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ARTICLE

Towards socially responsible public procurement

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Abstract
The 2014 procurement and concessions directives have clarified the possibilities that exist for referring to social considerations in public procurement (and socially responsible public procurement). Still, these rules fall, in the main, well short of being mandatory and instead leave wide margins to Member States and their contracting authorities which do not wish to consider social and human rights concerns when buying. Furthermore, concerns about ensuring the widest competition possible may limit reference to social considerations. Recently proposed reforms may however go a long way towards more sustainable production and procurement.

Keywords SPP · Socially responsible public procurement · Procurement Directive

1 Introduction: some history

Today an apparent paradox seems to characterise sustainable public procurement (SPP) in Europe and more generally in developed countries. These days, environmental aspects – green public procurement – are very much at the forefront of sustainable public procurement, having being strongly pushed to the fore by the climate crises and more generally by a recent upsurge in interest in environmental problems. Social aspects, such as for instance workers' or women's or consumers' rights, and more

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widely human rights,[1] seem to have taken a backseat, as if they were the children of a lesser god.[2]

However, things were very different even a mere 50 years ago. No one in power was worrying about the environment, but the instrumental role of public procurement in pursuing public policies, including social policies, was clear to everyone. Colin Turpin, writing in 1972, remarked that

> "the volume of government procurement is such that the government's decisions on how, when and what to buy must be inevitably have effects on the structure and health of industry, upon employment, and upon the economy as a whole. It would be remarkable if any government were to carry out its procurements wholly without regard to these incidental effects; in this as in other fields the decisions of government can be expected to be political decisions, which take account of the ulterior social and economic consequences of alternative courses of action".[3]

Creating jobs was for long felt to be a good reason to invest State budgets through procurement. This was seen in the New Deal, when President Roosevelt was called upon to address the aftermath of the 1929 crisis. The major piece of legislation we need to focus on here is the National Industrial Recovery Act of 1933. The idea that procurement was not an end in itself, but was rather a means to achieve social goals could hardly have been made clearer than it was in S. 203(a) of the Act, which provides:

> "With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project [. . .]; (4) to aid in the financing of such railroad maintenance and equipment as maybe approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; [. . .]".

Workers' rights too were very much at the forefront of the use of public procurement to pursue wider policy goals. The National Industrial Recovery Act of 1933 was not just about fighting unemployment: fair wages too were mandated in procurements. Under s. 204(2)(C)

> "all contracts involving the expenditure of such grants shall contain provisions establishing minimum rates of wages, to be pre-determined by the State highway department, which contractors shall pay to skilled and unskilled labor, and

[1] See *Martin-Ortega* and *Methven O'Brien* [17].

[2] See more generally *Gerbrandy*, *Janssen*, *Thomsin* [15].

[3] *Turpin* [30], p. 244.

such minimum rates shall be stated in the invitation for bids and shall be included in proposals for bids for the work".[4]

The sky was (believed to be) the limit. In the 1970s, some United Kingdom local councils tried using public procurement as a tool against apartheid, blacklisting suppliers doing business with South Africa.[5]

Putting aside such instances as the last one, in most cases social issues in procurement had protectionist effects. The unemployed or workers whom legislators and governments were worried about were the local unemployed or workers. A beggar-thy-neighbour approach was often lurking not too far behind. But this does not need to be the case, as is shown by the growing attention to human rights breaches along global supply chains.[6]

The music changed very much from the late 1970s on. Faced with the financial crises of Western states, conservative politicians were obsessed with cutting costs. Best (economic) value for money was the new public procurement mantra. One decade later, international trade was given an enormous boost by the collapse of planned economies in Eastern Europe and elsewhere. Public procurement became part of the WTO agreements – even if merely as a multilateral agreement – and non-discrimination (based on nationality) became a cornerstone of procurement legislation.[7] Focusing on baseline economic value, if not merely just on price, was obviously consistent with the desire to avoid discrimination based on nationality or otherwise. Economic values are easily computed, they are eminently objective, and make favouring national or local suppliers difficult.[8] Unsurprisingly, multilateral financial institutions based in Washington (the so-called 'Washington consensus') followed suit, insisting on public procurement being open to global competition.[9]

A supreme irony too often lost to those expounding the benefits of neoliberalism generally, and specifically of global procurement markets, is that the United States is actually a bastion of procurement protectionism, including at sub-national level.[10]

Be that as it may, in developed countries social considerations have until fairly recently found it difficult to find their place in public procurement again, while environmental considerations – possibly less tainted by the risk of protectionism or outright favouritism – have gone from strength to strength and are now at the core of the European Green Deal.[11]

Still, in the European Union (EU), sustainable public procurement has gained such momentum that these developments are affecting socially responsible public procure-

[4]The New Deal went a long way in introducing fair/living wages: see *Quigley* [21] esp. at pp. 144 ff. For similar developments in the UK see *Turpin* [30], pp. 255 ff.

