

Public Procurement and 'Core' Human Rights: A Sketch of the EU Legal Framework



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Public Procurement and ‘Core’ Human Rights: A Sketch of the EU Legal Framework

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Abstract

In this paper, I sketch the main mechanisms for the implementation of a ‘core’ human rights-orientated public procurement policy foreseen in the 2014 EU Public Procurement Package. I discuss the main constraints for the inclusion of human rights-related considerations in the procurement process through the following instruments: exclusion grounds; use of labels; award criteria; and contract performance requirements. I conclude by offering a sceptical view of the effectiveness of any of these mechanisms due to policy fuzziness and significant resource constraints, and query their desirability due to the implicit trade-offs they impose on the general effectiveness of the procurement function.

1. Introduction

Despite the fact that the term ‘human rights’ does not appear even once in the EU’s 2014 Public Procurement Package,² there is an emerging consensus that this new set of rules provides increased scope for contracting authorities to include human rights considerations in the design and execution of public tenders.³ This can be seen as a direct result of the post-Lisbon commitment for the EU to

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² The 2014 EU public procurement package is comprised of Directives 2014/23/EU on concession contracts (OJ 2014 L94/1), 2014/24/EU on public sector procurement (OJ 2014 L94/65) and 2014/25/EU on utilities procurement (OJ 2014 L94/243). There are additional regulatory instruments, such as Directive 2009/81/EC on defence and security procurement (OJ 2009 L216/76) and Directives 89/665/EEC and 92/13/EEC on remedies (both amended by Directive 2007/66/EC, OJ 2007 L335/31). These rules control the procurement activities of the EU Member States. In turn, procurement carried out by the EU institutions is controlled by the relevant version of the Financial Regulation (currently, the consolidated version of Regulation (EU, Euratom) No 966/2012, OJ 2012 L298/1, which is under review). The Financial Regulation creates a system that follows closely the substantive rules of the 2014 EU public procurement package and, in particular, Directive 2014/24/EU.

³ For discussion, see Olga Martin-Ortega, Opi Outhwaite & William Rook, ‘Buying power and human rights in the supply chain: legal options for socially responsible public procurement of electronic goods’ (2015) 19(3) *International Journal of Human Rights* 341-368. See also M Vogel, ‘Promoting human rights compliance through public procurement (regulation): the new European Directive’, in IPPC Proceedings, 14-1 August 2014 (pp. 980-989). For a broader discussion of the linkage between procurement and human rights, see C McCrudden, ‘Using public procurement to achieve social outcomes’ (2004) 28 *Natural Resources Forum* 257-267.

include human rights considerations as a horizontal element of all of its policies⁴—both internally (Art 3(1) ex Art 2 TEU,⁵ Art 6(1) TEU);⁶ and externally (Art 3(5) TEU,⁷ Art 21(1) TEU).⁸ Given that some human rights materially overlap with social considerations and employment rights (eg concerning protection of human rights in the workplace),⁹ this can also be seen as an indirect consequence of the EU's increased commitment to a social market economy model (Art 3(3) TEU).¹⁰ The increasing relevance of human rights issues in the formation of EU public procurement policy can, ultimately, also be seen as reflective of a broader international trend.¹¹ Regardless of its specific legal basis or ultimate justification, the pro-human rights orientation of the 2014 rules is usually identified in general statements such as those in recital 40 of Directive 2014/24/EU:

Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. The necessary verification for that purpose should be carried out in accordance with the relevant provisions of this Directive, in particular those governing means of proof and self-declarations.

However, it is worth emphasising that this is one of a relatively wide array of goals of the 2014 rules, which are by no means *primarily* concerned with the enforcement of labour and social standards. Thus, from a normative perspective, I think it is worth stressing that, with one limited exception,¹² the 2014 Public Procurement Package does not mandate the use of procurement for the enforcement or promotion of human rights norms. Therefore, all relevant decisions are left to either the implementing legislation of the Member States or, where the latter does not prescribe a specific approach, to general policies or case-by-case decisions by contracting authorities. This means that, to

⁴ For related discussion, with reference to pre-2014 EU procurement rules, see A Georgopoulos, 'The EU Accession to the ECHR: An Attempt to Explore Possible Implications in the Area of Public Procurement', in V Kosta, N Skoutaris and V Tzevelekos (eds), *The EU Accession to the ECHR* (Hart, 2014) 271-290.

⁵ Art 3(1) establishes that '[t]he Union's aim is to promote peace, its values and the well-being of its peoples', and Art 2 TEU details such values, which include: 'human rights, including the rights of persons belonging to minorities'.

⁶ 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to ... the protection of human rights, in particular the rights of the child'.

