
Integrating social and environmental
dimensions in public procurement:
one small step for the internal market,
one giant leap for the EU?

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Working Paper 2014.08

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europaen trade union institute

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Introduction

Since the Better Regulation agenda¹ was introduced and the *acquis* or body of EU law was systematically screened by the European Commission to assess the relevance of European legislation in light of various criteria (economic, social, environmental, etc.), a significant part of the EU's work has been focused on revising existing Directives, rather than starting new projects. Accordingly, in the context of the Single Market Act, the Commission proposed two sets of initiatives entitled 'Single Market Act I' (April 2011)² and 'Single Market Act II' (October 2012)³, with half of these initiatives involving a revision of the *acquis*.

This trend of revising the *acquis* rather than producing new legislation is based on three main reasons:

- the *acquis* consists of close to 6 000 legislative acts with 100 000 pages of text, some of which have become inadequate or obsolete;
- the neo-liberal approach considers that alternative methods to regulation should be favoured where possible and that the European Union must lighten the regulatory 'burden'⁴ on business, given that this hinders their development and compromises their competitiveness;
- finally, for different reasons, the Eurosceptic and Europhobic camps favour the EU's disengagement and even legislative abstinence under the subsidiarity principle.

Under the Single Market Act I, on 20 December 2011 the Commission adopted three proposals for directives intended to modernise comprehensively the legislation on public procurement. The revision of the legislative framework involved two existing Directives, namely the Directive coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (2004/17/EC) and the Directive on the coordination

1. The 'Better Regulation' agenda, which was succeeded by the 'Smart Regulation' agenda, was launched in 2002. See: Van den Abeele (2009), and Vogel and Van den Abeele (2010).

2. The Single Market Act I was the subject of a Commission communication entitled 'Single Market Act: Twelve levers to boost growth and strengthen confidence: Working together to create new growth', COM(2011) 206, 13 April 2011.

3. The Single Market Act II was the subject of a Commission communication entitled 'Single Market Act II. Together for new growth', COM(2012) 573, 3 October 2012.

4. This accusation of EU over-regulation appears to be largely 'ideological'. On the one hand, the EU does not regulate much more than the United States of America or Japan. On the other hand, the act of replacing 28 pieces of legislation with a single European regulation is often intended to simplify matters, including for business, which is assured of greater legal certainty and predictability.

of procedures for the award of public works contracts, public supply contracts and public service contracts (2004/18/EC)⁵, sometimes called the ‘Classic Directive’ as it applies to all sectors other than those covered by the aforementioned ‘specialised’ Directive. This ‘package’ on public procurement was one of the showcase projects of the ‘Barroso II’ Commission (2009-2014) and was therefore the most emblematic aspect of the Single Market Act I. European public contracts in fact account for nearly 20% of Community GDP and almost EUR 2 400 billion (2010 figure⁶).

The reform had four objectives, which were meant to be complementary:

- simplify and relax rules and procedures;
- promote SME participation in public contracts;
- facilitate better use of public procurement through strategic use of public contracts;
- improve governance.

With potential growth estimated by the Commission at EUR 100 billion in terms of annual savings for the Member States, mainly through the digitisation of administrative procedures (European Commission, 2014), the modernisation of EU legislation on public procurement is intended to reposition the EU in relation to its trading partners, in the context of the Europe 2020 strategy, and restore growth.

This project was crucial in three other respects: firstly, because of the challenge that it represented to the role of public authorities and the place of the State in public procurement, particularly in view of the inexorable process of liberalisation-privatisation of public services. One obvious aspect of this is cooperation between public authorities, which is not covered by this study, but which is a major challenge. Secondly, the European Union was able to take advantage of this revision of the Community framework to integrate strong social and environmental dimensions and include provisions favourable to employment in the public procurement rules. Finally, this project had a clear international dimension⁷ and an ambitious agreement at EU level could form the basis for profitable cooperation between trading partners⁸.

5. The Commission also adopted a proposal for a directive on concession contracts, which has led to the new Directive 2014/23/EU. To date concession contracts have been only partially regulated at European level, and are not covered by this study.

6. See in particular: Van den Abeele (2012).

7. The international arena in which public procurement is discussed is the plurilateral Government Procurement Agreement (GPA) within the WTO (see: Van den Abeele 2012).

8. Access to public contracts forms part of the TTIP negotiations, which have seen little or no progress due to the ‘Buy American Act’ forcing the US Government to favour the purchase of goods produced in the territory of the United States.

As a reminder, the social⁹ and environmental clauses aim to impose, through public procurement, a number of social objectives (such as the reduction of unemployment, inclusion of disadvantaged social groups, instruction of trainees, etc.) and environmental objectives (taking into account the life-cycle of products, taking into account the carbon footprint, etc.). These various concepts are defined and controlled by the European legislator.