[5]This was found unlawful in *R* v *Lewisham LBC*, *ex parte Shell UK Ltd* [1988] 1 All ER 938.

[6]See *Wiesbrock* [31]; *Martin-Ortega* [18].

[7]For a discussion, see *Semple* [23] pp. 293 f.

[8]A parallel development took place concerning procurement by – or financed by MDBs: *Morlino* [19] esp. pp. 121 ff.

[9]Neoliberalism shaped public procurement on many layers not immediately relevant here, including introducing a preference for outsourcing and PPPs: see *Kunzlik* [16] esp. pp. 302 ff.

[10]See *Czarnezki* [13].

[11]COM/2019/640 final; see *Tátrai* and *Diófási-Kovács* [28].

ment as well. This article will first recall the development of socially responsible public procurement in the EU before the 2014 procurement and concessions reform and focus next on the provisions of Directive 2014/24/EU. Initiatives which have been taken in the past few years will be analysed in the conclusions.

2 In the beginning were social rights

Compared with the UK, mainland Europe was somewhat late in converting to the neoliberal creed.[12] This allowed the very first sustainable public procurement cases to concern social aspects. *Bentjies* is still rightly recalled as having given birth to sustainable public procurement in Europe.[13] A contract was awarded to the second lowest bidder because the first was not capable of complying with an obligation to employ long-term unemployed persons. The Court of Justice took the view that, first, such a condition had no relation to the checking of contractors' suitability on the basis of their economic and financial standing and their technical knowledge and ability or to the criteria for the award of contracts. This led the Court to qualify the requirement in question as an "additional specific condition", which must comply with the general principles of (then) European Economic Community (EEC) law and must be mentioned in the contract notice, so that contractors might become aware of its existence.[14] The Commission responded by developing the notion of contract performance condition as distinct from both selection and award criteria.[15] On this basis, it structured an infringement procedure against France.[16] The notices for school buildings works set out the award criteria included an "additional criterion" relating to the promotion of employment. The Commission claimed that such a requirement could be used only as a contract performance condition, not as an award criterion; this was also because (then) Community law allowed two award criteria only, namely the lowest price and the most economically advantageous tender. The Court of Justice instead held that, provided the Treaty general principles were complied with, the procurement directives did not "preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment".[17]

Concordia Bus, the next big judgment on sustainable public procurement, focused squarely on the topic of green procurement as it considered the legality of an award criterion for a fleet of buses which focused on emissions. The case is still relevant for socially responsible public procurement in that it laid down a number of requirements allowing non-economic considerations to be take into account. The Court of Justice held that a contracting authority could take into consideration ecological criteria such

[12] Concerning the early phases, see the contributions collected by *Arrowsmith* and *Kunzlik* (eds.) [6] and by *Caranta* and *Trybus* (eds.) [10].

[13] Case 31/87, *Beentjes*, EU:C:1988:422.

[14] Case 31/87, *Beentjes*, EU:C:1988:422, para. 36.

[15] See e.g. the *Buying social. A Guide to Taking Account of Social Considerations in Public Procurement* (Publication Office of the EU, 2010) 43 f.

[16] Case C-225/98, *Commission* v. *France*, EU:C:2000:494.

[17] Case C-225/98, *Commission* v. *France*, EU:C:2000:494, paras. 50 f.

as the level of nitrogen oxide emissions or the noise level of buses, "provided that they 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 the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination".[18]

Finally – at a time when work on the preparation of what would eventually become the 2014 procurement and concessions directives was already well under way – *Max Havelaar* was decided.[19] The case concerned the procurement of fair trade coffee and clarified the notion of the link to the subject matter. The Court of Justice held that contracting authorities are "authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons".[20] Moreover, following the inspiring Opinion of Advocate General Kokott,[21] the Court further indicated that

> "there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof. The Court held thus, in paragraph 34 of *EVN and Wienstrom*, that European Union legislation on public procurement does not preclude, in the context of a contract for the supply of electricity, a contracting authority from applying an award criterion requiring that the electricity supplied be produced from renewable energy sources. There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin".[22]

The judgment in *Max Havelaar* is central for sustainable public procurement in that it dispatched for good the Commission's contention that only those elements in the life-cycle of goods or services that impact upon the 'substance' of what is purchased are linked to the subject matter.

