ 40,000	5 years
Wajong (UWV)	€ 40,000	5 years
Work-restricted Participation Act (warranty jobs)	€ 40,000	5 years
50 +	€ 5,000 extra	na
Work experience place for Participation Act and all categories of the disabled	€ 2,500 for six months (maximum period)	6 months
BBL apprenticeship	€ 15,000	duration internship
BOL and other internships	€ 5,000	duration internship
Internship for VSO students and practical education	€ 10,000	duration internship

WW–Unemployment Benefit

WIA/WAO–Disability Benefit

Wajong–Young disabled person’s facility

WSW–Social Employment Services Act secondment

BBL–Vocational Learning pathway

BOL–Vocational Training Learning Path

The amounts in the Figure 4 are on an annual basis, for full time (36 hours/week) employment. With BBL (4 days of work, 1 day at school), 32 hours of work counts as full time. Deviations are calculated pro rata. The period worked here (end date minus starting date) is divided by 365 days and multiplied by the number of hours worked per week divided by 36 (32 for BBL). The result of this calculation is multiplied by the amounts from the table and leads to the weighted SROI value for the relevant entry.

Example calculation: A candidate has been receiving a Participation Act payment for more than two years and receives a contract from February 1 to July 31 (180 days) for 24 hours a week. The calculation then goes as follows: 180 days x 24 hours x €35,000 = €11,506.85.

The contractor is responsible for the fulfilment of the SROI obligation. There is a contractual obligation to meet the requirement. The advisers of the municipality can advise and support the contractor in the implementation of the SROI commitment. If the contractor does not fully fulfil the SROI obligation at the end of the assignment, the municipality has a claim on the contractor from the outstanding SROI. This amount is charged for by the municipality and may be deducted from invoices to be paid to the contractor. Failure to comply or incomplete compliance with the SROI obligation can also result in the contractor being fined up to a maximum of 50% of the contract price.⁷⁷⁵

⁷⁷⁵ RPN, *Social Return on Investment*, <https://www.rpa-nhn.nl/projecten/social-return-investment> accessed 4 October 2019.

The Dutch focus on input has its advantages, one being that it is relatively simple to execute.⁷⁷⁶ As this quote from the Minister of the Interior and Kingdom Relations shows, this focus on inputs rather than outcomes was intentional: ‘Given the importance the cabinet places on creating extra work (experience) placements, the cabinet has consciously chosen a minimum requirement [of 5% of the tender] rather than a self-regulating system of performance [e.g., indicators and rewards].’⁷⁷⁷

8.2.7 Ireland

The Devolved Schools Programme⁷⁷⁸ was introduced as a pilot programme to trial the use of a social clause. It was administered by the NTMA, the agency that manages the assets and liabilities of the government of Ireland. The aggregate capital value of the contracts was approximately €70 million and work was completed at the end of 2015. A total of 50 long-term unemployed people and 18 apprentices or trainees were hired in the course of the programme as a result of the use of social clauses. In summary, the pilot clause requires that at least 10% of those working on the sites be drawn from the live register and had been unemployed for more than 12 months, and at least 2.5% of workers on the sites be engaged in an approved registered apprenticeship, training, or educational work placement scheme.⁷⁷⁹ While the initial phases of this scheme were successful, subsequent contracts had difficulty in fulfilling the clause due to there being unemployment.⁷⁸⁰

Dublin City Council in partnership with the Office for Government Procurement has allowed the inclusion of a community benefit clause in the conditions of contract of the Dolphin House Masterplan and St. Teresa’s Gardens. This will include on-site employment and training opportunities for long-term unemployed people. The community benefit clause explicitly stipulates that 10% of the hours worked on-site will be filled by people who have been unemployed for a continuous 12-month period and that 5% of the hours will be allocated to training and apprenticeship places. A joint working group comprising local employment and training agencies and those from community-based projects has commenced identifying skills within both communities to support the initiative. Training and support programmes for the long-term unemployed in the area are being developed to ensure that the targets of the clause can be met.⁷⁸¹

The New National Children’s Hospital is one of the first large-scale national projects in Ireland to include social clauses as part of its construction contracts. These aim to benefit surrounding communities by providing job opportunities for the unemployed, early school leavers, or people new to construction.⁷⁸² A total of 1,700 job years are expected

⁷⁷⁶N Uenk and F Schotanus, 'Steering On Social Output Offers Opportunities In The Netherlands' (Cobouw 2016).

⁷⁷⁷JPH Donner and P Krom, 'Kabinetstandpunt Ten Aanzien Van Social Return Bij Het Rijk Kenmerk' (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties 2011).

⁷⁷⁸This is a major school building projects which was announced in March 2012 as part of a €2 billion capital investment programme, procured and developed by the National Development Finance Agency (NDFA) for the Department of Education and Skills (DoES)
<http://www.ndfa.ie/TenderCompetitions/DevolvedSchoolsProgramme.htm> accessed 12 January 2015.

⁷⁷⁹Houses of the Oireachtas website, *Dáil Éireann debate* (21 Feb 2017)

<https://www.oireachtas.ie/en/debates/debate/dail/2017-02-21/32/> accessed 3 October 2019.

⁷⁸⁰Interview with David Hannon programme head for the devolved schools programme at NDFA (May 13th 2019).

⁷⁸¹'Announcement Of Community Benefit Clause Initiative 9 May 2016' (*Dolphin House & Park Community Website*, 2016) <<https://www.dolphinhouse.ie/news/2016/05/09/announcement-of-community-benefit-clause-initiativ/>> accessed 3 December 2019.

⁷⁸²EY, 'Harnessing The Potential, Maximising Community Benefit From The New Children’s Hospital' (2015).

to be generated during the construction phase, along with various other significant benefits in terms of total economic activity and long-term employment when the hospital is operational. Work experience placements for students will also be available for them to work with all the contractors and sub-contractors during the main construction phase.⁷⁸³

⁷⁸³ Department of Health, Press Release ‘Government approves Phase B construction investment decision for new children’s hospital project’ 18 December 2018.

Chapter 9: Findings and Conclusions

9.1 Key Themes

In the previous chapter, we examined *how* selected EU Member States have implemented and evaluated social clauses within their unique legal, political and economic context. In this concluding chapter we identify *what* are the dimensions that influence contracting authorities regarding the use of social clauses and explain *why* the different members states have different approaches. This analysis is split between factors arising at an EU level and those arising from a domestic level.

First, we examine the effect of the EU on the role of social considerations within Europe's internal market, examining the extent to which the law limits the discretion of Member States to pursue social clauses. This can be divided into:

1. The requirement for horizontal considerations to be linked to the subject matter of the contract, and
2. The requirement to justify trade restrictions.

Second, we examine the effect of the domestic framework on social considerations in order to evaluate the relevance of the wider country context within which procurement takes place and the role of the country's political and economic composition in the development of the national legal framework and policy position. What emerges is an attempt to assess the *political will of the state*, that is 'the commitment of actors to undertake actions to achieve a set of objectives [...] and to sustain the costs of those actions over time'.⁷⁸⁴ To aid in this assessment, the manifestations of political will have been categorised according to:

1. The national policy approach: centralised or decentralised and
2. The national framework to support social procurement:
 - National legislation and
 - National policy
3. The influence of the free market economic approach on the public procurement regulatory system and policy on:
 - The concepts of efficiency and competition in terms of the definition of value for money,
 - Social value versus community benefit versus SR and the availability and significance of evaluation frameworks, and
 - The difficulty in monitoring and measuring outcomes of social value.

9.2 The Influence of the EU

9.2.1 'Subject Matter of the Contract'

One of the major limiting principles for including social considerations is the need for the horizontal consideration to be linked 'to the subject matter,' as was decided in *Concordia, EVN, and Dutch Coffee* and emphasised in the recitals to the 2014 directives.⁷⁸⁵ This

⁷⁸⁴ Derick Brinkerhoff, 'Unpacking The Concept Of Political Will To Confront Corruption' (CHR Michelsen Institute 2010) <<https://www.u4.no/publications/unpacking-the-concept-of-political-will-to-confront-corruption.pdf>> accessed 3 December 2019.

⁷⁸⁵ Recital 97 of the Public Sector Directive, in setting out the link to the subject-matter requirement, states: 'Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social

effectively removes the ability to include general corporate social or environmental responsibility policies when they go beyond the specific contract. The concept of a ‘link to the subject matter’ requirement for award criteria was first articulated by the Court in the *Concordia* case⁷⁸⁶ and was included in the 2004 directives in relation to award criteria only. In the 2014 directives, this was expanded to include technical specifications, variants, labels, and special conditions, as well as award criteria. The test of whether the condition is ‘linked to the subject matter of the contract’ is the same test that applies in delimiting the scope of permitted award criteria, as can be seen from the cross reference in Article 70 to Article 67(3): it applies when they are concerned with what is provided in terms of the contract or the way in which the contract work is conducted—specifically the impact of production, trading, or delivery of what is provided; the effect of disposal of what is provided; and the impact on the work force in the course of providing the goods, works, or services. *EVN* established that it is not possible to include award criteria that go beyond anything to do with the way the specific contract is performed. This rules out those criteria relating to horizontal policies which concern the general nature of the provider and its general business practices. However, a number of exceptions to this approach have been made, notably the provisions on reservation of contracts and the ability, in terms of the 2014 directives to take the qualifications, experience, and organisation of staff into account at the award stage, recognising that the assessment of a contractor’s suitability or capacity can be allowed separately from an assessment of the tender. Similarly, the directives allow assessment at the selection stage of the environmental and supply chain management measures which an operator ‘will be able to apply’ in undertaken a contract—as opposed to merely a general statement of the policies or certifications which it holds.⁷⁸⁷ These provisions indicate that the capacity or resources of a bidder outside this one contract is allowed.

The restrictive interpretation of the subject matter link may be traced to the *Concordia* decision: ‘Since a tender necessarily relates to the subject matter of the contract, it follows that the award criteria which may be applied in accordance with [the provisions on the award criteria set out in the directives] must themselves also be linked to the subject matter of the contract.’⁷⁸⁸ However, this reasoning has since been criticised as a false syllogism.⁷⁸⁹ Yes, a tender relates to the subject matter of the contract; however, a tender may also relate to other things, for example, it will normally contain a description of the tenderer’s business, staff, and resources and an indication of acceptance of any proposed contract terms. The 2014 directives have confirmed that questions of capacity or experience can now be assessed at the award stage, contradicting the idea that award criteria may only concern the characteristics of what will be performed—as opposed to what has already occurred. Following *Dutch Coffee*,⁷⁹⁰ the 2014 directives have taken a broader view, allowing processes for the provision or trading of goods, services, or works. In that case, it was held that an authority was entitled to apply award criteria relating to organic agriculture and fair trade in a tender for the supply of tea and coffee, as these considerations were linked to the subject matter, and that there was no requirement for award criteria to relate to an intrinsic characteristic of a product or something which

or environmental responsibility policy in place.’

⁷⁸⁶ *Concordia Bus Finland v Helsingin kaupunki and HKL-Bussiliikenne* (C-513/99) [2002] ECR I-07213.

⁷⁸⁷ Annex XII, Pt II(d) and (g) Public Sector Directive.

⁷⁸⁸ *Concordia*, para 59.

⁷⁸⁹ Abby Semple, *A Practical Guide To Public Procurement* (Oxford University Press 2015).

⁷⁹⁰ *Commission v Kingdom of the Netherlands* (‘Dutch Coffee’), Case C-368/10, judgment of 11 July 2013.

alters its material substance. The 2014 directives also provide the clarification that award criteria can relate to any stage of the life-cycle, including production.

This requirement that horizontal considerations and award criteria be linked to the subject matter of the clause has been persuasively argued to adversely affect pursuit of such policies via procurement, not least due to legal uncertainty regarding its meaning.⁷⁹¹ In addition, it has been shown by Semple how the requirement has the potential to restrict the effectiveness of sustainability criteria in public contracts, drawing on examples related to renewable energy generation, transport emissions, and fair trade products.

Application of a strict version of the test may create difficulties in achieving the objectives of such criteria due to the complexity of supply chains and the prevalence of ‘upstream’ environmental and social impacts.⁷⁹² An example of this involves social clauses and conditions relating to promoting employment or apprenticeships. Currently, as we have seen, award criteria or contract clauses are only permitted to the extent that they are specific to the contract being awarded; it may better for firms to employ apprentices or long-term unemployed people on another contracts. This could provide flexibility by allowing ‘credit’ for the operation of such schemes as part of general corporate practices relating to other contracts.

One last point is the argument that the ‘linked to the subject matter of the contract’ requirement does *not* have to restrict the scope of horizontal considerations because contracting authorities are free to define the subject matter of their contracts as long as the social objective is included in the purchasing terms. McCrudden first clarified that contracting authorities are free to define the subject matter of their contracts and that the treaties and the directives do not limit what can be contracted for, allowing for what Arrowsmith and Kunzlik terms ‘a multi-purpose vehicle’, meaning ‘what to buy’ decisions are lawful even if indirectly (but not directly) discriminatory.⁷⁹³ Carrying this argument to its logical conclusion, a public authority can state that it was purchasing ‘renewable electricity and investment in renewable energy generating capacity’ or ‘construction of a school and training of apprentices’⁷⁹⁴. This point has been expanded on by Sue Arrowsmith and Peter Kunzlik to question the extent to which EU law does or should regulate the purchaser autonomy of public bodies, either by constraining their ability to pursue horizontal policies or by requiring them to do so.⁷⁹⁵

This approach is the basis of the ‘core’ approach advocated by Macfarlane and is the main strand of procurement policy in Wales. It may indeed be the appropriate approach to broadening the scope of sustainability criteria which contracting authorities can legitimately apply, while affording a high degree of transparency to the market regarding the implementation of horizontal policies. However, it is clear from the judgements in *Concordia, EVN*, and *Dutch Coffee* that exceptions will still apply, reflecting a general reluctance under the procurement directives to sanction restrictions on tenderers as opposed to tenders—as is evident in the exhaustive list of exclusion and selection criteria

⁷⁹¹ See Semple, *A Practical Guide* (n 781) 74; Sue Arrowsmith, *The Law Of Public And Utilities Procurement* (Sweet & Maxwell 2018) para 20-76, 752.

⁷⁹² Abbey Semple, ‘The Link To The Subject-Matter: A Glass Ceiling For Sustainable Public Contracts?’ [2015] SSRN Electronic Journal.

⁷⁹³ See Chapter 1, 7.

⁷⁹⁴ For the full explanation of this see Sue Arrowsmith and Peter Kunzlik (eds) (n. 20) 191-296; Peter Trepte, ‘The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate What We Buy?’ in Ølykke, Risvig and Tvarnø (eds), *EU Procurement Directives: Modernisation, Growth and Innovation* (Djøf 2012) ch 3.

⁷⁹⁵ Sue Arrowsmith and Peter Kunzlik (eds), (n 20) 297.

which may be applied to economic operators. A looser version of the test is recommended for development by the EU legislature.

9.2.2 Hindrances to Trade

As discussed in chapter 6, when a social consideration is considered a hindrance to trade, it requires justification. This places the burden on the state to prove that a non-economic justification exists for the trade restriction and that the restriction is proportionate to meeting the aims of that justification. This has a major impact upon the balance between social and economic interests. Barnard has argued that this market access approach ‘inevitably prioritises the economic right over the social interest’⁷⁹⁶ because, once a rule is found to be a restriction, it is presumed to be unlawful unless justified and proportionate. This burden is a difficult one for the state to overcome, even more so when the justification is social in nature.⁷⁹⁷ This appears the antithesis of balancing, a balance now mandated by Article 3(3) of the Treaty on European Union. The equal status of horizontal policies and commercial policies, the principles of subsidiarity and equality and, in light of the EU’s policy commitments to social progress, the EU should recognise a significant discretion on the part of EU Member States to use procurement as a policy tool and allow more discretion to social considerations in its justification and proportionality analysis. The European Charter might offer new ground upon which such arguments can be strengthened.

9.3 The Domestic Level

As we have seen, the use of public procurement is regarded as intrinsic in creating and developing a sustainable economy in the Netherlands, Scotland, Wales, and Northern Ireland. Broadly, the case studies have demonstrated that these countries have had a good uptake of social considerations. The same cannot be said for Ireland and Westminster. It will be interesting to see whether the UK’s recent commitment to applying the principles of the Social Value Act to the whole of government spending and making social value an explicit requirement in central government contracts with the private and third sectors denotes a change in approach, or whether Brexit will overshadow all intended reforms. While Ireland pays lip service to the concept of sustainable procurement, a lack of political will and Ireland’s market-led approach, combined with its centralised approach to public procurement, suggests that no fundamental change will occur.

9.3.1 Law and Policy: The Political Will of the State

9.3.1.1 Decentralised versus centralised policy approaches

Social procurement can be characterised as taking either a centralised or decentralised approach. In a decentralised or ‘bottom-up’ approach, social procurement is implemented by public bodies according to their own specific social priorities, with most of the legal and practical guidance provided by outside organisations. The second approach is a more centralised, ‘top-down’, approach in which the state creates focused social procurement

⁷⁹⁶ Catherine Barnard, ‘Procurement Law to Enforce Labour Standards’ in Guy Davidov and Brian Langille, *The Idea Of Labour Law* (Oxford University Press 2013).

⁷⁹⁷ Catherine Barnard, ‘Viking And Laval: An Introduction’ (2008) 10 *Cambridge Yearbook of European Legal Studies* 34; Alan Dashwood, ‘Viking And Laval: Issues Of Horizontal Direct Effect’ (2008) 10 *Cambridge Yearbook of European Legal Studies* 525; A. C. L. Davies, ‘One Step Forward, Two Steps Back? The Viking And Laval Cases In The ECJ’ (2008) 37 *Industrial Law Journal* 34; Simon Deakin, ‘Regulatory Competition After Laval’ (2008) 10 *Cambridge Yearbook of European Legal Studies* 581.

policies targeting priority social issues and provides the legal, policy, and practical guidance to facilitate their development. The UK is an example of the former: procurement is undertaken on a decentralised basis by individual government departments and agencies and by individual local authorities. As we have seen, it is primarily local government that uses social clauses; local authorities have the freedom to make their own purchases and have wide discretion for establishing their own procurement policies in doing so.⁷⁹⁸ Additionally the central government has devolved to regional administrations the power to regulate procurement, and this has resulted in a wide divergence in approaches to the use of public procurement to achieve policy goals. Scotland, Wales, and Northern Ireland's devolved status and individual policy goals have a significant effect on their social procurement policy, with horizontal considerations playing an integral part.