⁷ 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

⁸ 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: ... the universality and indivisibility of human rights and fundamental freedoms'.

⁹ Similarly, see G Bouwman, 'Safeguarding Human Rights through Public Procurement Law', 16 February 2017, presentation at PPRC, available at <http://www.pprc.eu/wp-content/uploads/ppt-ppl-Gerrieke-Powerpoint-Human-Rights-and-Public-Procurement-Law-1.pdf>, last accessed 16 January 2018.

¹⁰ For general discussion, see U Neergaard, R Nielsen and Lynn M Roseberry (eds) *Integrating Welfare Functions into EU Law—From Rome to Lisbon* (DJØF, 2009).

¹¹ See eg the three reports of the International Learning Law on Public Procurement and Human Rights: *Protecting Human Rights in the Supply Chain: A Guide for Public Procurement Practitioners* (July 1, 2017), *Modern Slavery and Human Rights in Global Supply Chains: Roles and Responsibilities of Public Buyers* (December 20, 2016) and *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (July 19, 2016). All available at <http://www.hrprocurementlab.org/>, last accessed 16 January 2018.

¹² This concerns the mandatory exclusion of economic operators convicted by final judgment of child labour and other forms of trafficking in human beings under Art 57(1)(f) Dir 2014/24/EU, discussed below (section 2).

a large extent, the pursuit of human rights goals is left to the discretion of contracting authorities and, consequently, subject to the relevant checks and balances. In that regard, the constraints derived from the general principles of EU procurement law will become particularly relevant. At the outset, I would like to clarify that, in my view, the constraints derived from the principle of competition in Article 18(1) of Directive 2014/24/EU and the ensuing prohibition for contracting authorities to artificially narrow down competition will play a significant role in constraining the possibilities of imposing human rights-orientated requirements.¹³ This restrictive approach to the use of procurement for the pursuit of human rights goals is coupled with concerns surrounding the use of procurement as a tool of regulation and the shadow costs this can create, the likely ineffectiveness of piecemeal interventions through procurement and the administrative burden for contracting authorities it creates, as well as the potential extraterritoriality of EU human rights norms that could derive from an expansive use of discretion in that regard. Even if some of these issues will emerge from the critical considerations in the conclusion, exploring these issues in detail exceeds the possibilities of this chapter. However, the reader may want to keep these issues in mind when reading the remainder of this contribution.

From an analytical perspective, assessing the regulatory space for human rights promotion in the 2014 Public Procurement Package requires distinguishing at least two tiers of issues. Given that the Charter of Fundamental Rights of the European Union (the Charter)¹⁴ is not constructed around an explicit notion of human rights, but rather of fundamental freedoms, it is worth stressing that its content encapsulates both ‘core’ human rights guarantees (eg rights of the child, right to liberty and security) and extended fundamental freedoms (eg right to access to documents and to good administration). Both types of guarantees are relevant in the context of procurement. This chapter will solely concentrate on the possibilities created in the 2014 Public Procurement Package (and, in particular, in Directive 2014/24/EU) for the pursuit of goals of enforcement or promotion of ‘core’ human rights guarantees, and in particular those that overlap with social considerations.¹⁵ It should also be noted that EU public procurement law is increasingly expanding the requirements of good administration and due process guarantees, and thus boosting the effectiveness of other parts of the Charter—i.e. those falling under the broader category of fundamental rights in the Charter, but outwith the narrower category of ‘core’ human rights discussed in other chapters of the book. Thus, this second line of interaction between EU procurement law and fundamental rights will not be explored in detail in this chapter.¹⁶

After this brief introduction and bearing in mind the narrow scope of the discussion, the chapter engages in a structured analysis of the regulatory space for inclusion of considerations related to core human rights’ guarantees in procurement covered by Directive 2014/24/EU, mainly through the following instruments: exclusion grounds, both mandatory and discretionary (section 2); use of

¹³ For general discussion on the principle of competition and the way it constrains the exercise of discretion, see A Sanchez-Graells, *Public procurement and the EU competition rules*, 2nd edn (Hart, 2015) ch 5.

¹⁴ (2012) OJ C 326/391.

¹⁵ For additional discussion of social or employment considerations not necessarily overlapping with ‘core’ human rights, see A Sanchez-Graells, ‘Regulatory Substitution between Labour and Public Procurement Law: The EU’s Shifting Approach to Enforcing Labour Standards in Public Contracts’ (2018) 24(2) *European Public Law Journal* forthcoming, and the various contributions to A Sanchez-Graells (ed), *Smart Public Procurement and Labour Standards—Pushing the Discussion after Regiopost* (Hart, 2018).