3 The scope for socially responsible public procurement under Directive 2014/24/EU

Three new instruments were enacted in 2014: Directive 2014/23/EU on concession contracts, Directive 2014/24/EU on public sector procurement, and Directive 2014/25/EU on procurement in the utilities sectors.[23] The focus here is on Directive 2014/24/EU – not merely because this is the measure covering most contracts – but because it is more detailed and its rules might be applied by analogy outside the Directive's scope of application.

[18] Case C-513/99, *Concordia Bus*, EU:C:2002:495, para. 69; *Concordia Bus* was reaffirmed in Case C-448/01, *EVN and Wienstrom*, EU:C:2003:651.

[19] Case C-368/10, *Commission* v. *Netherlands*, EU:C:2012:284.

[20] Case C-368/10, *Commission* v. *Netherlands*, EU:C:2012:284, para. 85.

[21] Case C-368/10, *Commission* v. *Netherlands*, EU:C:2012:284, esp. para. 110.

[22] Case C-368/10, *Commission* v. *Netherlands*, EU:C:2012:284, para. 91.

[23] See *Caranta* [12]; *Semple* [24]; *Sjåfjell* and *Wiesbrock* (eds.) [25].

Sustainable public procurement has an important place in the legal framework of the 2014 reform. According to Recital 2,

> "public procurement plays a key role in the Europe 2020 strategy, set out in the Commission Communication of 3 March 2010 entitled 'Europe 2020, a strategy for smart, sustainable and inclusive growth' ('Europe 2020 strategy for smart, sustainable and inclusive growth'), as one of the market-based instruments to be used to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds."

"For that purpose", the then existing rules "should be revised and modernised in order to increase the efficiency of public spending [...] and to enable procurers to make better use of public procurement in support of common societal goals."

Different aspects relevant for socially responsible public procurement are regulated in Directive 2014/24/EU. In this article the focus will be on: (i) the sustainability principle; (ii) workers' rights; (iii) accessibility for all and (iv) award and contract performance conditions and (v) reserved and special contracts. Before going into detail, it is, however, necessary to stress that in general the new Directive is enabling sustainable public procurement, having clarified under which conditions the contracting authorities may have recourse to sustainability clauses, but is not making it compulsory to have recourse to it. Public procurement and concessions rules are still very much on *how to buy*, and not on *what to buy*. The latter type of decision is left to each contracting authority, even if in some cases other pieces of EU secondary legislation may provide for the imposition of some obligation.

3.1 What sustainability principle?

Directive 2014/24/EU now includes the sustainability principle along with the traditional ones of non-discrimination, equal treatment and transparency and the novel one of competition. Under Art. 18(2)

> "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the 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 listed in Annex X".[24]

The provision was applied in *TIM*.[25] TIM had been excluded from an award procedure because one of its sub-contractors had been found to be in breach of Italian rules on the mandatory hiring quotas for people with disabilities. The Court of Justice very much highlighted the constitutional role of sustainability. According to the Court,

> "Article 18 of Directive 2014/24, entitled 'Principles of procurement', is the first article of Chapter II of that directive devoted to 'general rules' on public procurement procedures. Accordingly, by providing in paragraph 2 of that

[24] See *Andhov* [4] p. 199.

[25] Case C-395/18, *TIM*, ECLI:EU:C:2020:58.