Ireland is also an example of this bottom-up approach. The decision of the Children's Hospital in Ireland to include social clauses in the procurement contract was in response to pressure from local regeneration boards,⁷⁹⁹ and the National Paediatric Hospital Development Board engaged EY to produce a report to provide the legal, policy, and practical support to implement them. Social procurement in the UK has also developed in this manner: MacFarlane's toolkit was funded by the Joseph Rowntree Foundation and Camden's local authority's 'sustainable commissioning model' was sponsored by the NEF (a charity) and funded by ISB (a Blair Treasury/Cabinet Office initiative, which has since been closed).⁸⁰⁰ The Netherlands, Scotland, Wales, and Northern Ireland can be all categorised as having a centralised approach with a central government policy for social procurement that provides guidance and support to local government, public bodies, and buyers. The case studies show the centralised approach equates to a higher uptake in the use of sustainable procurement.

9.3.1.2 National legislation

Scotland and the Netherlands share a legislative and political commitment to the use of procurement as a means of delivering sustainable policy. In the Netherlands, social conditions must be included in all central government tenders and the 2016 Procurement Act places an obligation on contracting authorities to create as much societal value as possible. Similarly, in Scotland there is an obligation on public sector bodies to deliver community benefits in the Procurement Reform (Scotland) Act, which is linked to the country's vision to 'deliver procurement that improves public services for a prosperous, fairer and more sustainable Scotland'.⁸⁰¹ The Act also obliges public authorities in Scotland to report on their sustainable procurement.⁸⁰² The Scottish government provides support and guidance on its website and has produced statutory guidance on the use of community benefit requirements in procurement and sustainable procurement duty tools.⁸⁰³

⁷⁹⁸ Sue Arrowsmith, *The Law of Public and Utilities Procurement vol 1* (Swett & Maxwell 2014) 12

⁷⁹⁹ Interview with Community Benefits Oversight Group of National Paediatric Hospital Development Board (NPHDB), May 2019.

⁸⁰⁰ Geoff Mulgan and David Albury 'Innovation in the Public Sector' (Strategy Unit, Cabinet Office 2003) 40.

⁸⁰¹ Scottish Government, *Public Procurement: Governance* (1 October 2018)

<https://www.gov.scot/publications/public-procurement-governance/> accessed 4 November 2019.

⁸⁰² Scottish Government, *Annual Report On Procurement Activity in Scotland SG/2019/18* (2019).

⁸⁰³ Scottish Government, *Public sector procurement, Community benefit in procurement*

<https://www.gov.scot/policies/public-sector-procurement/community-benefits-in-procurement/>

Accessed 4 October 2019.

The Netherlands has embedded the proportionality principle in the Public Procurement Act 2016 and the Proportionality Guide, and this, in combination with the duty for contracting authorities to ‘comply with the Public Procurement Act 2016 or explain in case of non-compliance’ is both unique and farther reaching than is required in terms of the 2014 Procurement Directive. The Participation Act further implements the Dutch government’s policy of integrating people with labour limitations into work by giving responsibility to municipalities to provide support, training, supported employment, and employment subsidies. The Public Procurement Expertise Centre (PIANOO) was created to provide legal, policy, and practical support and guidance in the area of socially responsible public procurement.⁸⁰⁴

In the UK, there is legislation that places a proactive duty on public bodies when procuring: the public sector duty under the Equality Act imposes a positive duty on public authorities to have ‘due regard’ to various equality issues, and the Public Services (Social Value) Act 2012 requires public authorities to consider the ‘economic, social and environmental well-being of the relevant area’ before they procure major public service contracts. However, Westminster currently has no clear central policy regarding its approach to the use of procurement as a social policy tool, and this reflects the lack of social procurement in central purchasing practices.

9.3.1.3 National policy

Contracting authorities in Wales, Northern Ireland, and Ireland do not have a statutory duty to consider use of public contracts to address social, environmental, or economic considerations, unlike Scotland and the Netherlands. However, in Wales and Northern Ireland there are policies and guidance to encourage and mandate such activity. Wales’s Programme for Government 2011–16, Principle 4, made delivery of community benefits an integral part of procurement processes in the region⁸⁰⁵ and provides detailed guidance⁸⁰⁶ and online training.⁸⁰⁷ The Welsh government’s support and guidance is similar to Scotland’s as it is provided on the government website and includes measurements and online training.

Northern Ireland also has a clear policy in place, ‘Buy Social’, as a way to ‘maximise the benefits from public procurement in terms of personal well-being, social cohesion and inclusion, equal opportunities and sustainable development’.⁸⁰⁸ The policy approach of Northern Ireland is comparable to that of the Netherlands as they have both created separate units to support the use of social considerations in procurement and both have dedicated websites for this purpose. The ‘Buy Social’ website provides a ‘Buy Social Toolkit for Targeted Recruitment & Training’; resources to connect contractors who have been awarded public contracts with Buy Social clauses to relevant organisations who can support them to deliver on these clauses;⁸⁰⁹ and other resources, such as clauses, contract notices, and case studies.⁸¹⁰

In contrast, Ireland has neither proactive legislation nor policy in place. While the financial crisis is credited for an increased enthusiasm for the use of public procurement

⁸⁰⁴ PIANOO, *Sustainable public procurement in the procurement process*, (2016) <https://www.pianoo.nl/public-procurement-in-the-netherlands/sustainable-public-procurement-spp/spp-in-the-procurement-process> accessed 4 October 2019.

⁸⁰⁵ Welsh Government, *Community benefits: Delivering Maximum Value For The Welsh Pound* (2014).

⁸⁰⁶ *ibid.*

⁸⁰⁷ Welsh Government, *Community benefits: online training* <https://gov.wales/community-benefits-online-training> accessed 3 October 2019.

⁸⁰⁸ Buy Social Website, <https://buysocialni.org/#resources> accessed March 2019.

⁸⁰⁹ Buy Social Website, *Broker FAQs*. <https://buysocialni.org/brokers/broker-faqs/> accessed March 2019.

⁸¹⁰ Buy Social Website, Procurement, <https://buysocialni.org/procurement/> accessed March 2019.

to achieve wider social policy goals in Ireland,⁸¹¹ this is not evident in legislation or published policy. The government has stated that it supports the principle of social clauses and has published an information note on the incorporating social considerations into public procurement,⁸¹² however, it does not provide any policy guidance to support it. Indeed, Ireland's overall public procurement policy lacks a central focus: it is stated as concerning 'the delivery of public services in a sustainable manner by ensuring value for money and access to public procurement opportunities for businesses'⁸¹³ and then one is directed to 11 different circulars issued by the Departments of Finance and Public Expenditure and Reform.⁸¹⁴ The economic approach taken by the Irish government is a classical free market one in which the contracting authority is asked to consider the risk of narrowing markets and excluding businesses before including social clauses and to take into account of the cost to society created by market inefficiency due to the use of such clauses and the proportion of intervention benefits accounted for by reduced benefits elsewhere in the target area.⁸¹⁵ This touches on the conflicting goals of public procurement: sustainability, value for money, and opportunities for business but provides no guidance as to how to achieve them, highlighting the difficulty of placing sustainability alongside economic approaches to value for money and the requirements of the market.

The substantial difference in legislative and policy approaches has led to substantial differences in the way social clauses are used in the various Member States. In Scotland and the Netherlands, the centralised approach has shown high uptake in the use of social clauses, with both countries reporting that the figures are increasing. In Wales, the focus has been on the impact on the community, and in Northern Ireland the Organisation for Economic Cooperation and Development (OCED) reported a largely successful uptake of social clauses, noting the connection with planning, support, and political leadership.

9.3.2 Efficiency and Value for Money

In both Ireland and the UK, the influence of the free market economic approach is evident, with an emphasis on efficiency as a key component of value for money in procurement policy. In the UK, the National Audit Office's definition of VfM is based on the '3Es', effectiveness, economy, and efficiency, showing the influence of NPM⁸¹⁶ on government purchasing decisions. The procurement policy requirements are described as a mix of quality and effectiveness for the least outlay, achieved through competition,⁸¹⁷ where effectiveness is the relationship between the intended and actual results of public spending (outcomes). This concept of effectiveness is a difficult one to measure, as it can only be judged based on pre-defined and measurable objectives, which requires making a judgement as to what those objectives are. Furthermore, the achievement of the objectives may be influenced by other factors, thereby undermining accuracy.

⁸¹¹ Catherine Donnelly, 'Republic of Ireland' in Neergaard, Ulla B., Catherine Jacqueson, and Grith Skovgaard Ølykke, *Public procurement law: limitations, opportunities and paradoxes* (Djøf Forlag 2014).

⁸¹² OGP, *Incorporating Social Considerations into Public Procurement* (2018).

⁸¹³ OGP, *Social Considerations Information Note* (2019).

⁸¹⁴ OGP, *National Public Procurement Policy Framework* (2018).

⁸¹⁵ OGP, *Incorporating Social Considerations* (n 801)16.

⁸¹⁶ Michael Power, *The Audit Explosion* (Demos 1994).

⁸¹⁷ Cabinet Office, *Public Procurement Policy* (1 October 2015) <https://www.gov.uk/guidance/public-sector-procurement-policy#introduction> accessed 4 December 2019.

Ireland's value for money focus is 'concerned with the efficient and effective use of resources'.⁸¹⁸ However, no further definition is provided, despite the central place the concept holds in Ireland's procurement policy.⁸¹⁹

This lack of clarity is reflected in Ireland's overall public procurement policy, which does not exist as a complete whole but involves reference to 11 different circulars.⁸²⁰ The OGP's recent *Social Considerations Information Note* has not helped the cause by stating that Ireland's procurement policy focus is 'the delivery of public services in a sustainable manner by ensuring value for money and access to public procurement opportunities for businesses.'⁸²¹ No further guidance is offered as to how this can be achieved. If sustainability is meant in terms of meeting the needs of the present without compromising the ability of future generations to meet their needs, the difficulty of achieving this while *ensuring* value for money and also creating business opportunities is ignored, leading to the conclusion that Ireland's policy is more aspirational, though improbable, in nature than practical. Ireland's lack of a thought-out, workable strategy could be due to the difference in the evolution of its public system. Unlike the ideologically driven reform evident in the UK in the 1980s and 1990s, Ireland's Irish-style NPM, while also designed to promote market-type efficiencies, was without a radical programme of reform, as it originated in an ideological adoption of the market as inherently superior to state-led decision-making. Ireland's public service reform therefore had no direct political sponsor or driver and was a project of the senior civil service itself, principally the Department of the Taoiseach.⁸²² It reflects a 'top-down' process of largely generic management restructurings and processes initiated in the 1990s, having been born of the necessity to adapt to the exigencies of EU membership and economic challenges.⁸²³

In Wales, a definition of procurement is used that also includes both value for money concerns and sustainability; however, they require the consideration of value for money in the very widest sense, defining it on a whole life basis in terms of generating benefits not only for the organisation but also for society and the economy while minimising damage to the environment. This definition underpins all procurement in Wales and how it is conducted and makes it clear that value for money is linked to wider socioeconomic and environmental benefits (defined as community benefits). Detailed guidance is provided as to how to implement these. This is similar to Northern Ireland's procurement policy which includes the concept of best value for money as 'the most advantageous combination of cost, quality and sustainability to meet customer requirements',⁸²⁴ along with the recommendation that the 'wider economic, social and environmental strategies and initiatives of the Executive ... be more closely integrated into procurement policy'.⁸²⁵ It goes on to define cost as a consideration of the whole life cost; quality as meeting a

⁸¹⁸ Government Accounting, *Section D An Overview Of Financial Management And The Value-For-Money Framework*, <https://govacc.per.gov.ie/wp-content/uploads/2012/05/SECTION-D.pdf> accessed 3 March 2018.

⁸¹⁹ *ibid*, Chapter 5.

⁸²⁰ Office of Government Procurement, *National Public Procurement Policy Framework* (June 2018).

⁸²¹ Office of Government Procurement, *Social Considerations Information Note* (2019).

⁸²² Hardiman, N. & MacCarthaigh, M., 'The un-politics of New Public Management in Ireland' in Jean-Michel Eymeri-Douzans and Jon Pierre, *Administrative Reforms And Democratic Governance* (Routledge 2011).

⁸²³ Joe Wallis, 'Leadership Avoidance By Central Budget Agencies: A Social Constructivist Comparison Of The Irish Department Of Finance And The New Zealand Treasury' (2011) 11 *Public Finance and Management* 365.

⁸²⁴ NI Department of Finance and Personnel, *Northern Ireland Public Procurement Policy*, Version 11, August 2014, 3.

⁸²⁵ *ibid*.

specification which is fit for purpose and sufficient to meet the customer's requirements; and sustainability as economic, social, and environmental benefits, considered in the business case, in support of the Programme for Government.⁸²⁶

Scotland's procurement policy is the only one of the common law examples that abandons adherence to the best value paradigm and states that its policy is to ensure that public money is spent in a way that can 'deliver the most benefit to society'.⁸²⁷ Scotland's Procurement Reform Act established the framework for sustainable public procurement, and Scotland's policy note states that sustainable public procurement 'supports Scotland's economic growth ... and requires public bodies to consider how their procurement activity can improve the economic, social and environmental well-being of the authority's area'.⁸²⁸ Scotland's procurement activity is designed to contribute to its sustainable public procurement strategy in a way that achieves value for money,⁸²⁹ which is defined as the best balance of cost, quality, and sustainability.⁸³⁰ Section 15(5)(a)(ii) of the Act requires contracting authorities to set out how they intend to deliver value for money, while considering the whole life cost and evaluating community benefits in a similar manner to other sustainability aspects of the requirement.⁸³¹ The Netherlands too avoids a best value concept by defining procurement in terms of quality and defining best value for money only in terms of procurement contract awards, in which quality aspects must be considered in addition to price in the assessment of tenders.⁸³²

While the concept of value for money is intrinsic to public procurement policy, its close link to efficiency in Ireland and the UK is seen as problematic: measuring efficiency in the public sector context is difficult, as profitability, which often serves as a proxy for efficiency in the private sector does not apply, or if it does, it must also take into account the need of the state to deliver public functions and objectives. While many economists and international institutions such as the World Bank, IMF, and OECD have dedicated much effort to measuring and comparing efficiency in public spending practices, there is a fundamental difficulty in applying traditional input/output measures and surveying attempts to develop appropriate macro and micro indicators.⁸³³ Wales and Northern Ireland's broader considerations, including sustainability on a whole life basis is evidence of a new way of conceiving value; however, there remains a tension between ideas of efficiency and cost control, on the one hand, and addressing quality and sustainability on the other. By stepping outside the best value box, Scotland and the Netherlands offer a new direction that may avoid the clash with the economic framework and that goes beyond the concept of whole-of-life costs.

⁸²⁶ NI Department of Finance, *Definition of Best Value For Money*, <https://www.finance-ni.gov.uk/articles/definition-best-value-money> accessed March 2019.

⁸²⁷ The Scottish Government, *Policy, Public sector procurement* (Cabinet Secretary for Finance, Economy and Fair Work) <https://www.gov.scot/policies/public-sector-procurement/> accessed 3 October 2019.

⁸²⁸ The Scottish Government, *Scottish Procurement Changes to the Procurement Rules in Scotland*, Policy Note SPPN 6/2015, 18 December 2015.

⁸²⁹ The Scottish Government, *Annual report on procurement activity in Scotland* SG/2019/18 (2019).

⁸³⁰ The Scottish Government, *Guidance under the Procurement Reform (Scotland) Act 2014* (March 2016) <<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/03/guidance-under-procurement-reform-scotland-act-2014/documents/00496919-pdf/00496919-pdf/govscot%3Adocument/00496919.pdf>> accessed 3 October 2019.

⁸³¹ *ibid* 42.

⁸³² PIANOO, *Best value for money* <https://www.pianoo.nl/nl/themas/beste-prijs-kwaliteitverhouding-bpkv> accessed 8 November 2019.

⁸³³ See under this heading V Tanzi, 'Measuring Efficiency In Public Expenditure', *Conference on Public Expenditure Evaluation and growth* (2004) acknowledging this difficulty.

9.3.3 The Interpretation of Social Value versus Community Benefit and the Availability and Significance of Evaluation Frameworks

Preventing protectionist practice was one of the drivers behind the introduction of the original EU directives; however, national governments are allowed to encourage the growth of their local markets. In response to this, Richard Macfarlane removed the phrase ‘local’ from procurement contracts and instead advised using the phrase ‘community benefit’, not ‘social’ or ‘social value’. The word ‘community’ has a broad reach, meaning at a minimum a group of people in a geographical area; however, it can also mean collections of people with a particular social structure, a sense of belonging or community spirit, and can include all the daily activities of a community, work and non-work, within the geographical area, which is self-contained.⁸³⁴ This term is useful to overcome the taint of discrimination while embodying the potential to make a positive change for those in need. Both Scotland and Wales use the term ‘community benefit’. In Wales, community benefits are linked to delivering one or more of the following outcomes:

- Job opportunities for the economically inactive,
- Training opportunities for the economically inactive,
- Retention and training opportunities for the existing workforce,
- Promotion of open and accessible supply chains that provide opportunities for SMEs to bid for work, and promote social enterprises and supported businesses,
- Contribution to education in Wales through engagement with school, college, and university curricula,
- Contributions to community initiatives that support tackling poverty across Wales and leave a lasting legacy within the community, and
- Opportunities to minimise the environmental impact of the contract and to promote environmental benefits.

Scotland’s definition is similar but broader and less prescriptive, providing more flexibility. The Procurement Reform Act states that community benefits relate to training and the recruitment and/or availability of sub-contracting opportunities or that which is otherwise intended to improve the economic, social, or environmental well-being of the authority’s area in a way additional to the main purpose of the contract in which the requirement is included.⁸³⁵ The Netherlands provides no definition of social value, but has developed the concept of SR as a means of creating more employment opportunities for people who are disadvantaged in the labour market.⁸³⁶ This lack of flexibility, as in Wales, limits opportunities, though it could also be a strength in terms of providing clarity of meaning and simplifying measurement and evaluation.

In contrast, the UK’s definition of social value, ‘seeking to maximise the additional benefit that can be created by procuring or commissioning goods and services, above and

⁸³⁴ Karen Christensen, *Encyclopedia Of Community* (Sage Publ 2003).

⁸³⁵ Procurement Reform (Scotland) Act 2014.