¹⁶ These issues are, however, discussed in A Sanchez-Graells, ‘Territorial Extension and Case Law of the Court of Justice. Good Administration and Access to Justice in Procurement as a Case Study’ (2017) SSRN working paper available at <https://ssrn.com/abstract=3081061>, last accessed 16 January 2018.

labels and certification requirements (section 3); award criteria (section 4); increased leeway for decisions not to award contracts to tenderers that do not comply with relevant obligations, even if they submit the seemingly most advantageous tender (section 5), and an obligation to reject tenders that are abnormally low due to their non-compliance with relevant obligations (section 6); as well as, finally, contract performance requirements (7).¹⁷ Some common trends are picked up in the conclusion and form the basis for critical reflection (section 8). The discussion is necessarily limited due to space constraints, so the main focus will be to explore the space for ‘core’ human rights’ protections in each of the different provisions, rather than attempting comprehensive interpretation.

2. ‘Core’ human rights’ guarantees as exclusion grounds

The 2014 rules foresee the mandatory exclusion¹⁸ from tender procedures of economic operators convicted by final judgment of child labour and other forms of trafficking in human beings.¹⁹ Member States also need to take *adequate 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 EU law, national law of its Member States, collective agreements or by certain international environmental, social and labour law provisions.²⁰ This casts a rather wide net in principle, but also creates significant uncertainty as to the scope of ‘applicable obligations’ where tenderers are based in jurisdictions other than the contracting authority’s (an issue discussed below 8). Contracting authorities may also exclude, or may be required by EU Member States to exclude, from participation in a procurement procedure, economic operators that have violated those obligations,²¹ and can exercise significant discretion to exclude economic operators guilty of grave professional misconduct that renders their integrity questionable,²² which contracting authorities may decide to link to abusive or poor employment or social practices.

Given that there are different standards for different exclusion grounds, these are issues that are prone to litigation and that will likely require interpretation by the Court of Justice. In that regard, it is submitted that any means of proof should suffice to proceed to such exclusion, but the violation should be of a sufficient entity as to justify the exclusion under a proportionality test (similarly to what

¹⁷ For a more detailed mapping exercise, see *Protecting Rights by Purchasing Right - The Human Rights Provisions, Opportunities and Limitations Under the 2014 EU Public Procurement Directives* (2015) Institute for Human Rights and Business Occasional Paper Series Num 3, available at <https://www.ihrb.org/uploads/reports/2015-11%2C%20IHRB%20Report%2C%20Protecting%20Rights%20by%20Purchasing%20Right%20-%20Full%20Report.pdf>, last accessed 16 January 2018.

The discussion in this chapter does not cover subcontracting issues. The interested reader will find relevant analysis in R Craven, ‘Subcontracting matters: Articles 43 and 71 of the 2014 Directive’, in GS Ølykke & A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016) 295-317.

¹⁸ See D Hansom, ‘Mandatory exclusions: a new tool to protect human rights in EU public procurement?’, November 28, 2016, International Learning Law on Public Procurement and Human Rights blog, <http://www.hrprocurementlab.org/blog/mandatory-exclusions-a-new-tool-to-protect-human-rights-in-eu-public-procurement/>, last accessed 16 January 2018.

¹⁹ Art 57(1)(f) Dir 2014/24/EU.

²⁰ Art 18(2) Dir 2014/24/EU. The relevant obligations are listed in Annex X of the same Directive which, among others, includes ILO conventions on forced labour (Convention 29); and on the abolition of forced labour (Convention 105); on minimum age (Convention 138); on discrimination (employment and occupation) (Convention 111); and on worst forms of child labour (Convention 182).

²¹ Art 57(4)(a) Dir 2014/24/EU.

²² Art 57(4)(a) Dir 2014/24/EU, which the Court of Justice is interpreting functionally and in a way that recognises significant space for discretion by contracting authorities; by analogy, see Judgment of 20 December 2017 in *Impresa di Costruzioni Ing. E. Mantovani and RTI Mantovani e Guerrato*, C-178/16, EU:C:2017:1000.

the new Directive proposes in terms of lack of payment of taxes or social security contributions), since exclusion for any minor infringement of social, labour or environmental requirements may be disproportionate and, ultimately, not in the public interest if it affects the level and intensity of competition for the contracts. In that regard, it is worth stressing that the application of these rules is not strictly limited to violations taking place in the EU and, in any case, they constitute a core requirement for conditional access to the EU procurement markets by non-EU economic operators.²³ As a result of these rules, for example, a Dutch contracting authority can exclude a multinational oil company for causing environmental damage in Nigeria,²⁴ or a Spanish contracting authority can be obliged to exclude an international tenderer of apparel due to human and labour right violations in India.²⁵