> article that economic operators must comply, in the performance of the contract, with obligations relating to environmental, social and labour law, the Union legislature sought to establish that requirement as a principle, like the other principles referred to in paragraph 1 of that article, namely the principles of equal treatment, non-discrimination, transparency, proportionality and prohibiting the exclusion of a contract from the scope of Directive 2014/24 or artificially narrowing competition. It follows that such a requirement constitutes, in the general scheme of that directive, a cardinal value with which the Member States must ensure compliance pursuant to the wording of Article 18(2) of that directive".[26]

Still, the exact normative value of Art. 18(2) cannot be defined with precision. A possibly relevant limitation is that it refers to Member States rather than to contracting authorities. However, based on Recital 37, one might assume that contracting authorities are included in the reference to the Member States. In any case, according to its own terms, Art. 18(2) is applicable in the event of the breach of rules that are already mandatory because of international, EU or national provisions. Indeed, under Art. 57(4)(a), exclusion for breach of Art. 18(2) is not mandatory as a matter of EU law. TIM was excluded because the mandatory exclusion was provided for under Italian law. The Court of Justice upheld the exclusion, holding that

> "the need to ensure appropriate compliance with the obligations referred to in Article 18(2) of Directive 2014/24 must enable Member States, when determining the implementing conditions of the ground for exclusion referred to in Article 57(4)(a) of that directive, to consider that the party responsible for the failure to fulfil obligations may be not only the economic operator who submitted the tender, but also the subcontractors which the latter intends to use. The contracting authority may legitimately claim to award the contract only to economic operators who, at the stage of the contract award procedure, demonstrate their capacity to ensure in an appropriate manner, during the performance of the contract, that those obligations are fulfilled, where appropriate by having recourse to subcontractors who themselves comply with those obligations".[27]

Still, a mandatory EU exclusion would be more consistent with holding sustainability as a cardinal value in the scheme of EU procurement legislation.[28] Instead, exclusion is mandatory under EU law only in case of child labour (Art. 57(1)(f), which is also covered by just one of the many international instruments listed in Annex X (ILO Convention 182 on Worst Forms of Child Labour).

According to Recital 101,

> "Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights."

[26] Case C-395/18, *TIM*, ECLI:EU:C:2020:58, para. 38.

[27] Case C-395/18, *TIM*, ECLI:EU:C:2020:58, para. 39; see also para. 40.

[28] *Andhov* [3].

The ground of exclusion provided for in Art. 57(4)(c) is however, again, not mandatory at EU level.[29] Moreover, the same recital cautions contracting authorities about potential responsibility in the event of wrongful exclusions when these are not mandated by EU law and recalls the applicability of the proportionality principle. This is hardly a strong endorsement of exclusions as a mechanism for enforcing the application of the sustainability principle.

Reliance on Art. 18(2) is stronger in Art. 69(3) which concerns abnormally low tenders. Under this provision, "contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Art. 18(2)."[30] The unpleasant inference one might be tempted to draw from a systematic reading of Directive 2014/24/EU is that – as a matter of EU law – contracting authorities may be allowed by a Member State to condone most breaches of the provisions listed in Art. 18(2) as long as the tender is not abnormally low.

3.2 Workers' rights

Workers' rights in the implementation of public procurement contracts, and specifically minimum pay, have been the subject of a number of cases in the past, from *Rüffert* [31] up to and including *RegioPost*.[32] Arguably, the rules applicable should be those in the place in which or from which the service is rendered and the Posted Workers Directive should be complied with in the event workers move from one Member State to another in order to implement the contract.[33]

According to Recital 38,

> "services should be considered to be provided at the place at which the characteristic performances are executed. When services are provided at a distance, for example services provided by call centres, those services should be considered to be provided at the place where the services are executed, irrespective of the places and Member States to which the services are directed".

Beyond this, the law is unclear.[34] Directive 2018/957/EU, amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, failed to address specifically issues related to procurements.

A larger issue concerning workers' – and more generally social and even human – rights in procurement and concessions are the tools for monitoring respect for the applicable rules and for sanctioning breaches.

In the absence of provisions at EU level, some national experiences are worth recalling. Italy has introduced mandatory sustainable public procurement provisions re-

[29] See *Friton* and *Zöll* [14] esp. pp. 609 ff.

[30] See *Skovgaard*, *Ølykke* and *Clausen* [26] esp. pp. 738 f.

[31] Case C-346/06, *Rüffert*, EU:C:2008:189.

[32] Case C-115/14, *RegioPost*, EU:C:2015:760.

[33] See also Recital 37.