⁸³⁶ PIANOo, *Social Return for Money*, <https://www.pianoo.nl/en/sustainable-public-procurement/spp-themes/social-return-investment-sroi> Accessed 4 October 2019.

beyond the benefit of merely the goods and services themselves',⁸³⁷ is very broad, providing limited guidance to the user and presenting difficulties in measuring and evaluation of its implementation. Ireland avoids using 'social value' or 'community benefit' altogether and relies on the term 'social considerations', with no definition, but provides the examples of employment and training opportunities for disadvantaged groups, disability access, promoting social inclusion, and the protection of the environment and combatting climate change.⁸³⁸ The Irish government advises that contracting authorities must 'consider the risk of narrowing markets and excluding businesses' due to the 'additional costs associated with the inclusion of social considerations'.⁸³⁹ This cautious approach somewhat undermines the government's pronouncement regarding its commitment to opening public procurement to environmental and social considerations.⁸⁴⁰

9.4 Difficulties in Monitoring and Evaluating Outcomes

A common thread in each of the country reports is the difficulties in monitoring social considerations within the contract and in evaluating outcomes, with the result that the existing evidence base around CBCs comprises descriptive case studies with little data on outcomes and impacts. The University of Glasgow's⁸⁴¹ 2015 report set out to rectify this problem. Their research confirmed that evaluating *social value* is difficult due to a lack of data in relation to the additionality and sustainability of community benefit outcomes, which impede the assessment of the impact of CBCs, despite the increase in their use in procurement contracts. Typically, this data is not required by the contracting authorities. The report concludes that there is a need for the development of a more comprehensive evidence base on the longer term impact of CBCs, involving 'a more systematic monitoring of CBCs and their impacts in future contracts so that the use of CBCs can be fully *justified*.' However, the report shows that the outputs from the CBCs were available, including the number of people recruited and/or trained, for how long this was available, and that targets that were set were exceeded. The research was also able to report on the number of public organisations using CBCs, how many had a policy in place, and the attitudes of contractors to including them in contracts. The issue therefore was not that data was not available to calculate the additionality and sustainability of CBC outcomes so that their use can be *justified*. But what does justified mean, and to whom? We argue that 'justified' in this context relates to the need to provide 'empirical' evidence to support including CBCs by calculating 'the additionality and sustainability of CBC outcomes'. However, as we have seen in chapter 4, the assessment of outcomes is a highly complex and inherently subjective (and some would say inaccurate) process. We argue that if there are clear policy goals in place and the contract is successful in meeting those goals, then the need to justify the inclusion of added social value places an economic justification on a governmental policy decision. Ironically, in the quest for justification, allocative efficiency is sacrificed due the huge amount of data required to

⁸³⁷ Office of Government Commerce, *Explanatory memorandum to the Public contracts regulations 2006*, SI 2006/5 (2006) sections 4.2 and 6.3.

⁸³⁸ OGP, *Incorporating Social Considerations into Public Procurement* (2018) iv.

⁸³⁹ *ibid* 15.

⁸⁴⁰ Department of Public Expenditure and Reform, *Press Release, Government takes further steps to promote 'green' public procurement* (21 October 2019) <https://www.gov.ie/en/news/f633a8-government-takes-further-steps-to-promote-green-public-procurement/>, accessed 3 November 2019.

⁸⁴¹ Victoria Sutherland and others, 'Analysis Of The Impact And Value Of Community Benefit Clauses In Procurement' (Training and Employment Research Unit (TERU), University of Glasgow 2015).

implement evaluation tools such as SROI. In this context, the benefits of social value are still accepted as pro-economic and as a means of ensuring genuine 'value for money', despite Scotland's procurement objective: to 'deliver the most benefit to society'. Both Northern Ireland and Wales avoid the difficulty of assessing impacts and provide specific measurement tools. Northern Ireland's web-based monitoring of social clauses is similar to Wales' and focuses on achieving outputs, but it is not LM3 based. In Wales, the Community Benefits Tool has been designed to be both a monitoring report and a local impact evaluator, as it uses a local multiplier to measure the impact of CBCs on the economy of Wales. The tool is primarily designed to demonstrate how sourcing from Welsh suppliers will stimulate the local economy. It was designed in line with the approach of Macfarlane, who is in favour of simplifying the task of evaluating and measuring the social value of CBCs by limiting the range of social/community benefits sought by the purchaser; limiting the information that is required from contractors to assess outcomes; and obtaining other data on a one-off basis.⁸⁴² Guidance from Value Wales regarding how to use the tool includes the statement that the data collection form is a menu rather than a list of what should be included. It advises that only appropriate community benefits should be chosen in order to minimise the amount of data required. However, there has been low compliance in using the tool, as reported by Lynch and Unk, who indicate that the requirements are seen as difficult. This is supported by the findings of Thatcher and Sharp: data collection for LM3 was found to be time consuming and it is difficult to control the quality and accuracy of the data collected.⁸⁴³ Scotland offers a number of sustainable tools but also relies on SROI. However, Scotland reported difficulty in demonstrating the impact of community benefits in both 2015 and 2019. The UK, in common with Ireland, has no government framework for measuring and evaluating social value; however, this may change in response to their civil society strategy which commits to requiring social value in all government spending and its consultation on an evaluation model.

The Netherlands now has two versions of its own SROI: the classic method, focusing on inputs rather than outputs, which mandates that a minimum percentage of the contract sum for social return; and the new method, which is more flexible, targets a broader group, and works with tenderers to implement and support SR. The Netherlands has succeeded in stepping outside the paradigm of output and impact by focusing on input, similar to what Northern Ireland has done. This decision by the Dutch government was made deliberately, by defining what SR is (normally referred to as the '5% rule', where 5% of the total tender cost must be invested in the social procurement target group) without dictating precisely how these objectives are to be achieved.

One could argue that this focus on input is a matter of successfully stepping outside the restraining requirements of the framework of theoretical welfare economics in which policies are evaluated. However, there yet remains the issue of evaluating, outside a free market theory paradigm, whether policy intervention works. While evidence-based policy such as the use of randomised controlled trials, as used by the Cabinet Office's Behavioural Insights Team and the What Works Centres,⁸⁴⁴ may have a role to play, this too is problematic and can be of limited practical value. Evidence certainly contributes to

⁸⁴² Richard Macfarlane, 'Tackling Poverty Through Procurement' (Joseph Rowntree Foundation (JRF) 2014).

⁸⁴³ Jenny Thatcher and Liz Sharp, 'Measuring The Local Economic Impact Of National Health Service Procurement In The UK: An Evaluation Of The Cornwall Food Programme And LM3' (2008) 13 *Local Environment* 253.

⁸⁴⁴ Angus Deaton and Nancy Cartwright, 'Understanding And Misunderstanding Randomized Controlled Trials' (2018) 210 *Social Science & Medicine* 2.

the process of cumulative understanding—but so do personal experience and public debate. Delving into the area of evidence-based policy is beyond the realm of this thesis,⁸⁴⁵ however, while a focus on outcomes and the role of evidence in procurement policy-making has its place, ultimately, whether something should be done involves value judgements and political choices. More generally, there is a need to balance an evidence-based focus on the outcomes of using social clause with a principles-based focus on the delivery system. Reliance on ‘the evidence’ is meaningless without the power to choose what evidence counts. In this context, the research aims to raise and explain these issues in order to help policymakers clarify their choices and make more informed decisions. As previously noted, different conceptions of social value and different approaches to the measurement and evaluation of social value permeate current social procurement practices. These issues suggest that approaches to measuring social value are not simply instrumental tasks but are value-laden processes that shape purchasing decisions and organisational cultures that interact with the procurement process more broadly. Evaluations of social value in social procurement processes are not ‘neutral acts of verification but actively shape the design and interpretation of “auditable performance”’.⁸⁴⁶ Ultimately, it should be remembered that the process of assessing social value is not about the measurement itself but about changing behaviours among stakeholders that can maximise positive outcomes for the disadvantaged in the community. The data produced is not an end in itself but is information to assess the intervention. By focusing on achieving the output, stakeholders may seek easier ways to meet them, for example, by seeking beneficiaries that take less effort and resources to manage, at the expense of the difficult cases who really need help. So, what should be done? A bottom-up approach that places the community and its social needs and priorities at the foundation of any social intervention is fundamental. As is a social procurement policy created to meet those needs, taking into account what needs are already being met and working collaboratively with other organisations in the community to achieve this. The policy should be linked to required targets and should establish how these targets will be measured by means of valid and reliable metrics and methods of data collection and analysis—in a way which minimises potential bias. To avoid being burdensome, the range of social/community benefits must be limited and the information that is required from contractors to assess outcomes must be minimal. All other data must be obtained on a one-off basis, as suggested by Macfarlane. Finally, what about social value? Do we monetise social value outcomes by using techniques such as SROI? Those in favour argue that by making outcomes commensurate with monetary representation through the use of financial proxies allows their value to be acknowledged and comprehensible to those both within and external to the activity. However, we have seen that, underpinning the principles, are a number of assumptions that are concealed by adherence to what is often accepted as a technological tool but which obscures the theoretical and methodological issues beneath. There is a need for further consideration of the implications of these principles for the development of social value practice. By recognising that by defining value for money based on efficiencies, effectiveness, and a reduction of costs, we are relying on a free market economic imperative which leads to the need for an economic determination of social value, may allow us to conceive of other ways of viewing social value. When we consider how social

⁸⁴⁵ Paul Cairney, 'Evidence-Based Best Practice Is More Political Than It Looks: A Case Study Of The 'Scottish Approach' (2017) 13 *Evidence & Policy: A Journal of Research, Debate and Practice* 499.

⁸⁴⁶ Rosalind Pritchard and Maria Slowey, 'Resilience: A High Price For Survival? The Impact Of Austerity On Irish Higher Education, South And North', *Debating Austerity in Ireland: crisis, experience and recovery* (Royal Irish Academy 2017) 111–119.

valuation practice, as a decision-making tool, is driven by fiscal and market-based incentives, rather than by consideration of the wider benefits to the community, we can see how this has resulted in ‘the elevation of market-based principles and techniques of evaluation to the level of state-endorsed norms.’⁸⁴⁷ It is evident that there is a need for a wider discussion of the benefits and deficiencies of social valuation practice at a theoretical level in order to enable decision makers to make choices based on the social value of an intervention to society as a whole. The construction of value and valuation practices is complicated and multi-layered and elucidation of the techniques, networks, and narratives that are involved is essential to an understanding of the deficiencies and possibilities of value in political, social, and environmental terms. Moreover, it is pivotal to judgements underpinning how social value is calculated, understood, and used within public sector decision-making.

9.5 The Future

As Raj Patel has argued, it seems that the ‘dazzle of free markets has blinded us to other ways of seeing the world’.⁸⁴⁸ At the root of trying to solve the problem of social value is the belief that price and value are for most purposes one and the same. This notion is based on mainstream economic theory that does not reflect a scientific representation of the world and how it works but derives from an ideology that contains subjective judgements and beliefs which obscure the complexity of the free market and how human beings interact with it. In my opinion, the biggest problem with this viewpoint is how silently influential it is as regards policy choices. At a fundamental level, each person’s view of economic and political issues is shaped by the economic perspective that they subscribe to, and a lack of awareness of other perspectives results in a one-sided approach. Ha-Joon Chang has pointed out that one’s idea of whether a market is ‘working’ or not depends on one’s school of thought: what one sees as market failure, or whether one sees market failure, depends on one’s economic theory.⁸⁴⁹ Earle argues that ‘viewing everything relative to a single, mechanical ‘ideal’ thwarts a full scrutiny of the benefits and drawbacks of markets from a variety of perspectives’.⁸⁵⁰ Pluralism in economics expands the scope of understanding of how economic theory play a background role in shaping political discussion, including public procurement markets and the creation of social value.

There is evidence of a broader conception of value in public sector spending regarding the inclusion of social value in new legislation, such as the UK’s Social Value Act, the Scottish National Parties Sustainable Procurement Bill, and the Netherlands’ Public Procurement Act, and the procurement policies of Wales and the Northern Ireland. This, it could be argued, is indicative of a political response to wider changes in social priorities and attitudes to growth and development, and the growing recognition of the role and value of non-economic factors in shaping society. The position of social protections within Europe’s internal market and their interaction with the free movement principles set out in the treaties plays an important role in this discussion. We have argued that the EU rules have no role in ensuring that national resources are spent efficiently, and, therefore, there is no role for the EU in deciding on the balance between value for money and other national policy considerations such as procedural efficiency or accountability—and horizontal objectives. While the 2014 directives go much further than

⁸⁴⁷ Definition of Neoliberalism in William Davies, *The Limits Of Neoliberalism* (SAGE publications 2016).

⁸⁴⁸ Raj Patel, *The Value Of Nothing* (Portobello Books Ltd 2009).

⁸⁴⁹ Ha-Joon Chang, *Economics* (Penguin 2014).

⁸⁵⁰ Joe Earle and others, *The Econocracy* (Penguin Books 2017) 83-84.

their predecessors in endorsing environmental and social objectives in procurement, these objectives still must be balanced against the economic imperatives of competition and free movement. As we have seen, for social clauses to be included in cross-border procurement contracts, they must be connected to the ‘performance of the contract’ being awarded and be ‘linked to the subject matter of the contract’. This specifically undermines the right of Member States to pursue horizontal objectives, many of which are endorsed at EU level, via their procurement. In addition, if the social consideration is classified as a hindrance to trade, it must be *justified* in terms of a treaty exception or an objective justification recognised by the CJEU,⁸⁵¹ placing the burden on the state to prove that a non-economic justification exists. Barnard has argued this ‘inevitably prioritises’⁸⁵² the economic model over the social model, despite the balance mandated by Article 3(3) of the Treaty on the European Union and the EU Charter of Fundamental Rights. The question of how social and economic objectives are balanced plays a central role in establishing the democratic legitimacy of EU policy-making and establishing the appropriate balance between market and non-market objectives within the EU, which has a direct effect on national governments and their discretion to pursue social policies via public purchasing. For Member States to utilise this tool requires strong political will that places the community and its social needs and priorities at the foundation of any social intervention, together with a social procurement policy specifically created to meet those needs and, hence, linked to specific targets. Extending the range of social/community benefits to reflect what is required in the community would also expose the true purpose of social considerations. They are not intended to be a tick-box exercise to fulfil a requirement but a genuine effort to fight social inequality.

It is still not clear what a social market economy means in Europe, what the limits of market integration are, and what should the EU do, or refrain from doing, with regard to social policies. It remains up to Member States be bold and advance their procurement policies to truly respond to their citizens’ needs. We have seen how the different approaches of the Netherlands, Wales, Scotland, and Northern Ireland all offer lessons in the importance of clear vision, policy, and support in the use of public procurement to pursue societal goals and to create of social value.

Finally, in relation to proving whether social procurement ‘works’, whether it provides value for money and produces ‘social value’—at the heart of these questions lie a deeper question. What do we ‘value’? There is a discrepancy between the price of something and its value, one that economists cannot fix, because it is a problem inherent to the very idea of profit-driven prices. ‘Value for money’ in the context of the state is a complex and multi-faceted concept whose practical meaning is ultimately dependent upon what the state does value. The potential importance of integrating environmental and social criteria into procurement processes goes beyond trying to evaluate social value in terms of value for money. When the state chooses to purchase socially and environmentally friendly goods, works, and services, it is telling the market and its citizens what the state values. This may influence the behaviour of private market participants in terms of shaping the kind of market society we want and how we value the world and the people in it.

⁸⁵¹ See, for example *Alpine Investments BV v Minister van Financiën* () [1995] ECR I-1141; *Gebroeders Beentjes BV v Netherlands* (C-31/87) [1988] ECR 4635, (‘Beentjes’), para. 30. See also, *Commission v France* (C-225/98) [2000] ECR I-7445, (‘Nord Pas De Calais’).

⁸⁵² Catherine Barnard, ‘Procurement Law to Enforce Labour Standards’ in Guy Davidov and Brian Langille, *The Idea Of Labour Law* (Oxford University Press 2013).

Tables of Legislation and Cases

UK

Equality Act 2010
Government of Wales Act 1998
Government of Wales Act 2006
Local Government Act 1988
Local Government Act 1999
Local Government Act 2000
Northern Ireland Act 1998
Procurement Reform (Scotland) Act 2014
Public Services (Social Value) Act 2012
Scotland Act 1999

Statutory Instruments

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE),
SI 2006/246
Public Contracts (Amendment) Regulations 2009, SI 2009/2992
Utilities Contracts (Amendment) Regulations 2009, SI 2009/3100
Public Procurement (Miscellaneous Amendments) Regulations 2011, SI
2011/2053
Utilities Contracts (Scotland) Regulations 2012 SI 2012/79
Public Contracts Regulations 2015, SI 2015/102
Public Contracts (Scotland) Regulations 2015, SI 2015/466
Public Contracts and Utilities Contracts (Scotland) Amendment Regulations 2016
SI 2016/47

Ireland

The Public Service Management Act 1997

Statutory Instruments

S.I. No. 284/2016 - European Union (Award of Public Authorities Contracts) Regulations
2016
S.I. No. 286/2016 - European Union (Award of Contracts by Utility Undertakings)
Regulations 2016
S.I. No. 203/2017 - European Union (Award of Concession Contracts) Regulations 2017

The Netherlands

Amended Public Procurement Act 2012 (1 July 2016)
Procurement Act 2012
Procurement Regulations for Working 2016 (ARW 2016)
Algemene Wet Bestuurrecht (Dutch General Administrative Law Act)

European Legislation

Treaties

EC Treaty (Treaty of Rome) 1957
Treaty of European Union (Maastricht Treaty) 1992
Treaty on European Union (TEU) 2001
Treaty on the Functioning of the European Union (TFEU) 2008
Treaty of Lisbon 2009

EU Directives

- Directive 71/305/EEC on the coordination of procedures for the award of public works contracts
contracts
Directive 77/ 62/ EEC of 21 December 1976).
- Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts
- Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts
- Directive 93/36/EEC coordinating procedures for the award of public supply contracts
- Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts
- Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors
- Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
- Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC)
- Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC

EU Case Law

- Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (C-67/96) [1999] ECR I-5751
- Alpine Investments BV v Minister van Financiën (Case C-384/93) [1995] ECR I-1141
- Åklagaren v Hans Åkerberg Fransson, Case C-617/[2013] ECR I-0000
- Bundesdruckerei GmbH v Stadt Dortmund (Case C-549/13) judgement of 18 September 2014
- CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie (C-442/02) (2004) ECR I-08961
- Commission v Denmark ('Storebaelt') (Case C-243/89) [1993] ECR I-3353
- Commission v France (Nord Pas de Calais) (Case C-225/98) [2000] ECR I-17445
- Commission v Italy [2008] (Case C-412/04) ECR I-0000
- Commission v Kingdom of the Netherlands (Case C-576/10), judgement of 11 July 2013
- Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL-Bussiliikenne ('Concordia Bus') (Case C-513/99) [2002] ECR I-7213
- Contse SA, Vivisol Srl and Oxigen Salud SA v Instituto Nacional de Gestión Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud) (Contse) (Case C-234/03) [2005] ECR I-9315
- Criminal Proceedings against Jean-Claude Arblade (Cases C-369/96 and C-376/96) [1999] ECR I-8453
- Defrenne v SABENA (Case C-43/75) [1976] ECR 455
- Deutsche Telekom AG v Lilli Schröder (Case C-50/96) [2000] ECR I-00743

Deutsche Telekom AG v Agnes Vick and Ute Conze (Joined cases C-234/96 and C-235/96) [2000] ECR I-00799

Dirk Ruffert v Land Niedersachsen (Case C-346/06) [2008] ECR I-01989

Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No 2 Di Carrara ('Du Pont de Nemours') (Case C-21/88) [1990] ECR I-889

FENIN v Commission (C-205/03)[2006] ECR-6295

Fernando Zaera v INSS and others, (C-126/86) [1987] ECR-03697

Foster v British Gas (Case C-188/89) [1990] ECR I-3313

Gebroeders Beentjes BV v State of the Netherlands (Case 31/87) [1988] ECR 04635

Germany v. Parliament and Council (Case C-376/98) [2000] ECR I-8419

Höfner and Elser v Macrotron GmbH[1991] (Case C-41/90)ECR I-1979

Ingrid Schmelz v Finanzamt Waldviertel [2010] (Case C-97/09) ECR I-10465

International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti (Case C-438/05) [2007] ECR I-10779.

Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and others (Case C-341/05) [2007] ECR I-11767

Leyla Ecem Demirkan v Bundesrepublik Deutschland, judgement of 24 September 2013, Case C-221/11, ECLI:EU:C:2013:583

ENV AG and Wienstrom GmbH v Austria ('ENV') (Case C-448/01) [2003] ECR I-14527

Officier van Justitie v De Peijper (Case 104/75) [1976] ECR 613

Preussen-Elektra AG v Schleswig AG (Case C-379/98) [2001] ECR I-2099, ('Preussen-Elektra')

Mannesmann Anlagenbau Austria AG v Strohal Rotationsdruck GmbH (Case C-44/96) [1998] ECR I-73

Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon') (C-120/78) [1979] ECR 649

Roche Lietuva UAB v Kauno Dainavos Poliklinik (Case C-413/17) [2018] ECLI:EU:C:2018:865

Rush Portuguesa v. Office national d'immigration (Case C-113/89), [1990] ECR 1417

RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz (C-115/14) [2016] IRLR 125, SECAP SpA and Santorso Soc. coop. arl [2008] (Joined Cases C-147/06 and C-148/06) ECR I-3565

SIAC Construction v Mayo CC ('SIAC Construction') (Case C-19/00) [2001] ECR I-7725

Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici (Case C-247/02) [2004] ECR

Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn (Joined Cases C-569/16 and C-570/16) [2018] EU:C:2018:871.

Van Gend en Loos (Case 26/62) [1963] ECR I

Walter Tögel v Niederösterreichische Gebietskrankenkasse ('Walter Tögel') (Case C-76/97) [1998] ECR I-5357

Documents Produced By EU Institutions

European Council, 'Presidency Conclusions, Lisbon European Council'23 and 24 March 2000

—'Brussels European Council, 23/24 March 2006, Presidency Conclusions' 7775/1/06 REV 1

European Commission, 'White Paper to the Council on completing the Internal Market', COM (85) 310 final.

— 'The Cost of Non-Europe in Public Sector Procurement, in The Cost of Non-Europe, Basic Findings', (1988) vols 5A and 5B

- ‘Europe 1992: the overall challenge’ [summary of the Cecchini report]. SEC (88) 524 final, 13 April 1988.
 - ‘Public Procurement: Regional and Social Aspects’ COM(89)400 final
 - ‘Public Procurement in the EU: Special Sectoral Report No 1’ (1997)
 - ‘Public procurement in the European Union’ COM(1998) 143 final
 - ‘Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts’ COM (2000) 275 final
 - ‘Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors’ COM (2000) 276 final.
 - ‘Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement’ COM (2001) 566
 - ‘Buying Green! A handbook on environmental public procurement’ SEC (2004) 1050
 - ‘Statement by European Commissioner for Competition Neelie Kroes on results of June 21–22 European Council–Protocol on Internal Market and Competition’ MEMO/07/250 23 June 2007
 - ‘Towards a Single Market Act for a highly competitive social market economy’ COM(2010) 608 final/2
 - x— ‘Europe 2020: a strategy for smart, sustainable and inclusive growth’, COM (2010) 2020 final.
 - x— ‘Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement’ October 2010
 - ‘EUROPE 2020, A strategy for smart, sustainable and inclusive growth’ COM (2010) 2020
 - Eurostat ‘Regions in the European Union–Nomenclature of Territorial Units for Statistics’ NUTS 2010/EU-27 E
 - ‘Green Paper on the Modernisation of Public Procurement Policy: Towards a More Efficient European Procurement Market’ COM (2011) 042
 - ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM (2011) 896
 - ‘Towards a more efficient procurement market, Conference on the modernisation of European public procurement policy’ 30 June 2011
 - Commission Staff Working Paper, ‘Impact assessment accompanying the document - Proposal for a Directive of the European Parliament and of the Council on Public Procurement’ SEC(2011) 1586 final
 - ‘Guide to Cost-Benefit analysis on Investment Projects - economic Appraisal tools for Cohesion Policy 2014-2020’ 2014
- European Parliament Briefing ‘The Social and Employment Situation in the Netherlands and Outlook on the Dutch EU Presidency 2016, (2015) PE 563.473

National Reports

UK

- L. Booth, ‘Public Procurement and contracts’ (Briefing Paper, No 6029 House of Commons, 19 September 2018)
- Cabinet Office, *A Guide to SROI* (Strategy Unit, Cabinet Office London, 2003)
- Cabinet Office, *Public bodies reform reports, ‘Public Bodies Reform–Proposals for Change’* (14 December 2010)
- <https://webarchive.nationalarchives.gov.uk/20121003173331/http://www.direct.go>

[v.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191543.pdf](https://www.gov.uk/guidance/public-sector-procurement-policy#introduction) accessed 5 October 2019.

Cabinet Office, Guidance: Social Value Act: information and resources (2016)

Cabinet Office, *Public Procurement Policy* (1 October 2015)
<https://www.gov.uk/guidance/public-sector-procurement-policy#introduction>
 accessed 4 December 2019.

Cabinet Office, Procurement Policy Note–Public and the Public Sector Equality Duty (PPN 01/13)

Cabinet Office, *Social Value Act review* (Crown 2015)

Cabinet Office and Crown Commercial Service, *EU Procurement Directives and the UK Regulations*, updated 1 March 2017

Cabinet Office, Social Value in Government Procurement 11 March 2019

Equality and Human Rights Commission, *Buying Better Outcomes: Mainstreaming Equality Considerations in Procurement Guide for Public Authorities in England* (2013)

Fujiwara D and Campbell, R, ‘Valuation Techniques for Social Cost-Benefit Analysis: Stated Preference, Revealed Preference and Subjective Well-Being Approaches A Discussion of the Current Issues’ (HM Treasury 2011)

Government Equality Office, *Review of the Public Sector Equality Duty: Report of the Independent Steering Group* 6th September 2013

HM Government, *Civil Society Strategy: building a future that works for everyone*, August 2018

HC EU Procurement Directives and the UK Regulations Deb, 15 February 2011, col 913

HM Treasury, *The Green Book: Appraisal and Evaluation in Central Government* (1995)

Mulgan, G and Albury D, ‘Innovation in the public Office of the Third-Sector’ (2009)

Nicholls, J, ‘Why Measuring and Communicating Social Value Can Help Social Enterprise become More Competitive’ Cabinet Office, Office of the Third-Sector

Office of Government Commerce, *Explanatory memorandum to the Public contracts regulations 2006. SI 2006/5 (2006)sections 4.2 and 6.3.*

Public Health England Module: *Creating Social Value Implementation note* (2015)

Third Sector, ‘Civil Society Strategy: Reaction on Social Media’ 9 August 2018

UK Local

Croydon Council, *Social Value Policy 2019-2023* (2019)

Haringey Council, *SME Procurement Pilot: Community Benefit Clauses in Tenders and Contracts* (5 April 2005)

Harrow Council, *Social Value Case Study, Integrating Social value into Procurement at Harrow Council* (Social Value Portal, 2017)

Local Government Association, *National Procurement Strategy for Local Government in England 2018* (2018)

Local Government Information Unit, *Public Services (Social Value) Act 2012: Policy Briefing*(2012)

London Borough of Camden, *VCS Funding Implementation Update, Report to the Culture and Environment Scrutiny Committee* (1 April 2008)

Nottinghamshire County Council, ‘Procurement and community benefits, Guidance for Nottinghamshire-base small to medium enterprises (SMEs)’
 <<http://www.nottinghamshire.gov.uk/living/business/businesswiththecouncil/procurementpoliciesandprocedures/>> accessed 1 August 2013

Nottinghamshire County Council, 'Procurement and equality of opportunity'
<<http://www.nottinghamshire.gov.uk/living/business/businesswiththecouncil/procurementpoliciesandprocedures/>> accessed 1 August 2013.

Wales

Auditor General for Wales, *Public Procurement in Wales* October 2017
Constructing Excellence in Wales, Community Benefits Policies in Construction:
Evaluating the Impact. (2012)
National Assembly for Wales, The Record of Proceedings, The Impact of Procurement
Policy in Wales Jane Hutt 16.20 (2 December 2014)
<http://www.assembly.wales/cy/bus-home/pages/rop-nolinks.aspx?meetingid=2767&language=en&c=Record+of+Proceedings&startDt=03%2F11%2F2014&endDt=31%2F12%2F2014>
National Assembly for Wales, "James J, Oral Statement - Update on the Better Jobs,
Closer to Home Programme" 5 June 2018, paragraph 4.30 to 4.36
<http://record.assembly.wales/Plenary/4987#A43887> assessed 3rd August 2018
Value Wales, A guide to the Community Benefits Measurement Tool Version 6.6 (July
2014)
Wales Audit Office, *Public Procurement in Wales* (2017)
Welsh Government, Community Benefits Delivering Maximum Value for the
Welsh Pound—2014 (2014)
Welsh Government, *Community benefits: online training* <https://gov.wales/community-benefits-online-training> accessed 3 October 2019.
Welsh Government, Welsh Procurement Policy Statement, June 2015
Welsh Government, Community Benefits Policy Maximising Value For The Welsh
Pound (12 April 2016)

Scotland

MacFarlane R and Cook M, "Community Benefits in Public Procurement" (The Scottish
Government 2008)
McClelland J, 'Review of Public Procurement in Scotland - Report and
Recommendations' (Scottish Executive, March 2006)
The Scottish Government, Community Benefits in Public Procurement (2008)
The Scottish Government News Release, 'Scotland's Third Way' 23 December 2011
<http://www.scotland.gov.uk/News/Releases/2011/12/23120206>
accessed on 4 January 2013.
The Scottish Government, Research Report: Embedding Social Value through
Sustainable Procurement Survey of Public Sector Commissioners and
Procurement Professionals (2012)
The Scottish Government, *Procurement Scottish Procurement Policy Note*, SPPN 6/2014
(20 November 2014)
The Scottish Government, *Scottish Procurement Changes to the Procurement Rules in
Scotland*, Policy Note SPPN 6/2015, 18 December 2015
The Scottish Government. Annual report on procurement activity in Scotland (2019)
The Scottish Government, Annual report on procurement activity in Scotland SG/2019/18
2019
The Scottish Government, *Guidance under the Procurement Reform (Scotland) Act 2014*
March 2016
<https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2016/03/guidance-under-procurement-reform-scotland-act->

- [2014/documents/00496919-pdf/00496919-pdf/govscot%3Adocument/00496919.pdf](https://www.gov.scot/publications/00496919-pdfs/00496919-pdfs/govscot%3Adocument/00496919.pdf) accessed 3 October 2019
- The Scottish Government, *Policy, Public sector procurement* (Cabinet Secretary for Finance, Economy and Fair Work) <https://www.gov.scot/policies/public-sector-procurement/> accessed 3 October 2019
- The Scottish Government, *Public sector procurement, Community benefit in procurement* <https://www.gov.scot/policies/public-sector-procurement/community-benefits-in-procurement/> Accessed 4 October 2019.
- The Scottish Government, *Public procurement: governance* (1 October 2018) <https://www.gov.scot/publications/public-procurement-governance/> accessed 4 November 2019.
- The Scottish Government, *Publication - Advice And Guidance: Sustainable procurement duty tools*, (Scottish Procurement and Commercial Directorate 3 September 2018) <https://www.gov.scot/publications/sustainable-procurement-duty-tools/> accessed 3 September 2019
- The Scottish Government, *Publication–Factsheet: Public procurement: governance* (Scottish Procurement and Commercial Directorate) <https://www.gov.scot/publications/public-procurement-governance/> accessed 3 October 2019
- The Scottish Government, *The Public Procurement Reform Programme 2006–2016, Achievements And Impact* November 2016
- The Scottish Government, *The Scottish Model of Procurement*, <https://www.webarchive.org.uk/wayback/archive/20180529233014/http://www.gov.scot/Topics/Government/Procurement/about/spd-aims> accessed 3 October 2018.
- The Scottish Government, *The Sustainable Public Procurement Prioritisation Tool* <https://www2.gov.scot/About/Performance/scotPerforms/partnerstories/SustainablePublicProcurementPrioritisationTool> accessed 3 October 2019

Northern Ireland

- Buy Social Website, *Broker FAQs*, <https://buysocialni.org/brokers/broker-faqs/> accessed March 2019
- Buy Social Website, *Case Study*, www.buysocialni.org/case-studies assessed March 2019
- Buy Social Website, <https://buysocialni.org/#resources> accessed March 2019
- Buy Social Website, *Procurement*, <https://buysocialni.org/procurement/> accessed March 2019
- NI Department of Finance and Personnel, *Northern Ireland Public Procurement Policy*, Version 11, August 2014
- NI Department of Finance, *Procurement Guidance Note, Integrating Social Considerations Into Contracts* (PGN 01/13, 14th September 2016)
- NI Department of Finance, *Definition of best value for money*, <https://www.finance-ni.gov.uk/articles/definition-best-value-money> accessed March 2019
- Northern Ireland Executive, *Programme for Government* (February 2001)
- Northern Ireland Assembly, *Research Paper, On Social Clauses in public contracts* (2009)
- Northern Ireland Assembly, *Social Clauses and Valuing Social Impacts* Briefing Note 16/09 2009
- Northern Ireland Executive, *Programme for Government 2011-15* (March 2012)
- Strategic Investment Board, *Buy Social Training Toolkit: Targeted Recruitment & Training* 1st February 2019
- Strategic Investment Board, *Buy Social, A practical guide to socially responsible public procurement* (Edition 3, April 2016)

Ireland

- Dáil, 'Written Answers 369, Minister Brendan Howlin TD', 4 November 2014
<https://www.kildarestreet.com/wrans/?id=2014-11-04a.730>
- Dáil, 'Written Answer 240, Minister Brendan Howlin TD,' 16 December 2014
<https://www.kildarestreet.com/wrans/?id=2014-12-16a.353&s=social+clauses+brendan+howlin#g355.r>
- Department of Health, Press Release "Government approves Phase B construction investment decision for new children's hospital project" 18 December 2018
<https://health.gov.ie/blog/press-release/government-approves-phase-b-construction-investment-decision-for-new-childrens-hospital-project/> accessed 4 October 2019
- Department of Jobs, Enterprise and Innovation, Maximising Procurement Opportunities in "Action Plan for Jobs 2014" (2014)
- Department of Public Expenditure and Reform, Circular 13/13: The Public Spending Code: Expenditure Planning, Appraisal & Evaluation in the Irish Public Service - Standard Rules & Procedures DPE S 431/10/2011
- Department of Public Expenditure and Reform, *Circular 06/2018: The Public Spending Code: Publication of Post Project Reviews* DPE 022/007/2018 26 March 2018
- Department of Public Expenditure and Reform, Circular 18/2019: Update of the Public Spending Code (PSC): Central Technical References and Economic Appraisal Parameters DPE 022/006/2019 25th July 2019
- Department of Public Expenditure and Reform, Press Releases, 'Minister for Public Expenditure and Reform, Mr. Brendan Howlin, TD, announces establishment of Social Clauses Project group' June 9th 2014
- Department of Public Expenditure and Reform, Press Release, Government takes further steps to promote 'green' public procurement, 21 October 2019
<https://www.gov.ie/en/news/f633a8-government-takes-further-steps-to-promote-green-public-procurement/> accessed 3 November 2019
- Department of Public Expenditure and Reform, *The Public Spending Code, E- Technical References* <https://publicspendingcode.per.gov.ie/technical-references/> accessed 3 March 2019
- Government Accounting, *Section D An Overview Of Financial Management And The Value-For-Money Framework*, <https://govacc.per.gov.ie/wp-content/uploads/2012/05/SECTION-D.pdf> accessed 3 March 2018
- Houses of the Oireachtas website, *Social Clauses in Public Procurement Bill 2013*
<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/13413/document1.htm> accessed 3 October 2019
- Houses of the Oireachtas website, *Public Services and Procurement (Social Value) Bill 2015 (Bill 7 of 2015)*
<https://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2015/715/document1.htm> accessed 3 October 2018
- Houses of the Oireachtas website, *Public Services and Procurement (Social Value) Bill 2017 (Bill 4 of 2017)*
<https://www.oireachtas.ie/documents/bills28/bills/2017/417/b0417d.pdf> Accessed 3 October 2018
- Houses of the Oireachtas website, *Dáil Éireann debate* (21 Feb 2017)
<https://www.oireachtas.ie/en/debates/debate/dail/2017-02-21/32/> accessed 3 October 2019.