Exercising discretion to exclude economic operators that have violated relevant employment or social obligations or standards requires contracting authorities to comply with strict transparency requirements, as exclusion grounds need to be *ex ante* identifiable for potential tenderers or candidates,²⁶ and tenderers need to be given the opportunity to both oppose the existence of the alleged infringement or poor or exploitative practice,²⁷ and/or demonstrate that they have taken adequate remedial measures to 'self-clean' and restore their reliability.²⁸ Additionally, contracting authorities will need to allow interested tenderers or candidates to challenge other tenderers' or candidates' compliance with the required 'core' human rights guarantees, given the impact that non-exclusion of an (alleged) offender of the applicable rules or standards could have for the chances of being awarded the contract of compliant tenderers or candidates.²⁹ Therefore, contracting authorities willing to use the possibilities for discretionary exclusion of economic operators as a mechanism to promote 'core' human rights guarantees should be in a position to both receive and assess the relevant information (in part, as a result of the use of the European Single Procurement Document, possibly with very detailed instructions as to the interpretation of the relevant self-certification on the basis of compliance with a pre-disclosed set of rules and standards), to complete adversarial procedures with the affected economic operators, and to manage the risk of negative impacts on the completion of the tender for its entire duration, as exclusion on these grounds is possible at any point of the procurement process.³⁰ This is likely to be resource-intensive and potentially riddled with practical difficulties,³¹ not least where there is a need to assess documentation in several foreign

²³ The conditionality derives, primarily, from Art 25 Dir 2014/24/EU.

²⁴ L Ankersmit, *Green Trade and Fair Trade in and with the EU: Process-based Measures within the EU Legal Order* (Cambridge University Press, 2017) 123.

²⁵ Written Evidence Submitted by the International Corporate Accountability Roundtable: Human Rights and U.K. Public Procurement of Apparel, to the U.K. Joint Committee on Human Rights Inquiry into Human Rights and Business. Available at <http://www.hrprocurementlab.org/wp-content/uploads/2016/04/ICAR-Submission-to-JCHR-Human-Rights-and-UK-Public-Procurement-of-Apparel.pdf>, last accessed 16 January 2018.

²⁶ The Court of Justice has, for example, opposed exclusion based on general legal requirements not identifiable in the tender documentation, see Judgment of 2 June 2016 in *Pizzo*, C-27/15, EU:C:2016:404.

²⁷ *Ibid.*

²⁸ Art 57(6) Dir 2014/24/EU. For discussion, see R Caranta & S Richetto, 'On self-cleaning', in M Burgi, M Trybus & S Treumer (eds), *Qualification, selection and exclusion in EU procurement* (DJØF Publishing, 2016) 275-302.

²⁹ To that effect, see Judgment of 5 April 2017 in *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268.

³⁰ Art 57(5) Dir 2014/24/EU.

³¹ Along these lines, see P Telles, 'The European Single Procurement' (2017) 1 *Public Procurement Journal* 1-21, available at https://www.urt.cc/sites/default/files/UrT_2017-1_Telles.pdf, last accessed 16 January 2018.

languages, or where the allegations are based on on-going investigations, which may require cooperation with other domestic or international authorities (if at all possible).

3. Use of labels and third-party certification of compliance with 'core' human rights guarantees

Given the demands and potential difficulties of the use of discretionary exclusion grounds (above 2), one of the possibilities for contracting authorities willing to engage in a potentially less resource-demanding strategy to try and boost compliance with 'core' human rights guarantees consists on reliance in third-party certification of compliance, in particular using labels. The 2014 rules foresee this possibility and stress that '*Contracting authorities that wish to purchase works, supplies or services with specific ... social or other characteristics should be able to refer to particular labels*'.³² However, the specific requirements for the use of labels are more restrictive than may seem at first sight.

Label requirements can be used as either absolute requirements (technical specifications), relative or evaluated requirements (award criteria, see also below 4) or relational requirements (contract compliance clauses, see also below 7). However, labels need to adhere to a strict set of conditions stemming from the case law of the Court of Justice,³³ and in particular, they must ensure that all of the following conditions are fulfilled: (a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract; (b) the label requirements are based on objectively verifiable and non-discriminatory criteria; (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate; (d) the labels are accessible to all interested parties; and (e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.³⁴ Additionally, where a label sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.³⁵

Consequently, the rules on labels clearly follow the general criteria that regulate the establishment of technical specifications and particularly the prohibition of references to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.³⁶ Moreover, contracting authorities are bound to adopt a possibilistic approach to the assessment of compliance with label requirements. This is particularly clear from the provision that obliges contracting authorities requiring a specific label to accept all labels that confirm that the works, supplies or

³² Recital 75 Dir 2014/24/EU.