[34] Sanchéz Graells A. (ed.), *Smart Public Procurement and Labour Standards. Pushing the Discusion after Regiopost* (Oxford, Hart, 2018) [22].

garding a number of supplies and service procurement contracts. In the case of cleaning services, contractors are required to apply the relevant collective agreements, and the correct implementation of these must be verified, including by interviewing the workers.[35]

An interesting approach to compliance with equal pay rules has been adopted by Iceland. Since 2018, for all companies with more than 25 employees annually operating on the Icelandic market, it became mandatory to obtain the Icelandic Equal Pay Standard (ÍST85), an official certification that they comply with the relevant rules. The application of the ÍST85 to foreign economic operators engaged in public procurements in Iceland and meeting the quantitative requirement is somewhat contentious, notably insofar as its effects might extend outside Iceland. However, reverse discrimination against Icelandic economic operators would be a risk were ÍST85 not applied.[36]

3.3 Accessibility for all

Accessibility is very much at the core of Directive 2014/24/EU. According to the last two phrases in Art. 42(1),

> "for all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users. Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto".[37]

Moreover, as already recalled, Recital 101 suggests that violation of the rules on accessibility for disabled persons may make a potential contractor unreliable, and thus capable of exclusion for grave professional misconduct under Art. 57(4)(c).

3.4 Award and contract performance conditions

Art. 67 of Directive 2014/24/EU on award criteria took account of the case law up to *Max Havelaar*. Under Art. 67(2), the most economic advantageous tender may be selected according to the "best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question". Among these criteria are included "quality, including technical merit, aesthetic and functional characteristics,

[35] https://www.mite.gov.it/sites/default/files/archivio/allegati/GPP/2021/cam_sanificazione.pdf [1].

[36] Marta Andhov & Bergþór Bergsson, 'Equal Pay and EU Public Procurement Law – Case Study of Mandatory Icelandic ÍST85 Standard' Vol. 4 No. 1 (2021): Nordic Journal of European Law Issue 1.

[37] Recital 76 simply rewords the first phrase; see also Art. 62 on quality assurance standards; Recital 57 instead concerns accessibility to the electronic means of communication to be used in procurement procedures.

accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions".[38]

Recital 99 expands on the social aspects that might be included among award criteria (and contract performance conditions):

> "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 amongst 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, amongst 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. In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users".

Besides referring again to accessibility, the Recital greenlights some very 'classic' social policies calling on public procurement to contribute in the fight against unemployment, as was seen for instance in *Bentijes*.

Moreover, the last two phrases in Art. 67(2) indicate respectively that "the cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only" and that the "Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contract". Criteria giving too much weight to price naturally lead to depressing workers' conditions, and this is especially so for contracts where personnel are the most relevant cost. To fight against social dumping, Art. 95(3) of the Italian Public Contracts Code implements the last phrase in Art. 67(2) by providing that it is impermissible merely to refer to the price or cost alone in the award of contracts relating to social services, school and hospital catering and of any contract for which the personnel costs amount to at least 50% of the overall budget of the contract.

With reference to social and other special contracts, the last phrase of Art. 76(2) further specifies that Member States may provide that "the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services".

Social aspects are instead not really referred to into Art. 68, on life-cycle costing.[39] The last phrase of Recital 96 indicates that "the feasibility of establishing a common methodology on social life cycle costing should be examined, taking into account existing methodologies such as the Guidelines for Social Life Cycle Assessment of Products adopted within the framework of the United Nations Environment

[38] See Art. 67(2), lit. (a).

[39] See generally Andhov M., Caranta R, Wiesbrock A. (eds.), *Cost and EU Public Procurement Law. Life-Cycle Costing for Sustainability* (London, Routledge, 2020) [2].

Programme". The problem is that most social aspects – and especially those where human rights are at stake – cannot be monetised ethically, and life-cycle costing, unlike simple life-cycle assessment, does presuppose such monetisation.

Besides the link to subject matter, both Art. 67 and 68 provide for further safeguards to make sure that the contractor is chosen according to objective and non-discriminatory criteria.