Local Government Management Agency, *Irish Local Government*,
<https://www.lgma.ie/en/irish-local-government/> accessed 4 November 2019
National Development Finance Agency (NDFA) for the Department of Education and Skills (DoES), *Annual Report* (2014)
Office of Government Procurement, National Public Procurement Policy Framework June 2018
Office of Government Procurement, Incorporating Social Considerations into Public Procurement (2018)
Office of Government Procurement, *Social Considerations Information Note* (OGP 2019)

The Netherlands

BU [Construction and Implementation (B + U)] website; *Social value through a new perspective on tendering* January 11, 2016
https://bouwuitvoering.nl/politiek_en_economie/maatschappelijke-waarde-door-nieuwe-kijk-op-aanbesteden/ accessed 3 October 2019
Langedijk, Policy framework Participation Act Heerhugowaard, Alkmaar and Langedijk 2015-2018
https://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/Historie/Langedijk/358206/358206_1.html, accessed 3 October 2019
Ministry of Infrastructure and Water Management, *Sustainable Procurement Manifesto 2016 - 2020 (SP Manifesto)* December 2016
<https://www.pianoo.nl/en/sustainable-public-procurement/developments/sustainable-procurement-manifesto-2016-2020-text> accessed 3 November 2019
Parliamentary paper 30 196, No 184, Session 2011-2012
PIANOO, *Best value for money* <https://www.pianoo.nl/nl/themas/beste-prijs-kwaliteitverhouding-bpkv> accessed 8 November 2019.
PIANOO, *Social Return for Money*, <https://www.pianoo.nl/en/sustainable-public-procurement/spp-themes/social-return-investment-sroi> Accessed 4 October 2019.
Noord-Holland Noord, *SROI in Noord-Holland Noord, Toolkit 2017-2019*
https://www.rpa-nhn.nl/download_file/view/208/247 accessed 3 October 2019
Rijksoverheid, *Action plan for socially responsible procurement 2015-2020* (11th September 2015)
<https://www.rijksoverheid.nl/documenten/kamerstukken/2015/09/11/plan-van-aanpak-maatschappelijk-verantwoord-inkopen-2015-2020>
Stichting Onderzoek Multinationale Ondernemingen (SOMO) *A Review of Dutch Policy for Socially Responsible Public Procurement*, March 2014

Bibliography

- Adams R, Symart P and A Huff, 'Shades of Grey: Guidelines for Working with the Grey Literature in Systematic Reviews For Management And Organizational Studies' (2016) 19 *International Journal of Management Reviews* 23
- Adler M, *The Oxford Handbook of Well-Being and Public Policy* (Oxford University Press 2016)
- Adler M, *Well-Being and Fair Distribution* (Oxford University Press 2012)
- Allen K, *The Corporate Takeover of Ireland* (Irish Academic Press 2007)
- Anderson B, 'The Concept of Value Further Considered' (1915) 29 *The Quarterly Journal of Economics* 45
- Atkinson, A B, *Inequality: What can be done?* (Harvard University Press 2015)
- Andrecka M, 'Corporate Social Responsibility and Sustainability in Danish Public Procurement' (2017) 12 *European Procurement & Public Private Partnership Law Review* 331
- Arnould J, 'Secondary Policies in Public Procurement: The Innovations Of The New Directives' [2004] *Public Procurement Law Review*
- Arnall A, P Eeckhout and T Tridimas, *Continuity and Change in EU Law* (Oxford University Press 2008)
- Arrowsmith S and others, *EU Public Procurement Law* ([EU Asia Inter-University Network for Teaching and Research in Public Procurement Regulation] 2010)
- Arrowsmith S, Wallace D and Linarelli J, *Regulating Public Procurement* (Kluwer Law International 2000)
- Arrowsmith S, *A Guide to the Procurement Cases of The Court of Justice* (Earlsgate Press 1992)
- Arrowsmith S, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 *Journal of Public Procurement* 23
- Arrowsmith S, 'Special Issue–The New EU Procurement Directives: Part I; Editor’s Note' (2014) *Public Procurement Law Review* 231
- Arrowsmith S, *The Law of Public and Utilities Procurement: Regulation in the EU and UK* (3rd edn, Sweet & Maxwell 2014)
- Arrowsmith S, *The Law of Public and Utilities Procurement Vol I & II* (Sweet & Maxwell 2018)
- Arrowsmith S, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial And Horizontal Procurement Policies' (2012) 14 *Cambridge Yearbook of European Legal Studies* 45
- Arrowsmith S and Kunzlik P, *Social And Environmental Policies in EC Procurement Law* (Cambridge University Press 2009)
- Arrowsmith S and Kunzlik P, *The Law of Public and Utilities Procurement: Regulation in the EU And UK* (3rd edn, Sweet & Maxwell 2014)
- Arvidson M and others, 'Valuing the Social? The Nature and Controversies of Measuring Social Return on Investment (SROI)' (2013) 4 *Voluntary Sector Review* 34
- Arvidson M and Lyon F, 'Social Impact Measurement and Non-Profit Organisations: Compliance, Resistance, And Promotion' (2013) 25 *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations* 564
- Arvidson M and Kara H, 'Putting Evaluations to Use: From Measuring to Endorsing Social Value.' (Third Sector Research Centre 2013)
- Aspromourgos T, *On the Origins of Classical Economics* (Routledge 1996)

- Backhouse R, 'Sidgwick Marshall and the Cambridge School of Economics' (2006) 38
History of Political Economy 34
- Bagilhole B, 'Managing to be Fair: Implementing Equal Opportunities in a Local Authority' (1993) 19 Local Government Studies 134
- Baglioni S and Sinclair C, 'Introduction: Social Innovation and Social Policy' (2014) 13
Social Policy and Society 445
- Baldwin R, Cave M and Lodge M, *The Oxford Handbook of Regulation* (Oxford University Press 2010)
- Barman E, 'What Is The Bottom Line For Nonprofit Organizations? A History Of Measurement in the British Voluntary Sector' (2007) 18 VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations 556
- Barnard C, *The Substantive Law of The EU* (Oxford University Press 2019)
- Barnard C, 'To Boldly Go: Social Clauses in Public Procurement' (2016) Industrial Law Journal 23
- Barnard C, 'Viking and Laval: An Introduction' (2008) 10 Cambridge Yearbook of European Legal Studies 556
- Barraket J, Furneaux C and Keast R, *Social Procurement and New Public Governance* (Routledge 2015)
- Bateman B, Hirai T and Marcuzzo M, *The Return to Keynes* (Belknap Press of Harvard University Press 2010)
- Belfiore E, 'Auditing Culture' (2004) 10 International Journal of Cultural Policy 45
- Bix B, 'Law as an Autonomous Discipline' (2002) SSRN Electronic Journal
- Blanke H and Mangiameli S, *The Treaty on European Union (TEU)* (Springer 2013)
- Blaug M, *Economic Theory in Retrospect* (Cambridge University Press 2013)
- Blaug M, 'The Fundamental Theorems of Modern Welfare Economics, Historically Contemplated' (2007) 39 History of Political Economy 321
- Blinder A, *Economic Policy and the Great Stagflation* (Elsevier Science 2014)
- Blyth M, *Great Transformations* (Cambridge University Press 2002)
- Boldeman L, *The Cult of the Market* (ANU E Press 2007)
- Bourdieu P and Nice R, *Acts of Resistance* (The New Press 2006)
- Bovis C, *EU Public Procurement Law* (Edward Elgar Pub 2015)
- Bovis C, *Public Procurement in the European Union* (Palgrave Macmillan 2005)
- Bovis C, 'Public Procurement in the European Union: A Critical Analysis of the New Regime' (2006) Legal Issues Economic Intergration 342
- Boyer P, *The Oxford Companion to United States History* (Oxford University Press 2006)
- Brandeis L, 'Living Law' (1961) 10 Illinois Law Review 231
- Bresser-Pereira L, 'The 2008 Financial Crisis and Neoclassical Economics' (2010) 30
Revista de Economia Política 45
- Bresser-Pereira L, 'The Global Financial Crisis, Neoclassical Economics, and the Neoliberal Years of Capitalism' (2010) Revue de la Régulation 34
- Brinkerhoff D, 'Unpacking The Concept Of Political Will to Confront Corruption' (CHR Michelsen Institute 2010) <<https://www.u4.no/publications/unpacking-the-concept-of-political-will-to-confront-corruption.pdf>> accessed 3 December 2019
- Bronsteen J, Buccafusco C and Masur J, 'Well-Being Analysis vs. Cost-Benefit Analysis' (2012) 62 Duke Law Journal 546
- Brouwer P, Andriessen S and van Wijk E, 'Social Return Bij Het Rijk Inkooptechnische Haalbaarheid.' (TNO Arbeid 2011)
- Brower P, Smit A and van Wijk E, 'Social Return Bij Het Rijk: Effecten Op Arbeidsmarkt- En Reintegratiebeleid Arbeid.' (TNO Arbeid 2010)

- Brown W, 'Neo-Liberalism and the End of Liberal Democracy' (2003) 7 Theory & Event 13
- Bryson J, Crosby B and Bloomberg L, 'Public Value Governance: Moving Beyond Traditional Public Administration and the New Public Management' (2014) 74 Public Administration Review 57
- BSI, 'Social Value and Impact Assessment Due Diligence Research Report' (2016)
- Buchanan D, *The SAGE Handbook of Organizational Research Methods* (SAGE 2011)
- Bücker A, 'A Comprehensive Social Progress Protocol is Needed More than Ever' (2013) 4 European Labour Law Journal 78
- Bull M and others, 'Conceptualising Ethical Capital in Social Enterprise' (2010) 6 Social Enterprise Journal 145
- Bull MD Wilson, 'Demonstrating Value in Chaos: The Elephant in the Room' (International Social Innovation Research Conference (ISIRC), Birmingham, 12 September 2012 - 14 September 2012)
- Burritt R, *Environmental Management Accounting and Supply Chain Management* (Springer 2011)
- Bursch K, 'Euro Crisis, Austerity Policy and The European Social Model, How Crisis Policies In Southern Europe Threaten the EU'S Social Dimension' (Friedrich Ebert Stiftung 2013)
- Butler J and Redding D, 'Healthy Commissioning: How the Social Value Act Is Being Used by Clinical Commissioning Groups' (National Voices and Social Enterprise UK 2017) <<https://www.nationalvoices.org.uk/publications/our-publications/healthy-commissioning-how-social-value-act-being-used-clinical>> accessed 3 December 2019
- Byrne M, 'Asset Price Urbanism and Financialization After the Crisis: Ireland's National Asset Management Agency' (2016) 40 International Journal of Urban and Regional Research 45
- Cairney P, 'Evidence-Based Best Practice Is More Political Than It Looks: A Case Study of the 'Scottish Approach'' (2017) 13 Evidence & Policy: A Journal of Research, Debate and Practice 678
- Calabresi G, 'The Pointlessness of Pareto: Carrying Coase Further' (1991) 100 The Yale Law Journal 234
- Calandrillo S, 'Responsible Regulation: A Sensible Cost-Benefit, Risk vs. Risk Approach to Federal Health and Safety Regulation' (2005) 81 Boston University Law Review 23
- Calleja A, *Unleashing Social Justice Through EU Public Procurement* (Routledge 2017)
- Campbell J and Pedersen O, *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press 2018)
- Caranta R and Trybus M, *The Law of Green and Social Procurement in Europe* (Djøf Pub 2010)
- Caranta R and Treumer S, *Modernising Public Procurement: The New Directive* (DJOF Publishing 2014)
- Champ P, Boyle K and Brown T, *A Primer on Nonmarket Valuation* (Springer Dordrecht 2003)
- Chang H, *Economics* (Penguin 2014)
- Chang H, *Kicking Away the Ladder* (Anthem Press 2007)
- Chiti E and Mattarella B, *Global Administrative Law and EU Administrative Law* (Springer 2011)
- Christensen K, *Encyclopedia of Community* (Sage Publ 2003)

- Claassen R and others, 'Introduction to the Special Issue 'Rethinking the European Social Market Economy'' (2018) 57 *Journal of Common Market Studies* 456
- Clark B, *Principle of Political Economy* (Praeger 1998)
- Clark C, Rosenzweig W and Long D, 'Double Bottom Line Commissioning Outcomes and Recovery' (UC Berkley 2004)
- Clark C and Rosenzweig W, 'Double Bottom Line Project Report: Assessing Social Impact in Double Bottom Line Ventures' (The Rockefeller Foundation 2004)
- Coleman J, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 *Hofstra Law Review* 89
- Cooter R and Ulen T, *Law and Economics* (6th edn, Addison-Wesley 2012)
- Costamagna F, 'The Internal Market and the Welfare State After the Lisbon Treaty' (2011) 5 *Research Paper Observatoire Social Européen* 456
- Courtney P and others, 'A Socio-Economic Study of Grant Funded Traditional Drystone Wall And Farm Building Restoration in The Yorkshire Dales National Park' (English Heritage & Defra 2007)
- Courtney P, Lépicier D and Schmitt B, 'Spatial Patterns Of Production Linkages in the Context of Europe's Small Towns: How are Rural Firms Linked to the Local Economy?' (2008) 42 *Regional Studies* 78
- Cox A, *Public Sector and Public Procurement in the European Community* (Earlsgate Press 1992)
- Cox A, *The Single Market Rules and the Enforcement Regime after 1992* (Earlsgate Press 1993)
- Cox J, Bowen M and Kempton O, 'Social Value: Understanding the Wider Value of Policy Interventions' (New Economy 2012)
- Craig J and Lynk S, *Globalization and the Future of Labour Law* (Cambridge University Press 2010)
- Craig P and De Búrca G, *The Evolution of EU Law* (Oxford University Press 2011)
- Craig P and De Búrca G, *EU Law* (Oxford University Press 2014)
- Dashwood A, 'Viking And Laval: Issues of Horizontal Direct Effect' (2008) 10 *Cambridge Yearbook of European Legal Studies* 445.
- Davidov G and B Langille, *The Idea of Labour Law* (Oxford Univ Press 2013)
- Davies A, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 *Industrial Law Journal*
- Davies W, 'What Is "Neo" About Neoliberalism?' (The New Republic, 2019) <<https://newrepublic.com/article/143849/neo-neoliberalism>> accessed 27 May 2019
- Davies W, *The Limits of Neoliberalism* (SAGE publications 2016)
- Dawson MB Witte, 'The EU Legal Framework of Social Inclusion and Social Protection: Between The Lisbon Strategy And The Lisbon Treaty',) *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia 2012)
- Dayson C, 'Evaluating Social Innovations and their Contribution to Social Value: The Benefits of a 'Blended Value' Approach' (2017) 45 *Policy & Politics* 67
- de Witte B, 'European Union Law: A Unified Academic Discipline?' (RSCAS 2008)
- Deakin S, 'Regulatory Competition After Laval' (2008) 10 *Cambridge Yearbook of European Legal Studies* 234
- Deaton A and Cartwright N, 'Understanding and Misunderstanding Randomized Controlled Trials' (2018) 210 *Social Science & Medicine* 23
- Dekel O, 'The Legal Theory of Competitive Bidding for Government Contracts' (2007) 37 *Public Contract Law Journal* 567

Denny SF Seddon, *Social Enterprise* (Routledge 2014)

DG GROW, 'Public Procurement Indicators 2015' (G4 - Innovative and e-Procurement 2016)

Diaz L, 'Social Cost/Benefit Analysis' (1984) *Accounts Journal* 12

Dietz S and Porter C, 'Making Sense of Social Value Creation: Three Organizational Case Studies.' (2012) 14 *ECO* 456

Dolan P and Kahneman D, 'Interpretations Of Utility And Their Implications For The Valuation Of Health' (2007) 118 *The Economic Journal* 123

Dolan P, *Happiness By Design* (Penguin 2004)

Donner J and Krom P, 'Kabinetstandpunt Ten Aanzien Van Social Return Bij Het Rijk Kenmerk' (Ministerie van Binnenlandse Zaken en Koninkrijksrelaties 2011)

Durlauf S and Blume L, *The New Palgrave Dictionary of Economics* (2008)

Eadie R, Murphy M and McCann L, 'An Analysis of Social Clause Impacts Between Various Options Tested in Government Construction Contracts', (ixth International Scientific Conference on Architecture and Civil Engineering 2019)

Earle J, Cahal M and Ward-Perkins Z, *The Econocracy* (Penguin Books 2017)

Edwards R and others, 'A Study of the Social and Economic Impacts and Benefits of Traditional Farm Building Repair and Re-Use in The Lake District ESA' (English Heritage and Defra 2005)

Ellis J and Gregory T, 'Developing Monitoring and Evaluation in the Third Sector: Research Report' (Charities Evaluation Service (CES) 2008)

Emerson J, Wachowics J and Chun S, 'Social Return on Investment: Exploring Aspects of Value Creation in The Non-Profit Sector' (The Roberts Foundation 2000)

Emerson J, 'The Blended Value Proposition: Integrating Social and Financial Returns' (2003) 45 *California Management Review* 67

Emmerik M, van Jong M and de Brouwer P, 'Inventarisatie Social Return Bij Gemeenten' (TNO 2014)

Erridge A, Fee R and Hennigan S, 'Pilot Project on Utilizing the Unemployed in Public Contracts: Final Evaluation Report' (University of Ulster 2005)

Erridge A, 'Public Procurement, Public Value and the Northern Ireland Unemployment Pilot Project' (2007) 85 *Public Administration* 67

Esping-Andersen G, *The Three Worlds of Welfare Capitalism* (Polity Press 2009)

Esping-Andersen G, *Politics Against Markets* (Princeton University Press 1985)

Esteves A and Barclay M, 'Enhancing the Benefits of Local Content: Integrating Social and Economic Impact Assessment into Procurement Strategies' (2011) 29 *Impact Assessment and Project Appraisal* 13

Evans B, Richmond T and Shields J, 'Structuring Neoliberal Governance: The Nonprofit Sector, Emerging New Modes of Control and the Marketisation of Service Delivery' (2005) 24 *Policy and Society* 76

Exodea Europe, 'Study of the Employment Opportunities Arising from the Grangegorman Development Of Dublin's North Inner City' (2009)

EY, 'Harnessing the Potential, Maximising Community Benefit from the New Children's Hospital' (2015)

Eymeri-Douzans F and J Pierre, *Administrative Reforms And Democratic Governance* (Routledge 2011)

Ferlie E, *The New Public Management in Action* (Oxford University Press 1996)

Fernández Martin J, *The EC Public Procurement Rules* (Clarendon Press 1996)

Ferri D and Cortese F, *The EU Social Market Economy and the Law* (Taylor and Francis 2019)