³³ See Judgment of 10 May 2012 in *Commission v Netherlands (fair trade coffee)*, C-368/10, EU:C:2012:284. For discussion, see A Sempé, 'The role of environmental and social labels in procurement' (May 2012), available at <https://www.procurementanalysis.eu/app/download/5804183001/Environmental%2Band%2Bsocial%2Blabels%2Bin%2Bprocurement.pdf>, last accessed 16 January 2018.

³⁴ Art 43(1) Dir 2014/24/EU.

³⁵ Art 43(2) Dir 2014/24/EU.

³⁶ Art 42(4) Dir 2014/24/EU.

services meet equivalent label requirements.³⁷ In addition, in cases where the tenderer has not been able to obtain the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, requires contracting authorities to accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.³⁸

Therefore, two main constraints for the use of labour or social labels to promote ‘core’ human rights guarantees arise from the relevant rules. First, the requirements for the use of the label must only concern criteria which are linked to the subject-matter of the contract and *appropriate to define characteristics of the works, supplies or services that are its subject-matter*.³⁹ This can be read in an expansive or restrictive manner. In a limited reading, this would require that the requirements translate into a specific characteristic of the products or services, which would largely neutralise the possibility to use social and employment labels. In a broader reading, and in a functional approach similar to that of award criteria (below 4), it would be possible to use labels concerned with social and labour conditions throughout all stages of their life cycle.⁴⁰ However, even in this broader reading, it is necessary to comply with the general requirement of link to the subject matter,⁴¹ which will limit the possibilities of using labels encompassing requirements linked to general corporate policies or aspects of the supply chain that are too far detached from the direct provision of services or supply of products to the contracting authority. The requirements of the label must also *be based on objectively verifiable and non-discriminatory criteria*,⁴² which can create difficulties where the substantive standards are of an absolute nature (eg require the payment of specific minimum wages, or compliance with specific health and safety standards) and thus potentially advantage economic operators subject to those standards by law or by industry practice in their home State. This will be particularly problematic where labels’ requirements serve the purpose of exporting high standards of protection that, de facto, exclude providers from third countries.⁴³

The second, and possibly more relevant constraint is the *need for the contracting authority to retain the ability to make judgements of equivalence* between different labels and between the prescribed elements of the applicable label and the documentation provided by economic operators that legitimately avail themselves of the possibility of alternative verification due to the impossibility of obtaining the relevant label in the specified tender timeframe. Arguably, this comes to neutralise the transaction cost advantage of the possibility of using labels in the first place (at least partially), in that the contracting authority needs at all times to be in a position to undertake specific verification

³⁷ Art 43(1) III Dir 2014/24/EU.

³⁸ Art 43(1) *in fine* Dir 2014/24/EU.

³⁹ Art 43(1)(a) Dir 2014/24/EU.

⁴⁰ See Art 67(3) Dir 2014/24/EU, by analogy.

⁴¹ For discussion, see A Semple, ‘The Link to the Subject Matter: A Glass Ceiling for Sustainable Public Contracts?’, in B Sjøfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law. New Perspectives on the State as Stakeholder* (Cambridge University Press, 2015) 50-74.

⁴² Art 43(1)(b) Dir 2014/24/EU.

⁴³ For discussion of the WTO law implications of such approach, see M A Corvaglia, ‘*RegioPost* and Labour Rights Conditionality: Comparing the EU Procurement Regime with the WTO Government Procurement Agreement’, in Sanchez-Graells (n 15) 245-264.

of the documentation provided by tenderers, thus relinquishing the outsourcing of that duty to the third-party certification entity (or having to hire those services on an *ad hoc* basis, where possible).

4. 'Core' human rights' guarantees as award criteria

A challenging possibility for the promotion of 'core' human rights' guarantees is to use them as award criteria. As already mentioned (above 3), there is at least the theoretical possibility of using compliance with social or employment labels as an award criterion.⁴⁴ This is also compatible with the contracting authority's discretion to assess the most economically advantageous tender (MEAT) on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question⁴⁵—and bearing in mind that award criteria shall be considered to be linked to the subject-matter of the public contract 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 the specific process of production, provision or trading of those works, supplies or services; or a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.⁴⁶ However, the implementation of a general will of using 'core' human rights' guarantees as award criteria raises difficult functional questions.