Because of the peculiar evolution of EU law that started with *Bentijes*, contract performance conditions are associated with award criteria rather than with technical specifications. Be it as it may, Art. 70 of Directive 2014/24/EU provides that special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract and indicated in the call for competition or in the procurement documents, "may include economic, innovation-related, environmental, social or employment-related considerations". As indicated in Recital 99, already alluded to above, many traditional policies relating to working conditions may be pursued under contract performance conditions. However, Recital 104 clarifies that requirements referring to a general corporate policy of the economic operator cannot be considered as linked to the subject matter. Basically, corporate social responsibility policy requirements are considered to pertain to the contractor rather than to the contract.[40]

3.5 Reserved and special contracts

In many jurisdictions, such as the US, set-asides of quotas of contracts (or types of contracts) are the tool of choice to pursue social policies through procurements. This approach runs afoul of the principle of equal treatment which is at the core of EU public procurement law. However, Art. 20 of Directive 2014/24/EU on reserved contracts is a clear exception to that principle insofar as it provides that

> "Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30 % of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers".[41]

The provision has been at the center of the recent *Conacee* case.[42] *Conacee* is a non-profit-making association, whose members are federations and associations of special employment centres. It challenged instructions from the *Diputación Foral de Gipuzkoa* reserving (a) the right to participate in procedures for the award of contracts to social initiative special employment centres or to work integration social

[40] See critically Andrecka M., 'Corporate Social Responsibility and Sustainability in Danish Public Procurement' 3/2017 EPPPL, 333 [5].

[41] See Baciu I., The Possibility to Reserve a Public Contract under the New European Public Procurement Legal Framework, EPPPL 4|2018, 307; Baciu I, Comment to Art. 20 in Caranta R. and Sanchez-Graells A. (eds.). 218 [7–9].

[42] Case 598/19, *Conacee*, ECLI:EU:C:2021:810.

enterprises, and (b) the performance of a number of such contracts in the context of sheltered employment programmes. Under Spanish law, 'social initiative special employment centres', in the first place, have more than 50% of their shares held directly or indirectly by not-for-profit entities and, secondly, reinvest their profits in full in their own establishment or in another centre of the same kind, consistently with those principles. Basically, by limiting their scope to 'social initiative special employment centres', the instructions exclude from the reservation for-profit economic operators that otherwise satisfy the conditions laid down in Art. 20, in that at least 30% of their employees are disabled or disadvantaged persons and their main aim is to further the social and professional integration of those persons. The Court of Justice reasoned on the basis that Directive 2014/24/EU gives the Member States a degree of latitude in implementing the conditions laid down in Art. 20(1).[43] The Court left to the referring court the task of determining whether social initiative special employment centres,

> "on account of their particular characteristics, are in a position to implement more effectively the social integration objective pursued by Article 20(1), which could objectively justify a difference in treatment with respect to business initiative special employment centres. In that regard, the Spanish Government states that social initiative special employment centres maximise social and non-economic value, given, first, that they have no profit-making aim and that they reinvest all their profits in their social objectives, second, that they tend to be governed by democratic and participatory principles and, third, that they thus achieve greater social impact by providing better quality employment and better social and professional integration and reintegration for disabled and disadvantaged persons".[44]

A further possibility of reserving contracts is provided for in the particular regime for social and other special contracts laid down in Arts. 74 ff of Directive 2014/24/EU.[45] Under Art. 76(2), in awarding those contracts, contracting authorities "may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation". With reference to a subgroup of specific health, social and cultural services, Art. 77 lays down a specific regime for reserved contracts for the benefit of non-profit participatory organisations having as their objective the pursuit of a public service mission linked to the delivery of those same services.[46] Under Art. 10(h), a smaller group of civil defence, civil protection, and danger prevention services contracts are instead excluded from the scope of application of the procurement directive insofar as they are provided by non-profit organisations or associations.[47]

[43] Case 598/19, *Conacee*, ECLI:EU:C:2021:810, paras. 21 f.

[44] Case 598/19, *Conacee*, ECLI:EU:C:2021:810, para. 41.

[45] Tudurić M. Comments to Artt. 74–77 in Caranta R. and Sanchez-Graells A. (eds.) 810 ff [29].

[46] Baciu I. 319 ff.

[47] Stalzer, Comment to Art. 10, in Caranta R. and Sanchez-Graells A. (eds.) esp. 106 f; see also Caranta R. Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts,

While the reason why the provisions just referred have very different beneficiaries is not clarified, the possibility of reserving contracts for social economy actors is consistent with the idea that NGOs may be best suited to provide quality social services. This idea is at the roots of the *Sodemare* judgment.[48] The case concerned a statute of the Lombardy Region in Italy allowing only NGOs to participate in contracts concerning the provision of services in the framework of the social welfare system. Rejecting the arguments raised by a federation of Belgian commercial companies, the Court of Justice held that