- Fine S, *Laissez Faire and the General Welfare State: A Study of Conflict in American Thought, 1805–1901* (University of Michigan Press, 1956)
- Floyd L, 'The Elephant in the Room: The Public Services (Social Value) Act 2012' (2013) 129 *Law Quarterly Review* 432
- Fujiwara D, 'A General Method for Valuing Non-Market Goods Using Wellbeing Data: Three Stage Wellbeing Valuation' (Centre for Economic Performance 2013)
- Fujiwara D, 'Measuring the Social Impact of Community Investment: The Methodology Paper.' (Housing Associations Charitable Trust (HACT) 2014)
- Fujiwara D and Campbell R, 'Techniques for Social Cost-Benefit Analysis: Stated Preference, Revealed Preference and Subjective Well-Being Approaches A Discussion of the Current Issues' (HM Treasury 2011)
- Gair C, 'SROI Act II: A Call to Action for Next Generation SROI' (REDF 2009)
- Galbraith J, *A History of Economics* (Penguin Books 1991)
- Garben S, 'The Constitutional (Im)Balance Between 'The Market' and 'The Social' in the European Union' (2017) 13 *European Constitutional Law Review* 786
- Giddings F, 'The Idea and Definition of Value.' (1893) 8 *Publications of the American Economic Association* 65
- Giubboni S, 'Social Rights and Market Freedom in the European Constitution: A Re-Appraisal' (2010) 1 *European Labour Law Journal* 234
- Giubboni S, *Social Rights and Market Freedom in the European Constitution* (Cambridge University Press 2005)
- Goldman L, *Oxford Dictionary of National Biography* (Oxford University Press 2009)
- Goldschmidt N and Rauchenschwandtner H, 'The Philosophy of Social Market Economy: Michel Foucault's Analysis of Ordoliberalism' (Institute for Economic Research, University of Freiburg 2007)
- Gormly J, 'What are the Challenges to Sustainable Procurement in Commercial Semi-State Bodies in Ireland?' (2014) 14 *Journal of Public Procurement* 34
- Graddy-Reed A and Feldman M, 'Stepping Up: An Empirical Analysis of the Role of Social Innovation in Response to an Economic Recession' (2015) 8 *Cambridge Journal of Regions, Economy and Society* 1
- Grangegorman, 'Labour & Learning Forum, Coordinator's End Of Year Report' (2012)
- Grazer D, 'Community Benefits In Practice And In Policy' (Atkinson Foundation 2016)
- Green D, 'Silent Revolution' (Monthly Review Press 2003)
- Greenspan A, 'Globalization' (Federalreserve.gov, 2001)
<<https://www.federalreserve.gov/boarddocs/speeches/2001/20011024/default.htm>>
> accessed 27 May 2019
- Greider W, *One World, Ready Or Not* (Simon & Schuster 1997)
- Greve B, *Handbook of Social Policy Evaluation* (Edward Elgar 2017)
- HACT, 'Measuring the Social Impact of Community Investment: A Guide to Using the Wellbeing Valuation Approach' (2014) <<http://www.hact.org.uk/measuring-social-impact-community-investment-guide-using-wellbeing-valuation-approach>> accessed 3 December 2019
- HACT, 'Procurement and Social Value: A White Paper for Wandle' (2015)
- Hall M, 'Evaluation Logics in the Third Sector' (2012) 25 *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations* 678
- Hall P and Soskice D, *Varieties of Capitalism* (Oxford University Press 2013)
- Hall P, *The Political Power of Economic Ideas* (Princeton University Press 1989)
- Hann C and Hart K, *Economic Anthropology* (Polity Press 2018)
- Hansen A and Keynes J, *A Guide to Keynes* (McGraw-Hill Pub Co 1953)

- Hanson J and Hart M, 'Law And Economics, A Companion to Philosophy of Law and Legal Theory' (Blackwell 1996)
- Harcourt B, *The Illusion of Free Markets* (Harvard University Press 2011)
- Harlock J, 'From Outcomes-Based Commissioning to Social Value? Implications for Performance Managing the Third Sector' (2014) 16 *International Journal of Management Reviews* 12
- Harlock J, 'Impact Measurement Practice in the UK Third Sector: A Review of Emerging Evidence' (Third Sector Research Centre 2013)
- Hartwich O, 'Neoliberalism: The Genesis of a Political Swearword' (Centre for Independent Studies 2009)
- Harvey D, *A Brief History of Neoliberalism* (Oxford University Press 2005)
- Hausman D, McPherson M and Satz D, *Economic Analysis, Moral Philosophy and Public Policy* (Cambridge University Press 2006)
- Heady L, 'Social Return on Investment, Position Paper' (New Philanthropy Capital 2010)
- Hebb T and Hachigian H, 'Social Value Procurement Measurement and Evaluation' (Carleton Centre for Community Innovation 2017)
- Heilbroner R, *The Worldly Philosophers* (Touchstone 2014)
- Hendricks M, Plantz M and Pritchard K, 'Measuring Outcomes of United Way-Funded Programs: Expectations and Reality' (2008) *New Directions for Evaluation* 12
- Hesselink M, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15 *European Law Journal* 45
- Hettne J, 'Sustainable Public Procurement and the Single Market—Is there a Conflict of Interest?' (2013) 8 *European Procurement & Public Private Partnership Law Review* 67
- Hindriks J and Myles G, *Intermediate Public Economics* (MIT Press 2013)
- Hobsbawm E, *The Age of Extremes, 1914-1991* (Pantheon Books 1995)
- Hofmann H and Pantazatou K, 'The Transformation of the European Economic Constitution' (2015) *SSRN Electronic Journal*
- Hood C, 'A Public Management for All Seasons?' (1991) 69 *Public Administration* 78
- Ilzkovitz F, Dierx A and Kovacs V, 'Steps Towards a Deeper Economic Integration: The Internal Market In The 21st Century. A Contribution to the Single Market Review,' (Directorate-General for Economic and Financial Affairs 2007)
- Indén T, 'Article 67, Contract Award Criteria', in *EU Public Procurement Law* (Hart 2018)
- Irwin D, *Against the Tide* (Princeton University Press 1998)
- Janssen W and Bouman G, 'Sustainable Procurement: A National Obligation?' (Gemeente.nu, 2019) <<https://www.gemeente.nu/blog/duurzaam-aanbestedenen-nationale-verplichting/>> accessed 2 December 2019
- Jevons W and Higgs H, *The Principles of Economics* (Palgrave 2001)
- Joerges C, 'The European Economic Constitution and its Transformation through the Financial Crisis' (2012) *SSRN Electronic Journal*
- Joerges C, 'What is Left of the European Economic Constitution?' (2004) 30 *European Law Review* 345
- Johnson D and Saad-Filho A, *Neoliberalism: A Critical Reader* (Pluto Press 2005)
- Jones N and Yeo A, 'Community Business and the Public Services (Social Value) Act 2012' (Power to Change 2018)
- Kahlenborn W, Moser C and Frijdal J, 'Strategic Use of Public Procurement in Europe, Final Report To The European Commission' (2010)
- Keynes J, *The General Theory of Employment, Interest, and Money* (Harcourt 1936)

- Kirshner J, 'Keynes, Capital Mobility and The Crisis of Embedded Liberalism' (1999) 6 *Review of International Political Economy* 67
- Kiser C, Leipziger D and Shubert J, *Creating Social Value: A Guide For Leaders and Change Makers* (Greenleaf Publishing 2014)
- Kotsonis T, 'Green Paper on The Modernisation of EU Public Procurement Policy: Towards a More Efficient European Procurement Market' (2011) 3 *Public Procurement Law Review* 567
- KPMG International, 'A New Vision of Value Connecting Corporate and Societal Value Creation' (2014)
- KPMG, 'Monitor Duurzaam Inkopen 2010', 15 June 2011' (2011)
- Krlev G, Munscher R and Mulbert K, 'Social Return on Investment (SROI): State-Of-The-Art And Perspectives A Meta-Analysis Of Practice in Social Return on Investment (SROI) Studies Published 2002-2012' (Centre for Social Investment 2019)
- Krugman P, 'In Praise of Cheap Labor' (Slate Magazine, 2019)
<http://www.slate.com/articles/business/the_dismal_science/1997/03/in_praise_of_cheap_labor.html> accessed 30 June 2019
- Kuijpers R, 'Implementing Social Sustainability in the Public Sector - Social Return on Investment as an Instrument to Achieve' (Open Universiteit Nederland 2016)
- Kunzlik P, 'Green Public Procurement European Law, Environmental Standards and "What To Buy" Decisions' (2013) 25 *Journal of Environmental Law* 173
- Kunzlik,P, 'Neo-liberalism and the European public procurement regime' in Catherine Barnard et al (eds), *Cambridge Yearbook of European Legal Studies 2012–2013* (Oxford, Hart Publishing, 2013)
- Kunzlik P, "The 2014 Public Procurement Package – One step forward and two back for Green and Social Procurement" in Marique and Wauters (eds.) *EU Directive 2014/24 On Public Procurement. A new turn for competition in public markets?* (Larcier, 2016)
- Langille B, 'Globalization and the Just Society–Core Labour Rights, the FTAA, and Development' [2006] *Globalization and the Future of Labour Law*
- Latané B, 'The Psychology of Social Impact.' (1981) 36 *American Psychologist* 123
- Latour B, *Reassembling the Social* (Oxford University Press 2007)
- Lawlor E, 'Social Return On Investments: An Approach to Avoiding False Economies', (UKES Annual Conference 2009)
- Lawrence A and others, 'Where is the Evidence? Realising the Value of Grey Literature for Public Policy and Practice:' (Swinburne Institute for Social Research 2014)
- Layard R, Mayraz G and Nickell S, 'The Marginal Utility of Income' (2008) SSRN Electronic Journal
- Layard R, *Happiness: Lessons From a New Science* (Penguin Books 2014)
- Leary V and Warner D, *Social Issues, Globalisation and International Institutions* (M Nijhoff 2006)
- Leighton C and Wood D, 'Measuring Social Value: The Gap Between Policy and Practice' (Demos 2014)
- London Borough of Camden, 'Commissioning Outcomes and Recovery' (Camden 2008)
- Ludlow A, 'Social Procurement: Policy and Practice' (2016) 7 *European Labour Law Journal* 56
- Luke B, Barraket J and Eversole R, 'Measurement as Legitimacy versus Legitimacy of Measures' (2013) 10 *Qualitative Research in Accounting & Management* 567

- Lynch J and others, 'Community Benefits of Public Procurement: A Comparison Between Local Governments in Wales (UK) and the Netherlands.', 25th Annual IPSERA Conference 2016 (2016)
- Macfarlane R and Cook M, 'Achieving Community Benefits Through Contracts Law, Policy and Practice' (Policy Press 2002)
- Macfarlane R, 'Tackling Poverty Through Procurement' (Joseph Rowntree Foundation (JRF) 2014)
- Maduro M, Dougan M and Spaventa E, *We the Court* (Bloomsbury Publishing 1998)
- Malloy R, *Law and Market Economy* (Cambridge University Press 2000)
- Mankiw N, *Principles of Economics* (South-Western Cengage Learning 2012)
- Marktanner M, 'Addressing the Marketing Problem of the Social Market Economy', in *Public Procurement and Labour Rights: Towards Coherence in International Instruments of Procurement Regulation* (Bloomsbury Publishing 2017)
- Marshall A, *Principles of Economics* (Verlag Wirtschaft und Finanzen 1989)
- Mattei U, *Research Handbook on Political Economy and Law* (Edward Elgar Publishing 2017)
- Mazzucato M, *The Value of Everything* (Penguin 2019)
- McConville M and Chui W, *Research Methods for Law* (Edinburgh University Press 2007)
- McCrudden C, *Buying Social Justice* (Oxford University Press 2013)
- McCrudden C, *Equality, Government Procurement, and Legal Change* (Oxford University Press 2007)
- McCrudden C, 'Country Legal and Policy Review for SRPP in Northern Ireland' (Directorate General for Employment, Social Affairs and Equal Opportunities 2008)
- McGinnis J and Movsesian M, 'The World Trade Constitution' (2001) SSRN Electronic Journal
- McHugh N and others, 'Social Impact Bonds: A Wolf in Sheep's Clothing?' (2013) 21 *Journal of Poverty and Social Justice* 12
- McNamara K, *The Currency of Ideas: Monetary Politics in the European Union* (Cornell University Press 1999)
- Mercuro N and Medema S, *Economic and the Law* (Princeton University 2006)
- Metcalf L, 'Measuring Impact: How Can Third Sector Organisations Make Sense of a Rapidly Expanding Marketplace of Tools?' (University of Birmingham 2013)
- Metcalf S, 'Neoliberalism: The Idea that Swallowed the World' (The Guardian, 2017) <<https://www.theguardian.com/news/2017/aug/18/neoliberalism-the-idea-that-changed-the-world>> accessed 30 August 2018
- Micossi S and Tosato G, 'The European Union in the 21st Century' (CEPS 2009)
- Millar R and Hall K, 'Social Return on Investment (SROI) and Performance Measurement' (2013) 15 *Public Management Review* 34
- Min H and Galle W, 'Green Purchasing Practices of US Firms' (2001) 21 *International Journal of Operations & Production Management* 675
- Monti M, 'Competition in a Social Market Economy Speech by Commissioner Monti at the Conference of the European Parliament and the European Commission on 'Reform of European Competition Law' in Freiburg On 9/10 November 2000' (2001) 1 *Competition Policy Newsletter*
- Moody M, Littlepage L and Paydar N, 'Measuring Social Return On Investment' (2015) 26 *Nonprofit Management and Leadership* 23
- Moravcsik A, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 *International Organization* 45

- Morgan R, 'Calculating Social Value: A Critical Analysis of how Social Value is Constructed, Understood and Utilised within Public Sector Value for Money Decision Making.' (Leverhulme Centre for the Study of Social Value 2015)
- Morris P, 'Legal Regulation of Contract Compliance: An Anglo-American Comparison' (1990) 19 *Anglo-American Law Review* 234
- Mulgan G, Tucker S and Rushanara A, 'Social Innovation: What it is, Why it Matters and How it Can Be Accelerated.' (Skoll Centre for Social Entrepreneurship 2007)
- Mulgan G, 'Measuring Social Value' (2010) 8 *Stanford Social Innovation Review* 23
- Mulgan G, *Metrics: Measuring Social and Public Value*, in *Art of Public Strategy* (Oxford University Press 2008)
- Mulhearn C and Vane H, *Economics for Business* (Palgrave Macmillan 2012)
- Nadeau R, *The Wealth of Nature* (Columbia University Press 2003)
- Neergaard U, *Public Procurement Law* (DJØF Publishing 2014)
- NEF, 'Equality Outcomes Social Return on Investment Analysis' (Equality and Human Rights Commission and Local Government Improvement and Development 2013)
- Nelson R, *Economics as Religion* (Pennsylvania State University Press 2014)
- Newman P, *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan 2002)
- NICA, 'Social Clauses in Northern Ireland: A Research Paper' (2012)
- Norris M, *Property, Family and the Irish Welfare State* (Palgrave 2016)
- O'Brien G, 'Envisaged Change in the Procurement Regime: The Point of View of the European Commission', (Seminar on 'Legal Aspects of EC Public Procurement', Luxembourg, 29–30 October 1998)
- OCED, 'OECD Government at a Glance 2013 (Total Value Of Public Expenditure On Goods And Services);' (2015) <<https://data.oecd.org/gga/general-government-spending.htm>> accessed 1 June 2019
- OECD, 'Northern Ireland (United Kingdom): Implementing Joined-Up Governance for a Common Purpose' (2016)
- OECD, 'Cost-Benefit Analysis and the Environment: Recent Developments' (2006)
- Painter A, 'The Washington Consensus is Dead' (the Guardian, 2019) <<https://www.theguardian.com/commentisfree/cifamerica/2009/apr/09/obama-g20-nato-foreign-policy>> accessed 27 November 2019
- Palley T, 'From Keynesianism to Neoliberalism: Shifting Paradigms in Economics' (Foreign Policy in Focus 2004)
- Pareto V, *The Mind and Society* (Routledge 2003)
- Parfit D, *Reasons and Persons* (Clarendon Press 1987)
- Patel R, *The Value of Nothing* (Portobello Books Ltd 2009)
- Phillips P, *Inside Capitalism* (Fernwood 2003)
- Pigou A, *The Economics of Welfare* (Macmillan and Co, Limited 1921)
- Polinsky A, *An Introduction to Law and Economics* (Aspen Publishers 2003)
- Pollack M, 'A Blairite Treaty: Neo-Liberalism and Regulated Capitalism in the Treaty of Amsterdam', in Karlheinz Neunreither and Antje Wiener (eds) *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press 2000)
- Posner R, *Economic Analysis of Law* (5th edn, Wolters Kluwer Law & Business 1997)
- Potts D, 'Assessing The Impact of Regeneration Spending: Lessons from the United Kingdom and the Wider World' (2008) 2 *Education, Knowledge and Economy* 56
- Power M, *The Audit Explosion* (Demos 1994)
- Power M, *The Audit Society* (European Institute for Advanced Studies in Management 1993)