While qualitative selection/exclusion (above 2) and technical compliance (above 3) are usually assessed on a pass/no pass, or compliance/non-compliance basis⁴⁷—which lends itself to the exclusion of economic operators or the rejection of tenders that do not meet the required threshold of compliance with social and labour rules or standards—award criteria are structurally designed to allow for an overall comparison of non-homogeneous tenders, which functionally allows for certain trade-offs between different criteria used in the evaluation. From that perspective, and unless a contracting authority used compliance with 'core' human rights guarantees throughout the life cycle (and supply chain) of the relevant service or product as an 'all-or-nothing' award criterion and established failure to obtain maximum points under this criterion as an award constraint preventing the tender from being chosen for award; the consideration of social and labour aspects of the tender as an award criterion would simply allow the contracting authority to 'price' its willingness to overlook non-compliance and trade it for more advantageous economic and technical conditions. For example, a contracting authority that established three award criteria including quality, price and compliance with specific labour and social standards (assessed by a label, or otherwise) and gave them respective weightings of 40%, 40% and 20%, would simply be indicating its willingness to trade reductions or shortcomings in social or labour aspects by quality or price advantages of double their magnitude. This may be acceptable to some contracting authorities (and their constituencies), but it seems normatively incompatible with their desire to use procurement as a lever to promote 'core' human rights' guarantees. Moreover, it creates technical complexity in the evaluation, in particular given the need to come up with a scale to assess different levels of (non)compliance with the relevant labour and social rules or standards.

⁴⁴ Art 43(1) Dir 2014/24/EU.

⁴⁵ Art 67(2) Dir 2014/24/EU.

⁴⁶ Art 67(3) Dir 2014/24/EU.

⁴⁷ Except where variant offers are accepted, and the relevant requirements have not been established as mandatory or minimum requirements; see Art 45 Dir 2014/24/EU.

5. Possibility to deviate from MEAT on ‘core’ human rights concerns

Probably in view of the difficulties in the use of ‘core’ human rights considerations as award criteria just outlined (above 4), the 2014 rules foresee the possibility of not using social and labour considerations as an award criterion *stricto sensu* to assess the most economically advantageous tender, but rather as a possibility to deviate from MEAT on the basis of ‘core’ human rights concerns. Indeed, contracting authorities are empowered to decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with applicable social and labour obligations,⁴⁸ but solely if such non-compliance does not make the tender abnormally low (in which case its rejection is mandatory, see below 6). Therefore, contracting authorities that identify elements in a tender that would imply a violation of applicable labour and social requirements can reject it despite its having achieved the highest score at tender evaluation phase, and their exercise of discretion in this regard will solely be constrained by the general principles of public procurement—amongst which proportionality requirements will probably be the most relevant.⁴⁹

In that regard, and as mentioned above concerning discretionary exclusion decisions (above 2), contracting authorities should be able to avail themselves of any means of proof to proceed to such rejection of the tender (which may be decided on the basis of the documentary evidence contained in the tender, or in the evaluation reports), but the violation of applicable labour and social obligations should be of a sufficient entity as to justify the exclusion under a proportionality test because rejection for any minor infringement of social or labour obligations may be disproportionate and, ultimately, not in the public interest if it results in the award of the contract on the basis of a significantly inferior tender. The procedural requirements to carry out such rejection of the tender are not regulated in Directive 2014/24/EU but, in the interest of ensuring transparency and equal treatment, and by analogy with the cases where the non-compliant tender is suspected of being abnormally low (below 6), it is submitted that the contracting authority needs to enter into an *inter partes* procedure where it should allow the affected tenderer to explain whether applicable social and labour obligations would be infringed or not in the execution of the contract in the terms of its tender, and to put forward any arguments why discretionary rejection of the tender would or not be in the public interest.⁵⁰

It is also worth emphasising that this possibility to deviate from MEAT and the possibility to apply discretionary exclusion grounds (above 2), both on grounds of the violation of applicable social and labour obligations, serve exactly the same function—ie the strengthening of the social and labour aspects of the public procurement function. Indeed, both provisions aim at the same outcome, with the only apparent difference that the possibility to deviate from MEAT is concerned with the *tender* specifically, whereas the possibility to exclude the *economic operator* is concerned with its human rights compliance more generally—and, consequently, screening for selection/exclusion purposes may be seen as a rule that looks at the past and present (general) compliance of the economic

⁴⁸ Art 56(1) *in fine* Dir 2014/24/EU, by reference to Art 18(2) obligations, which are in turn specified in Annex X Dir 2014/24/EU; see above (n 20).

⁴⁹ Art 18(1) Dir 2014/24/EU.