> "a Member State may, in the exercise of the powers it retains to organize its social security system, consider that a social welfare system of the kind at issue in this case necessarily implies, with a view to attaining its objectives, that the admission of private operators to that system as providers of social welfare services is to be made subject to the condition that they are non-profit-making."[49]

While this *dictum* is sweeping in its nature, the provisions in 2014/24/EU Directive are much more detailed, even if not well aligned with one another. *Sodemare* is based on the constitutional division of competencies between the EU and its Member States and therefore might vouchsafe wider possibilities for the latter to reserve procurement to the benefit of social economy actors than those open under Directive 2014/24/EU. To say the least, *Conacee* stands for the proposition that not-for-profit economic operators might be more suitable for pursing social policies.[50]

4 Conclusions: taking (social) rights seriously

The 2014 reform was indeed a step forward for socially responsible public procurement. While there is still uncertainty as to whether or not some measures in favour of the unemployed, workers or social enterprises are consistent with EU public procurement rules, it is clearly established that social considerations may be added to the different steps of the award procedure, from technical specifications to contract performance conditions.

The main limit of the 2014 reform is that it is mainly an instrument for enabling contracting authorities, but, with the exception of the question of accessibility and to some extent that of abnormally low tenders, it does not really push contracting authorities to embrace socially responsible public procurement or sustainable public procurement more generally. The weak enforcement foreseen for the sustainability principle laid down in Art. 18(2) is indeed telling of a lukewarm approach.

Nonetheless, the multiple crises that have hit Europe and the world as a whole in the past few years have prodded the EU to launch a highly ambitious reform plan. The European Green Deal and many of the initiatives associated with it are going to

in Lichère F. Caranta R. and Treumer S. (eds.), *Modernising Public Procurement: The New Directive* (Copenhagen, DJØF, 2014) 88 ff [11, 27].

[48] Case C-70/95, *Sodemare*, ECLI:EU:C:1997:301.

[49] Case C-70/95, *Sodemare*, ECLI:EU:C:1997:301, para. 32.

[50] *Sodemare* was upheld in Case C-436/20, *Asade*, ECLI:EU:C:2022:559.

change the sustainable public procurement landscape forever. We may in fact be witnessing a paradigm shift ahead where the EU moves more towards creating a framework for 'what' is bought. The initiatives taken under the European Pillar of Social Rights, in particular Chapters 1 (on equal opportunities and access to the labour market) and 2 (on fair labour conditions), will specifically impact on socially responsible public procurement.[51]

For instance, the *Rüffert* case law is going to be impacted by the Commission proposal for a directive to improve the adequacy of minimum wages in the EU, as it aims not only to protect workers in the EU by ensuring adequate minimum wages allowing for a decent living wherever one works, but also to help close the gender pay gap, strengthen incentives to work and create a level playing field in the internal market.

The Commission proposal for a Directive on corporate sustainability due diligence, which aims at fostering sustainable and responsible corporate behaviour throughout global value chains, including both social and environmental considerations, will also be very relevant.[52] As it stands, a reduced group of economic operators will be required to identify and, where necessary, prevent, end or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on the environment, for example pollution and biodiversity loss. Contracting authorities and SMEs are not directly included within the scope of the proposed Directive, but, as regards the former, once approved, the Directive will be one of the relevant standards under Art. 18(2), while, as regards the latter, they will more often than not be in the supply chain of some large economic operators, so that a cascade effect is to be expected. Basically, while referring to the general corporate policy of a company might be not linked to the subject matter of the contract, compliance with corporate social responsibility rules is going to become an item to be checked in order to assess the reliability of tenderers.

To understand socially responsible public procurement – and more generally sustainable public procurement – it is now necessary to go well beyond the public procurement and concessions directives, and to delve deep into sectoral EU law. It is primarily in sectoral legislation that inroads for mandatory sustainable public procurement standards are opened.[53] That does not mean that a reform of the 2014 Directives would not help. For instance, strengthening the sustainability principle by making exclusion mandatory in the event of breach of the rules covered by Art. 18(2) would assist. Nonetheless, we are moving rapidly away from the neoliberal mechanical procurement approach which held sway in past decades.

[51] https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights_en.

[52] https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en. See also the proposal for a Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM/2021/189 final.

[53] Pouikli, K. Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: reconsidering the role of public procurement as an environmental policy tool. *ERA Forum* 21, 699–721 (2021) [20]. See also the proposals in *Andhov M.* [3].

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