- Power M, 'The Audit Society - Second Thoughts' (2000) 4 *International Journal of Auditing* 56
- Pritchard R and Slowey M, 'Resilience: A High Price for Survival? The Impact of Austerity on Irish Higher Education, South and North', in Emma Heffernan, John McHale, & Niamh Moore-Cherry (Eds.), *Debating Austerity in Ireland: crisis, experience and recovery* (Royal Irish Academy 2017)
- Ramsey L, 'The New Public Procurement Directives: A Partial Solution to the Problems of Procurement Compliance' (2006) 12 *European Public Law* 89
- Randall H, *Local Government Contracts and Procurement* (Bloomsbury Professional 2011)
- Rao P and Holt D, 'Do Green Supply Chains Lead to Competitiveness and Economic Performance?' (2005) 25 *International Journal of Operations & Production Management* 34
- Reich A, *International Public Procurement Law* (Den Haag 1999)
- Reisman J and Giennap A, 'Theory of Change: A Practical Tool for Action, Results and Learning' (Organizational Research Services, Erasmus University 2004)
- Ricardo D, *Principles of Political Economy and Taxation* (Dover Publications 2012)
- Rodgers D, *Age of Fracture* (Belknap Press of Harvard University Press 2012)
- Rossi P, Lipsey M and Freeman H, *Evaluation* (Sage 2004)
- Ruggie J, *Globalization and the Embedded Liberalism Compromise* (Max Planck Institute for the Study of Societies 1997)
- Ruggie J, 'International Regimes, Transactions, And Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 145
- Sacks J, 'The Money Trail' (New Economics Foundation 2002)
- Samuelson P, 'Consumption Theory In Terms Of Revealed Preference' (1948) 15 *Economica* 89
- Samuelson P and Nordhaus W, *Economics* (Tata McGraw Hill 2010)
- Sanchez Graells A, *Public Procurement and the EU Competition Rules* (Hart 2015)
- Sauter W and Schepel H, *State and Market in European Union Law* (Cambridge University Press 2009)
- Sauter W, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 278
- Savage H, 'A Bit Of 'I Told You So' Outside World Bank Talks' (Nytimes.com, 2008) <<https://www.nytimes.com/2008/10/11/business/11scene.html>> accessed 26 January 2019
- Say J, Prinsep C and Biddle C, *A Treatise on Political Economy* (Grigg and Elliot 1844)
- Scharpf F, 'The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy' (2009) 8 *Socio-Economic Review* 45
- Schiek D, 'The European Social Model and the Services Directive' in *The Services Directive-Consequences for the Welfare State and the European Social Model* (Copenhagen, DJØF Publishing 2008)
- Secretariat of the European Convention, 'Final Report of Working Group XI on Social Europe' (Brussels 2003)
- Semple A, *A Practical Guide to Public Procurement* (Oxford University Press 2015)
- Semple A, 'The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?' [2015] SSRN Electronic Journal
- Shanahan S and Tuma N, 'The Sociology of Distribution and Redistribution', in *The Handbook of Economic Sociology* (Princeton University Press 1994)
- Shavell S, *Foundations of Economic Analysis of Law* (Belknap 2004)

- Siems M, 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert' (2009) 7 *Journal of Commonwealth Law and Legal Education* 89
- Sjåfjell, B., & Wiesbrock, A (Eds.) *Sustainable public procurement under EU law: new perspectives on the state as stakeholder* (2015, Cambridge University Press)
- Skidelsky R, 'Keynes: The Return of the Master: Why, Sixty Years after his Death, John Maynard Keynes is the Most Important Economic Thinker for America' (Public Affairs 2009)
- Slay J and Penny C, 'Commissioning for Outcomes and Co-Production, A Practical Guide for Local Authorities,' (NEF 2014)
- Slee B, 'The Socio-Economic Evaluation of the Impact of Forestry on Rural Development: A Regional Level Analysis' (2006) 8 *Forest Policy and Economics* 89
- Small A, 'Social Theory: A Grouping of Social Facts and Principles, John Bascom' (1896) 1 *American Journal of Sociology* 78
- Šmejkal V and Šaroč S, 'EU as a Highly Competitive Social Market Economy –Goal, Options, and Reality' (2015) 14 *Review of Economic Perspectives* 89
- Smith A and Playfair W, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Pickering 1995)
- Social Enterprise UK, 'Procuring for Good, How the Social Value Act is Being Used by Local Authorities' (2016)
- Social Enterprise UK, 'UK Transposition of New EU Procurement Directives: Public Contracts Regulations 2015 Consultation Response From Social Enterprise UK' (2014)
- Streit M and Mussler W, 'The Economic Constitution of The European Community: From 'Rome' to 'Maastricht'' (1995) 1 *European Law Journal* 278
- Sutherland V and others, 'Analysis of the Impact and Value of Community Benefit Clauses in Procurement' (Training and Employment Research Unit (TERU), University of Glasgow 2015)
- Syllová J, Pítrová J and Paldusová H, *Lisabonská Smlouva, Komentář [Treaty Of Lisbon. Comment]* (CH BECK 2010)
- Syrpis P, *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012)
- Tanzi V, 'Measuring Efficiency in Public Expenditure', (Conference on Public Expenditure Evaluation and Growth 2004)
- Taylor-Gooby P, 'Root and Branch Restructuring to Achieve Major Cuts: The Social Policy Programme of the 2010 UK Coalition Government' (2011) 46 *Social Policy & Administration* 234
- Teasdale S, 'What's in a Name? Making Sense of Social Enterprise Discourses' (2011) 27 *Public Policy and Administration* 89
- Temple N and Wigglesworth C, 'Communities Count: The Four Steps of Unlocking Social Value' (Social Enterprise UK 2014)
- Terre N, Warnke D and Ameiss A, 'Cost/Benefit Analysis of Public Projects' (1973) *Management Accounting* 78
- Thai K, *Towards New Horizons in Public Procurement* (PrAcademics Press 2011)
- Thatcher J and Sharp L, 'Measuring the Local Economic Impact of National Health Service Procurement in the UK: An Evaluation of the Cornwall Food Programme and LM3' (2008) 13 *Local Environment* 178
- Tittenbrun J, 'The Death of the Economic Man' (2013) 11 *International Letters of Social and Humanistic Sciences* 459
- Trepte P, *Regulating Procurement* (Oxford University Press 2006)

- Trepte P, *Public Procurement in the EU* (Oxford University Press 2007)
- Trepte P, "The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate What We Buy?" in Ølykke, Risvig and Tvarnø, *EU Procurement Directives- Modernisation, Growth & Innovation* (2012).
- Tridimas T and Nebbia P, *European Union Law for the Twenty-First Century* (Hart Publishing 2004)
- Tuan M, 'Impact Planning and Improvement Measuring and/or Estimating Social Value Creation: Insights into Eight Integrated Cost Approaches.' (Bill & Melinda Gates Foundation 2008)
- Tuori K, *The Eurozone Crisis* (Cambridge University Press 2014)
- Unk N and Schotanus F, 'Steering on Social Output Offers Opportunities in the Netherlands' (Cobouw 2016)
- Van den Abeele E, 'The Reform of the EU's Public Procurement Directives: A Missed Opportunity?' [2012] SSRN Electronic Journal
- van Gestel RH Micklitz, 'Why Methods Matter in European Legal Scholarship' (2013) 20 *European Law Journal* 387
- van Jong MP de Brouwer, 'Inventarisatie Social Return Bij Gemeenten' (TNO 2014)
- Vick D, 'Interdisciplinarity and the Discipline of Law' (2004) 31 *Journal of Law and Society* 45
- Vogel S, *Marketcraft* (Oxford University Press 2018)
- Wales Centre for Public Policy, 'Sustainable Public Procurement' (Wales Centre for Public Policy 2019)
- Walker H and Jones N, 'Sustainable Supply Chain Management Across the UK Private Sector' (2012) 17 *Supply Chain Management: An International Journal* 56
- Walker H and Brammer S, 'Sustainable Procurement in the United Kingdom Public Sector' (2009) 14 *Supply Chain Management: An International Journal* 678
- Walker N, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 45
- Wallace P, 'Stagflation and the Crisis of Capitalism' (1980) 38 *Review of Social Economy* 456
- Wallis J, 'Leadership Avoidance by Central Budget Agencies: A Social Constructivist Comparison of the Irish Department Of Finance and the New Zealand Treasury' (2011) 11 *Public Finance and Management* 67
- Waterman A, 'New Political Economies" Then and Now: Economic Theory and the Mutation of Political Doctrine' (2002) 61 *American Journal of Economics and Sociology* 678
- Weatherill S, *The Internal Market as a Legal Concept* (Oxford Scholarship Online 2017)
- Webley L, 'Qualitative Approaches to Empirical Legal Research', in *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010)
- Weller C and Pritchard J, 'Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) 8 *European Procurement & Public Private Partnership Law Review* 67
- Westall A, 'Value and the Third Sector' (TSRC 2009)
- Whelan J and Pearson E, 'Underlying Values in Government Contracts' (1961) 10 *Journal of Public Contract Law* 56
- Wiesbrock A, '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* 456

- Wiesbrock, A, 'Socially responsible public procurement' in Sjøfjell, B., & Wiesbrock, A. (Eds.) *Sustainable public procurement under EU law: new perspectives on the state as stakeholder* (2015 Cambridge University Press)
- Williamson J, 'What Washington Means by Policy Reform', in John Williamson (Ed) *Latin American Adjustment: How Much has Happened* (Institute for International Economics 1990)
- Wilson D and Bull M, 'SROI in Practice: The Wooden Canal Boat Society' (2013) 9 *Social Enterprise Journal* 345
- Winter M and Rushbrook L, 'Literature Review of the English Rural Economy: Final Report to DEFRA' (Centre for Rural Research, University of Exeter 2003)
- Wrobel R, 'The Social Market Economy as a Model for Sustainable Growth in Developing And Emerging Countries' (2012) 12 *Economic and Environmental Studies* 456
- Yergin D and Stanislaw J, *The Commanding Heights* (Free Press 2008)
- Yin R, *Case Study Research* (Sage Publications 2009)
- Yukins C and Cora J, 'Feature Comment: Considering the Effects of Public Procurement Regulations on Competitive Markets' (2013) 55 *Government Contractor* 89

Websites

- 'A Less 'Anglo-Saxon' EU: Sarkozy Scraps Competition Clause From New Treaty - SPIEGEL ONLINE - International' (SPIEGEL ONLINE International, 2007) <<http://www.spiegel.de/international/europe/a-less-anglo-saxon-eu-sarkozy-scraps-competitionclause- from-new-treaty-a-490136.html>> accessed 3 December 2019
- 'Announcement of Community Benefit Clause Initiative, 9 May 2016' (Dolphin House & Park Community Website, 2016) <<https://www.dolphinhouse.ie/news/2016/05/09/announcement-of-community-benefit-clause-initiativ/>> accessed 3 December 2019
- 'Beste Prijs-Kwaliteitverhouding (BPKV) | PIANOo - Expertisecentrum Aanbesteden' (PIANOo - Expertisecentrum Aanbesteden, 2019) <<https://www.pianoo.nl/nl/themas/beste-prijs-kwaliteitverhouding-bpkv>> accessed 2 December 2019
- 'Custom Work For People, AEF & VKA' (Maatwerkvoormensen.nl, 2019) <<https://www.maatwerkvoormensen.nl/praktijkvoorbeelden/a/aef--vka>> accessed 4 December 2019
- 'Custom Work For People, USG Professionals' (Maatwerkvoormensen.nl, 2019) <<https://www.maatwerkvoormensen.nl/praktijkvoorbeelden/u/usg>> accessed 5 December 2019
- 'Customisation For People, EIFFEL' (Maatwerkvoormensen.nl, 2019) <<https://www.maatwerkvoormensen.nl/praktijkvoorbeelden/e/eiffel>> accessed 5 December 2019
- 'Joaquín Almunia Vice President of the European Commission Responsible for Competition Policy How Competition Policy Contributes to Competitiveness and Social Cohesion Europa 2011 - Regulação E Competitividade Lisbon, 14 January 2011' (European Commission - European Commission, 2011) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_17> accessed 29 January 2019

- 'PIANOO | PIANOO - Expertisecentrum Aanbesteden' (PIANOO - Expertisecentrum Aanbesteden, 2019) <<https://www.pianoo.nl/>> accessed 2 December 2019
- 'Social Return Bij De Rijksoverheid | PIANOO - Expertisecentrum Aanbesteden' (PIANOO - Expertisecentrum Aanbesteden, 2019) <<https://www.pianoo.nl/nl/themas/maatschappelijk-verantwoord-inkopen-duurzaam-inkopen/mvi-themas/social-return/aan-de-slag-0>> accessed 2 December 2019
- 'Social Return on Investment (SROI) | PIANOO - Dutch Public Procurement Expertise Centre' (PIANOO - Dutch Public Procurement Expertise Centre, 2019) <<https://www.pianoo.nl/en/sustainable-public-procurement/spp-themes/social-return-investment-sroi>> accessed 2 December 2019
- 'Social Value Act Needs More Bite, Says Lord Adebawale | The Social Enterprise Magazine - Pioneers Post' (Pioneerspost.com, 2019) <<https://www.pioneerspost.com/news-views/20150205/social-value-act-needs-more-bite-says-lord-adebowale>> accessed 3 December 2019
- 'The CDU and the ‘Social Market Economy’: Düsseldorf Guidelines For Economic Policy, Agricultural Policy, Social Policy, And Housing' (Ghdi.ghi-dc.org, 1949) <https://ghdi.ghi-dc.org/sub_document.cfm?document_id=3094> accessed 30 November 2017
- 'What is Social Value?' (Social Value Portal, 2014) <<http://socialvalueportal.com/what-is-social-value/>> accessed 11 November 2017

Interviews

- 'Interview with Community Benefits Oversight Group Of National Paediatric Hospital Development Board (NPHDB),' (2019)
- Deirdre Halloran, Interview with David Hannon, 'Interview With David Hannon, Programme Head For The Devolved Schools Programme At NDFA' (2019)

Appendix 1

Data source for Social Clauses Use and Evaluation 2008-2019

Table 1: Data source for Social Clauses Use and Evaluation 2008-2019

Report	Jurisdiction/ Source	Description	Findings	Social Value evaluation
Richard MacFarlane and Mark Cook, 'Achieving community benefits through contracts Law, policy and practice' (Policy Press 2002)	UK/ Funded by Joseph Rowntree Foundation and supported by officials at HM Treasury, the Office of Government Commerce and the Scottish Executive.	Through legal and policy research, the report shows how public bodies can include community benefit requirements in their procurement activities, including case studies.	The inclusion of community benefits in procurement contracts is permissible in UK, under certain conditions.	Importance of monitoring and evaluation arrangements emphasized.
Andrew Erridge, Ruth Fee and Sean Hennigan, 'Pilot Project on Utilising the Unemployed in Public Contracts: Final Evaluation Report' (University of Ulster at Jordanstown School of Policy 2005)	Northern Ireland/ University of Ulster for the Northern Ireland Executive.	A pilot project was undertaken with a requirement to employ people from the target group, monitored over a two year period from July 2003 to July 2005, and a final evaluation report was submitted in September 2005 to the Procurement Board. Data was drawn from 15 case studies.	2 respondents (10.5%) felt that the pilot had led to an increase in direct costs. 3 respondents (15.8%) felt that their workload had increased as a result of the clauses. 51 new employees were employed from the target group of whom 46 have been retained by the contractors. The overall "project cost per job created" during the evaluation period was £900,000, against a construction industry benchmark of £1 million.	Treasury Evaluation Model, which links aims to inputs, throughputs and outputs, and the outcomes of the project. Concluded the project in relation to social goals, was economically efficient and effective. Recommended both arrangements and extending the monitoring period after the project completion.
SQW, 'Cost Benefit Analysis of Sustainable Public Procurement' (DEFRA 2006)	UK and Northern Ireland/The UK's Department for Environment, Food and Rural Affairs	A cost benefit analysis of sustainable public procurement initiatives to evaluate their efficacy as a policy tool.	Utilising unemployed in Northern Ireland results: The present value of benefits of employing the previously unemployed amounted to £264,785; whilst the costs amounted to some £167,615, at a 3.5% discount rate. Thus generated a small social gain, with a net present value (NPV) of £97,170.	Cost Benefit Analysis.
Richard MacFarlane and Mark Cook, 'Community Benefits in Public	Scotland/ The Scottish Government.	This report presents the findings of the Community Benefits in Public	Provides a toolkit of appropriate clauses and procurement	Not mentioned.

<p>Procurement' (The Scottish Government 2008)</p>	<p>Procurement Pilot Programme in Scotland to promote the use of Community Benefit, in particular, targeted recruitment and training (TR&T) clauses in public contracts. The report draws on the experiences of five contracting authorities: Glasgow Housing Association, (GHA), Raploch Urban Regeneration Company (Raploch URC); Dundee City Council; Inverclyde Council and Falkirk Council.</p>	<p>procedures which can be used to achieve Community Benefits through procurement. Demonstrates a range of approaches that have been adopted during the pilots Identifies good practice and potential pitfalls. Presents some evidence of the impact of including targeted recruitment and training (TR&T) requirements on competition, affordability and VfM.</p>	<p>Identified two barriers to the use of Social clauses: a cultural challenge, requiring a change in approach from procurement professionals; and a technical challenge presented by the difficulty of valuing important potential social impacts that do not have market values.</p>	<p>No.</p>
<p>'Social Clauses Project: Report of the Social Clauses Project' (Cabinet Office 2008)</p>	<p>UK / Office of the Third Sector</p>	<p>Consolidate knowledge on the existing use and best practice of social clauses, provide clarity on the merits of using social clauses, and support good commissioning and procurement by producing user friendly materials to help decision makers</p>	<p>The main barriers to the use of social clauses were identified as confusion about when they can be legally used, concern about the processes needed to include them in any contract specification and how to evaluate them.</p>	<p>No.</p>
<p>Northern Ireland Assembly, 'Social Clauses And Valuing Social Impacts' (Briefing Note 16/09 2009)</p>	<p>Raploch URC in Stirling, Scotland the London Olympics 2012 and the Northern Ireland Unemployment Pilot Scheme/ The Northern Ireland Assembly.</p>	<p>Overview of the development and use of the concept of Social Return on Investment (SROI) and the use of social clauses in the UK</p>	<p>Identified two barriers to the use of Social clauses: a cultural challenge, requiring a change in approach from procurement professionals; and a technical challenge presented by the difficulty of valuing important potential social impacts that do not have market values.</p>	<p>NO evident of SROI being used, the authors conclude that only a limited number of SROI analyses have been conducted in the UK or Ireland, and, furthermore, a smaller number still have involved SROI in a procurement process.</p>
<p>Matthew Jackson; Jessica Arnold; Mark Bramah, 'More bang for the public buck: A guide to using procurement to achieve community benefits' (Association for Public Service Excellence (APSE) and Centre for Local Economic Strategies (CLES) 2010)</p>	<p>England, Scotland and Wales/ The Association for Public Service Excellence (APSE) and Centre for Local Economic Strategies (CLES)</p>	<p>Five case study on local authorities that have used community benefits clauses through procurement, measuring social outcome barriers</p>	<p>Identified barriers to implementing CBC as 1. the EC Treaty and Procurement Directives; 2. the inability of local suppliers to bid for and deliver contracts; 3. the large scale and size of public contracts; 4. a lack of knowledge of the potential of procurement for achieving</p>	<p>Outcomes were broadly tracked in 4 out of 5 case studies. One used cost benefit analysis and LMS</p>