⁵⁰ Along the same lines of ensuring due process rights prior to exclusion of the economic operator or the rejection of its tender, and with more detailed arguments, see A Sanchez-Graells, ‘“If it Ain’t Broke, Don’t Fix It”? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts’, in S Torricelli & F Folliot Lalliot (eds), *Administrative oversight and judicial protection for public contracts* (Bruylant, 2018) 495-534.

operator with social and labour law, whereas the possibility to deviate from MEAT evaluation allows the contracting authority to make a prognosis of compliance and reject a tender if its (future) implementation would imply non-compliance with social or labour law requirements (which brings it closer to the use of 'core' human rights considerations as contract performance requirements, as discussed below 7).

6. Obligation to reject abnormally low tenders on 'core' human rights grounds

A specific situation where contracting authorities have no discretion to deviate from MEAT on the basis of the violation of labour or social obligations concerns abnormally low tenders.⁵¹ As explained in recital 103 of Directive 2014/24/EU, in the interest of preventing social and labour dumping, the EU legislator considered that rejection of a tender should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions. This is regulated as a positive duty for contracting authorities, which are bound to reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations.⁵²

In these cases, prior to rejection, contracting authorities must require economic operators to explain the price or costs proposed in their tender, and shall only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed in a manner that justifies the absence of a violation of applicable labour and social obligations. The application of this provision will be complicated by the absence of a definition of abnormally low tenders, but contracting authorities are under a positive duty to screen all tender for abnormality,⁵³ which should somehow reduce the risk of under-inclusion of any tests devised by the contracting authority. Contracting authorities seeking to enforce 'core' human rights guarantees will probably be well-advised to keep a homogeneous approach regardless of the apparent abnormality of the tender (see above 5), and concentrate their enquiry not so much on the economic aspects of the tender, but on its (non)compliance with applicable social and labour obligations.

7. 'Core' human rights and contract performance requirements

As a complement to efforts to boost 'core' human rights' guarantees in the screening of economic operators (above 2), the design of the object of the contract (above 3) and the assessment of tenders from that perspective (above 4 to 6), the 2014 rules also foresee the possibility of establishing on-going obligations during the phase of contractual execution. Indeed, recitals 98 and 99 of Directive 2014/24/EU indicate that contracting authorities should be able to impose contract performance requirements of a labour and social nature, such as *'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... and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, and to recruit more disadvantaged persons than are required under national legislation'*,⁵⁴ or to implement *'Measures aiming at the protection of*

⁵¹ For in-depth discussion, see GS Ølykke, 'The provision on abnormally low tenders: a safeguard for fair competition?', in Ølykke & Sanchez-Graells (n 17) 146-169.

⁵² Art 69(3)II Dir 2014/24/EU, by reference to relevant obligations as described above (n 20).

⁵³ Judgment of 29 March 2012 in *SAG ELV Slovensko and Others*, C-599/10, EU:C:2012:191.

⁵⁴ For discussion of the use for the purposes of implementing ILO Conventions, and in particular Labour Clauses (Public Contracts) Convention, 1949 (No. 94), see H K Nielsen, 'Labour clauses in public contracts: ILO Convention no. 94 in the European Union after RegioPost' (2017) 26(5) *Public Procurement Law Review* 201-219.

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’.

In that regard, the rules establish that contracting authorities may lay down special conditions relating to the performance of a contract that may include social or employment-related considerations, provided that they are linked to the subject-matter of the contract (see above 3 and 4) and indicated in the call for competition or in the procurement documents. In case of using this possibility, the contracting authority will not only have to comply with these explicit transparency requirement, but will also have to identify clear audit strategies and ensure effective monitoring and enforcement of any contractual penalties for breach of those contract performance requirements, as it would otherwise be in potential breach of the duty to treat tenderers impartially and equally—and, more importantly, could risk awarding the contract to the best liar. Once more, the effectiveness of this mechanism will rest on both the ability to specify the relevant applicable obligations, the investment of significant resources and the practical possibility for the contracting authority to react to potential breaches of ‘core’ human rights’ guarantees in a manner that does not damage the more immediate public interest in the execution of the public contract (which can be particularly challenging where human rights infringements take place in a different jurisdiction or in a manner that only indirectly affects the core object of the contract). These are some recurring issues, which deserve some additional consideration.