<p>Brouwer, P., Smit, A., Van Wijk, E., & Zwinkels, W, 'Social return bij het reïntegratiebeleid Arbeid' (Hoofddorp, TNO Arbeid 2010)</p>	<p>The Netherlands/ TNO for the Dutch central government.</p>	<p>A research project presenting the results of investigation into the possibilities for the application of 'social return' in all procurement by the government, including the effects of social return on government procurement labour market and reintegration policies and finding the conditions for a successful application. Paper by Council for Economic Renewal on Community Benefits through Procurement in Wales. The seven Regeneration Area partnerships have been used as a delivery platform for embedding community benefits into procurement contracts, using projects that support delivery of DiES programmes such as Pathways to Apprenticeships and the Young Recruits Programme.</p>	<p>The greatest challenge was monitoring the social return targets. The report found that the costs for applying 'social return' was limited and the effects was successful in helping people at a distance to work but as a support to the existing reintegration policy.</p>	<p>SROI (Dutch Model).</p>
<p>Council for Economic Renewal, 'Community Benefits through Procurement' (CFER 3-29/02/2012)</p>	<p>Wales/ Council for Economic Renewal.</p>	<p>Six projects worth £146m had been tracked using the Wales community benefit measurement tool. £56m went directly in salaries of Welsh citizens, and £68m was spent with Wales based businesses of which 82% were Welsh SMEs. 140 disadvantaged people received work experienced. innovative public procurement has a positive impact on the economy and progress has been made in extending benefits for local communities.</p>	<p>Value Wales Community Benefits Measurement Tool.</p>	<p>Not mentioned.</p>
<p>Constructing Excellence in Wales, 'Community Benefits Policies in Construction: Evaluating the Impacts (Welsh Government 2012)</p>	<p>Wales/Welsh Government</p>	<p>The report gathered the views of 16 suppliers into the Community Benefits Policy: a) What suppliers are already doing regardless of the policy b) Whether or not the policy has had an effect on their approach c) What barriers, if any, exist to delivering greater community benefits.</p>	<p>Consistency and continuity in community benefit requirements needed; Rigid application of targets should be avoided. Leadership required and avoid focusing on the choice between 'core' and 'non-core' approaches. Strategic view of community benefits needed rather than merely passing on short-term,</p>	<p>Not mentioned.</p>

<p>Tom Tweddell, 'Social Clauses in Northern Ireland a research paper' (Centre for Economic Empowerment Research Report: two, 2012)</p>	<p>Northern Ireland/ NICVA's Centre for Economic Empowerment (CEE).</p>	<p>Research on the difficulties experienced in implementing social clauses; commentary on the monitoring systems and procedures regarding the implementation of social clauses and development of real examples to influence government on the use of social clauses.</p>	<p>unrealistic targets to the supply chain. Coordination of employment/training support agencies required by the client. Greater awareness and understanding of community benefits.</p>	<p>No</p>
<p>Ready for Business, 'Embedding Social Value through Sustainable Procurement: Survey of Public Sector Commissioners and Procurement Professionals' (2012)</p>	<p>Scotland/ Scottish Government.</p>	<p>The study explores the current awareness, attitudes, behaviors and aspirations of public sector commissioners and procurement professionals in Scotland. The focus is on ways that the public sector can buy more sustainably, maximise Social Value. The survey received views from 182 respondents located across the public sector in Scotland.</p>	<p>The survey indicates that relevant public sector staff are 'reasonably well informed' or have at least a 'basic understanding' of requirements under the Sustainable Procurement Action Plan. Overall 93% of respondents indicated some level of awareness of CBCIs although in half of cases this was partial (52%). 67% of CBCIs are being applied by public authorities in some but not all contracts. 37% reported some level of involvement in applying CBCIs over the previous 12 months. (81% consider CBCIs to be either 'very' or 'fairly' helpful as an approach to building economic or social conditions into public</p>	<p>Over half of cases respondents stated that they attempt to identify and value Social Value. 39% this occurs only 'sometimes' in 7% of cases 'never'. 39% indicated that they design outcomes around the needs of service users and other stakeholders. 51% reported some level of familiarity with SROI although only 6% of these were 'fully familiar' with the approach. Of those, 49% felt that SROI was 'fairly' helpful. 38% held a neutral view.</p>

<p>Markie, K. 'Targeted Recruitment and Training Clauses in Procurement. The Improvement Service' (2012)</p>	<p>Scotland/ SLAED Employability Theme Group</p>	<p>A collection of case studies showing practical applications of TRT clauses. A focus group made of 18 representatives from the Scottish Local Authorities Economic Development (SLAED) were asked to discuss their experiences of TRT clauses Followed up by an online survey each council with a 65% response.</p>	<p>contracts. Only 1% found them unhelpful</p>	<p>Not mentioned.</p>
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<p>Richard Macfarlane, 'Tackling Poverty Through Public Procurement' (Joseph Rowntree Foundation 2014)*</p>	<p>UK: England, Scotland, Northern Ireland and Wales. /The Joseph Rowntree Foundation supported by all the participating public bodies.</p>	<p>Report on the law and demonstrate outcomes and good practice, and reflect on the implications for delivering 'social value' in public procurement in UK based on six case studies Glasgow Housing Association (GHA); Birmingham City Council; Knowsley Council social value framework; United Welsh Housing Association; The Peace Bridge in Derry— Londonderry and NHS Greater Glasgow and Clyde</p>	<p>The case studies in this report demonstrate that by including appropriate targeted recruitment and training requirements in specifications and contract conditions, public bodies can use their purchasing to make a positive impact on the employment prospects for disadvantaged communities.</p>	<p>The report found that it may be impractical to collect the range of data that is required to implement 'social return on investment' or the Local Multiplier 3 (LM3) measure of social impact – which they find "may be useful in establishing the case for including social/community benefits in procurement but impractical in the routine monitoring of contracts."</p>
<p>Gerardine Blee and Colin Pidgeon, 'Implementation of social clauses policy in Northern Ireland' (Northern Ireland Assembly 2014)</p>	<p>Northern Ireland / Northern Ireland Assembly</p>	<p>Briefing Paper presents information in relation to the implementation of social clauses by Northern Ireland departments</p>	<p>The Department of Finance and Personnel provided data on the implementation of social clauses from 2008 to 2013. From 2012 – 2013, 33 trainees were engaged out of 168 contracts. From 2008 to 2012, 430 trainees were placed; 250 jobs and 366 apprenticeships.</p>	<p>No evaluations or evidence of evaluation had been carried out on the social clauses.</p>
<p>'Community Benefits, Delivering Maximum Value for the Welsh Pound' (Welsh Government 2014)</p>	<p>Wales/ Welsh Government</p>	<p>A guide on how to incorporate Community Benefits in public procurements</p>	<p>Results from the first 35 projects worth £465m show that 85% has been re-invested in Wales – £124m directly on salaries to Welsh citizens, and £277m with Wales-based businesses, 80% of which were Welsh SMEs. Some 562 disadvantaged people have been helped into employment, receiving over 15,460 weeks of training. It contains 4 case studies, both core and non core, 3 reporting outcomes via the Community Benefits Measurement Tool and a further</p>	<p>Community Benefit Measurement Tool and the Welsh Local Multiplier</p>

Van Emmerik, M. L., Jong, T. D., & Brouwer, P, 'Inventarisatie social return bij gemeenten' (No. R10705) (TNO 2014).	The Netherlands/ The Dutch Ministry of Social Affairs and Employment	Report for the Ministry of Social Affairs and Employment on the use of social return by municipalities in the Netherlands.	two utilizing the Welsh Local Multiplier. The number of municipalities that applied social return had risen sharply to 79% with 86% of this number with a policy in place. The beneficiaries were not always the unemployed but efforts were made to target other groups. Many did not track their results.	SROI Dutch Adapted.
Halloran, Deirdre, ' A Primer on the use of social clauses in Ireland' (CAN 2015)	Ireland/ The Irish Research Council, Citizen Action Network and NUI Galway.	Report in the use of social clauses in Public Procurement and their legitimacy and legality in an Irish context.	Social Clauses are a legitimate step to take in the Public Procurement process in Ireland, with legal explanation of how how Social Clauses fit into the EU and Irish legal framework.	Not mentioned.
Wright, Tessa, 'New development: Can 'social value' requirements on public authorities be used in procurement to increase women's participation in the UK construction industry?' <i>Public Money & Management</i> 35, no. 2 (2015)135	England / The University of London and Women into Construction (WiC) project.	Research on pilot study of the Women into Construction project established to provide opportunities for women to work on the construction of the Olympic Park for the 2012 Summer Olympics and after. The research looks at the outcomes of incorporating social value into procurement processes from the perspectives of women beneficiaries and employers as well as in meeting social policy objectives. The pilot study involved semi structured interviews and a focus group comprised of participants and stakeholders in the WiC project.	The percentage of women working on the Olympic Park site more than doubled compared to the industry average, with the WiC project training 455 women, placing 87 into work placements and 255 in employment between 2008 and June 2011. Since 2011 the project has consistently achieved results beyond its targets, training 450 women, and placing 135 into work placements and 195 into employment, approximately half of whom are in the manual trades and half in professional construction occupations. The report concludes that the WiC project, is operating a successful model that can assist in overcoming some of the barriers	The impact of the project was derived from data collected from interviews with a variety of participants and stakeholders engaged with the project

<p>Sutherland, Victoria, Alexander McTier, Andrea Glass, and Alan McGregor, 'Analysis of the impact and value of community benefit clauses in procurement' (Training and Employment Research Unit (TERU) University of Glasgow 2015).</p>	<p>Scotland/ University of Glasgow for the Scottish Government.</p>	<p>To assess the usage of CB clauses, and the impact these have on employment and skills development – with a particular focus on the benefits to more disadvantaged groups including young people, disabled people, women and ethnic minorities replying on a broad based e-survey of CB activity across Scotland.</p>	<p>women face when trying to enter male-dominated construction occupations. Additionally, the project appears to be contributing valuable support for the retention of women in construction employment.</p>	<p>Recommendations made for monitoring and evaluation framework, including the indicators that should be captured; the monitoring system to collect the data and the reporting requirements.</p>
<p>OECD Northern Ireland, 'Implementing Joined-up Governance for a Common Purpose' OECD Public Governance Reviews (OECD Publishing, Paris. (2016),</p>	<p>Northern Ireland/ OCED.</p>	<p>An assessment and recommendations on a wide range of issues, including strategy-setting and co-ordination, strategic government-wide human resources management, open government, regulatory reform and digital government.</p>	<p>CBCs are increasingly being used in public sector; scope to build awareness and understanding of CB clauses; the targets around job opportunities, apprenticeships, work placements and training for priority groups have been exceeded; capturing the social value difficult due contractors not monitoring the sustainability and additionality of CB outcomes. The research findings strongly point towards the need for a more comprehensive evidence base to be developed around the longer-term impact of CB clauses. This requires a more systematic monitoring of CB clauses and their impacts in future contracts so that the use of CB clauses can be fully justified.</p>	<p>Not mentioned.</p>

<p>Kuijpers, R. 'Implementing social sustainability in the public sector - Social return on investment as an instrument to achieve social outcomes' (Heerlen: Open Universiteit Nederland 2016) Available at: http://dspace.ou.nl/bitstream/1820/7556/1/Kuijpers%20R%20scriptie%20dspace.pdf [Accessed: 8 August 2017].</p>	<p>The Netherlands /Open University Study.</p>	<p>Explorative study to find the factors that influence the implementation of social sustainability through the procurement function of Dutch municipalities and what management approach is used to manage the relationship between municipalities and social enterprises. A qualitative approach to investigate SROI implementation. Four cases were selected, each consisting of two organisational entities: 1) the municipality and 2) the social enterprise responsible for the implementation e.g. execution of SROI activities. Semi-structured interviews were conducted with two actors: a senior procurement officer from the municipality and a SROI officer from the social enterprise</p>	<p>successful use of social clauses often dependent on high level departmental support. To improve outcomes in the pursuit of social objectives through public procurement, elevation of the importance of the issue and its inclusion early in the commissioning process should be pursued.</p>	<p>The differences in policy application lead to different standards between municipalities. Policies become more useful with a certain degree of freedom to execute the policy. A very strict policy provides difficulties on the functional level, whereas a very loose policy is prone to provide difficulties on the corporate level. Need for the National government provide clear guidelines; informing and educating actors about SROI is paramount; need to establish guidelines or regulation about the storage and processing of privacy related information of SROI candidates</p>
<p>Lynch, Jane, et al., 'Community benefits of public procurement: A comparison between local governments in Wales (UK) and the Netherlands' 25th Annual IPSERA Conference 2016. 2016.</p>	<p>Wales and the Netherlands/ Cardiff University.</p>	<p>A paper on social public procurement practice across local governments in Wales (UK) and the Netherlands using an institutional theory perspective, to understand how and why community benefits policies are formulated and enacted in these different yet comparable institutional environments.</p>	<p>Each municipality uses a different approach to SROI. Large municipalities develop their policy whereas smaller municipalities copy existing policies and aim to optimise the use of available resources. SROI policies greatly differ between municipalities: some policies are strict, while others are loose. The differences in policy design are reflected in the way SROI is organized between municipalities and social enterprises</p>	<p>In Wales, compliance with social procurement is low. Of the total local government contract values analysed (£310,268,443 from schools and regeneration projects), the formulae calculate that 61.68% (£191,382,737) revenue was awarded to Welsh based</p>
			<p>In Wales, compliance with social procurement is low. Of the total local government contract values analysed (£310,268,443 from schools and regeneration projects), the formulae calculate that 61.68% (£191,382,737) revenue was awarded to Welsh based</p>	<p>In Wales, Community Benefit Measurement Tool and the Welsh Local Multiplier. In the Netherlands, three approaches for measuring Social Return on Investment are presented: Direct hiring; Building blocks method and Tailored approach</p>

	<p>For this study, a total of 36 contracts from local governments in Wales were examined and a sample of 81 public tenders for social care during 2014 in the Netherlands.</p>	<p>businesses, 23.54% (£73,021,716) share of income to Welsh residents and 5.29% (£16,402,692) contributed to landfill fees saved and benefit gained. Non-cash benefits include 490 disadvantaged people being helped back into employment, 12,474 training weeks being delivered and 10,937 apprenticeship weeks as a direct result of the contracts being awarded. For every GBP spent by public procurement, the data set indicates that an average total of 81 pence is reinvested back into Welsh based businesses and salaries.</p>
		<p>In the Netherlands: out of the 81 public tenders, 45 tenders (56%) feature an Social Return (SR) condition. These 45 tenders reflect contracts for 241 local governments (64% of the 374 municipalities in the research). Among the local governments that do require SR there is variety in the exact terms and requirements. Out of the 45 tenders requiring SR, in eighteen tenders contractors are required to make an effort towards involving long-term unemployed. The remaining 27 contracts had hard requirements, monitored as part of contract management, they specify a 5 percent social re-investment.</p>

<p>Auditor General for Wales, 'Public Procurement in Wales' (October 2017)</p>	<p>Wales /Welsh Government.</p>	<p>The report examines whether there is evidence that current procurement arrangements in Wales are helping to deliver value for money in public spending and are fit for the future.</p>	<p>The report recommends that the Welsh Government update its community benefits toolkit, including taking account of the Well-being of Future Generations (Wales) Act 2015 and building on lessons learned from current practice across Wales such as the use of community benefits champions.</p>	<p>Report found that public bodies are commonly delivering and monitoring community benefits. Between 2010 and 21 May 2017, the Welsh Government monitored the results of 310 projects which used the toolkit. Those projects had a combined worth of £1.4 billion. The Welsh Government reported that the 310 projects had created 2,116 job opportunities, over 45,000 weeks of training, and with 83% of the expenditure being reinvested in Wales on business and salaries.</p>
<p>Commission, 'Procurement monitoring report of the Netherlands' (Ministry of Economic Affairs and Climate Policy 2018)</p>	<p>Netherlands / European Commission</p>	<p>The report gives an account of the Netherlands' fulfilment of its monitoring obligations under articles 83 and 85 of Procurement Directive 2014/24/EU, discusses a broad range of subjects relating to public procurement</p>	<p>The Section on Socially responsible public procurement notes the importance of Socially Responsible Public Procurement in the Netherlands. Data on SRPP is fairly limited, they did have information on contracts reserved for sheltered employment and sheltered workshops in 2017: Out of 2538 procedures, 14 people were placed in sheltered workshops</p>	<p>No information.</p>
<p>Eadie, Robert, Martina Murphy, and Laura McCann, 'An Analysis of Social Clause Impacts Between Various Options Tested in Government Construction Contracts' In IXth INTERNATIONAL SCIENTIFIC CONFERENCE on ARCHITECTURE AND CIVIL ENGINEERING ArCivE 2019, Varma, Bulgaria. 2019.</p>	<p>Northern Ireland/ Ulster University.</p>	<p>Research on the Northern Ireland's "Buy Social" pilot construction projects were on benefits to organisations and New Entrance Trainees (NETs)</p>	<p>Findings indicate 63% of organisations would voluntarily adopt social clauses. A large number of social clauses impacts on NET's are documented: the most positive being that after being involved in social clauses 88% were considered more employable</p>	<p>An on-line survey asked respondents (organisations listed as being involved with the "Buy Social" pilot project) to rank positive and negative impacts in order of importance for students, apprentices and the long term unemployed.</p>

<p>Buy Social Website https://buysocialni.org/</p>	<p>Northern Ireland/ The Northern Ireland Executive.</p>	<p>Buy Social is the website to support the "The Buy Social services model". This has been developed by the Strategic Investment Board and CPD and should now be considered in services contracts with an anticipated value of £500,000 per annum or more.</p>	<p>Buy Social website: https://buysocialni.org/about-buy-social/case-studies/</p>	<p>Monitoring of Clauses only. The new monitoring system is a web-based system requiring registration by the contractor and monthly reports.</p>
<p>Scottish Procurement and Commercial Directorate, 'Annual report on procurement activity in Scotland: 2019' (April 2019)</p>	<p>Scotland/ Scottish Government.</p>	<p>First annual report by Scottish Ministers on the procurement activity of higher spending public bodies in Scotland.</p>	<p>Over the period 2015 to 2018 years, significant improvements have occurred. Figures from the Public Contracts Scotland advertising portal show large increases in contracts with community benefit requirements. These also show a significant shift in the types of contracts that include a community benefit requirement. As a direct result of procurement activity reported by public bodies: Six hundred and thirty five contracts were awarded in the reporting period with community benefit requirements, these contracts had a total value of over £588 million. Seventy-four contracts valued at or above £4 million included community benefit requirements, with a total value of £342 million</p>	<p>While the statutory guidance suggested indicators that demonstrate the impact of community benefits, the report found that there were significant variation in the level and type of information provided in individual annual procurement reports resulting in a need to improve on how to capture this data.</p>