8. Conclusion and critical reflection

The discussion in the paper has shown how, in general terms, the 2014 EU Public Procurement Package has indeed created regulatory space for the exercise of discretion in all relevant stages of the procurement process, so that willing contracting authorities (or Member States) can use the exercise of such discretion as a lever to boost compliance with ‘core’ human rights’ guarantees. There are constraints derived from the main goals of public procurement law—which are not of a regulatory nature—and thus concentrate on the need for the relevant “‘core’ human rights-orientated” requirements to retain a sufficient link to the subject matter of the contract at hand; although this has been significantly expanded in the allowance for consideration of factors concerning the specific process of production, provision or trading of those works, supplies or services, or, a specific process for another stage of their life cycle—and, more importantly, that such a link is not broken even where such factors do not form part of their material substance.⁵⁵ The exercise of such discretion is to be subjected to a proportionality test and its impact on effective competition for the relevant contract needs to also be carefully weighed—which leads me to take the normative position that the constraints derived from the principle of competition in Article 18(1) of Directive 2014/24/EU and the ensuing prohibition for contracting authorities to artificially narrow down competition should play a significant role in constraining the possibilities of imposing human rights-orientated requirements. However, even from a different (more permissive) normative position, it should be acknowledged that the effectiveness of the mechanisms discussed in this paper largely rests on two main factors: policy clarity and resources. Indeed, their effectiveness will largely depend on the transposition decisions of the Member States and, ultimately, on the actual capacity of contracting authorities to engage in such

⁵⁵ Art 69(3) Dir 2014/24/EU.

(possibly complex) assessments of compliance with EU, domestic and international social, labour and environmental rules.

Firstly, one of the main difficulties in ensuring the effectiveness of 'core' human rights-orientated procurement policies requires much more clarity of the relevant policies. The 2014 rules are unclear as to the obligations that can be taken into consideration by contracting authorities and a broad policy (eg demanding absolute and complete compliance with any applicable human rights standards) would potentially require each contracting authority to have the ability to assess compliance with local human rights norms in any jurisdiction on which an interested tenderer or candidate is based, which is not a minor burden. It would also potentially generate extraterritoriality of EU human rights norms, which could in turn result in trade disputes. Even if these difficulties could be side-stepped, the main difficulty would remain one of resources.

Indeed, secondly, it should be uncontroversial that the implementation of a 'core' human rights-orientated procurement policy will impose significant costs. Part of the costs will result from the need to adequately resource contracting authorities so that they can avail themselves of the skills and time required to carry out the additional human rights-compliance verifications at different stages of the tender procedure, as well as during the execution of the relevant contracts. Simply adding an additional duty to the existing workforce will not result in effective mechanisms for the promotion of 'core' human rights' guarantees and can diminish the effectiveness of the procurement function more generally. Resources will also be necessary to fund the additional litigation that is likely to result from more complex procurement exercises and from expanded possibilities for tenders and candidates to challenge each other standing to be awarded a contract. Additional resources will also be needed to ensure horizontal consistency of approaches between different contracting authorities in the same Member State. On the whole, the implementation of a 'core' human rights-orientated procurement policy will detract resources from the acquisition of services or goods required for the provision of public services and for the discharge of public functions. Whether the relevant public interest is best served by a 'core' human rights-orientated procurement policy is both an empirical question and a democratic incognita. This should trigger additional governance checks and balances, and subject the formation and adoption of such policies to adequate legitimacy tests—which, however, exceed the possibilities of this paper.

Given that it is unlikely that any given contracting authority (or Member State) will be able to completely sort out the information and resources difficulties, the question arises whether prioritisation of the mechanisms included in the 2014 rules is possible and whether it could result in effective checks for a 'core' human rights-orientated procurement. I can only offer a sceptical view. Any measures oriented towards the centralisation of expertise and resources in relation to exclusion decisions will be limited by the need for any given contracting authority to assess the personal position of any tenderer that is not included in the relevant registry—at least when they come from an EU jurisdiction or, most likely, from a WTO GPA jurisdiction, given the obligation of equal treatment embedded in the 2014 Public Procurement Package.⁵⁶ And any such measures would still be insufficient in view of the need to ensure that each of the tenders are still compliant with 'core' human rights' guarantees in view of their specific characteristics and the conditions for their execution.

⁵⁶ Art 25 Dir 2014/24/EU.

This is not to say that any such measures would be completely ineffective, but it should bring home the message that public procurement rules were never conceived as an instrument for the enforcement of 'core' human rights norms and that, other than by giving effectiveness to findings of relevant violations established under the relevant rules and due process—such as the mandatory exclusion of economic operators sentenced by final judgement of child labour and other forms of trafficking in human beings (above 2)—the procurement function has a very limited ability to provide efficient mechanisms to react to human rights violations or prevent them. Consequently, the resources required to try to give effectiveness to a 'core' human rights-orientated procurement policy may be put to better use if invested in the context of rules and mechanisms directly concerned with the enforcement of those standards. This is not likely to represent the majority view, and it would be interesting to see if future empirical research can demonstrate any relevant effects of policies seeking to enforce human rights' norms in procurement on the overall effectiveness of such norms, as well as whether there has been a positive trade-off once the additional costs of carrying out more complex procurement procedures are taken into account.