This study focuses on the innovations and amendments introduced in Directive 2014/24/EU¹⁰, published in the Official Journal of the European Union on 28 March 2014 (European Parliament and Council of the European Union 2014). In the following paragraphs, we will successively examine the obligation to comply with social, environmental and labour law dimensions, **introduction of social and environmental rules at various stages of the procedure**, choice of participants and award of contracts, performance of contracts, and finally reserved contracts. At each stage we will offer an evaluation of the proposed measures or provisions.

9. The Court of Justice of the European Union accepted social clauses for the first time in the *Beentjes* judgment of 20 September 1988 (Case 31/87). The Court found that it is not incompatible to impose social conditions or requirements (in this case, a condition regarding employment of the long-term unemployed), provided that these comply with all the relevant principles of EU law or that they have no impact on tenderers from other Member States.

10. The same provisions have been included in Directive 2014/25/EC.

1. Enshrinement in the Directive of the obligation to comply with social, environmental and labour law dimensions

Article 18(2) of Directive 2014/24/EU (see below) served as a test. Regarded as the touchstone of the Directive with regard to compliance with social, environmental and labour law dimensions, this article could have remained an optional provision or could have become compulsory. The stakes were high. For the first time, the European Parliament and the Council were in a position to jointly neutralise or give substance to a demand widely expressed by the social partners and civil society: to use the lever of public procurement to reinforce the social and environmental dimension of the European Union.

After 18 months of negotiation, the provision finally become compulsory. The text of the Directive sets out the general rules which will apply:

Article 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.’

This provision, which the Council would have preferred to be optional, is binding in its scope. Recital 37, which clarifies the scope of Article 18(2), states that ‘it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law’.

In addition to confirming the compulsory nature of this provision, the practicalities are clarified as the text underlines that the measures shall apply at the place where the works are executed or the services provided.

It will therefore be possible to include, in public contracts, clauses ensuring compliance with collective agreements. This was in fact possible before, but recital 39 of Directive 2014/24/EC clearly states: ‘Non-compliance with the relevant obligations could be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract’.

This provision is also quite clearly conditional: such rules, and their application, shall comply with Union law. In other words, the Directive introduces a minimum core of social and environmental provisions, but cannot force Member States which have not included certain social, environmental or labour law provisions in their national law to require compliance with those provisions, due to their optional nature, for example.

Annex X to Directive 2014/24/EU

List of international social and environmental conventions referred to in Article 18(2)

ILO Convention 29 on Forced Labour (1930)
ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise (1948)
ILO Convention 98 on the Right to Organise and Collective Bargaining (1949)
ILO Convention 100 on Equal Remuneration (1951)
ILO Convention 105 on the Abolition of Forced Labour (1957)
ILO Convention 111 on Discrimination (Employment and Occupation) (1958)
ILO Convention 138 on Minimum Age (1973)
ILO Convention 182 on Worst Forms of Child Labour (1999)
Vienna Convention (1985) and Montreal Protocol (1987) for the protection of the ozone layer
Basel Convention on the movement and disposal of hazardous wastes (1989)
Rotterdam Convention on international trade in hazardous chemicals (1998)
Stockholm Convention on Persistent Organic Pollutants (2001)

Evaluation of the provision

With regard to the international conventions, many voices, starting with that of Marc Tarabella (S&D – Belgium), rapporteur on the Directive for the IMCO Committee of the European Parliament, together with certain Member States (Belgium, France) and many associations, would have preferred other conventions to be included in Annex X (see box above). Several important conventions, which form the cornerstone of social, environmental and employment provisions, have not been included as compulsory references for tenderers.

This is particularly the case with the following conventions:

- ILO Convention 81 (labour inspection);
- ILO Convention 94 (labour clauses in public contracts);
- ILO Convention 95 (protection of wages);
- ILO Convention 102 (minimum standards of social security);
- ILO Convention 122 (employment policy);
- ILO Convention 155 (occupational safety and health).

Yet these conventions form part of the legal culture and body of law of most Member States. As a result, reference to these conventions would have potentially consolidated the level playing field between the EU and its trading partners outside the EU, even though all the conventions listed in Annex X are included within the exceptions laid down by the WTO's plurilateral

Government Procurement Agreement. This was unfortunately not possible, particularly because only around 10 Member States out of the 28 have formally ratified these conventions and they do not therefore, strictly speaking, form part of the *acquis*. Consequently, those Member States which have not yet signed or formally ratified these conventions considered that they should not be legally bound by them.

2. Introduction of social and environmental rules at various stages of the procedure

Considerations other than economic considerations can be included in a public contract at four different stages of the procedure: during the definition of the subject-matter of the contract and technical specifications; during the qualitative selection of the undertaking (exclusion clause or selection criterion); during the choice of the most advantageous tender or price (award criterion); or during the performance of the contract (conditions of performance). In the following paragraphs, we will review the various ways of introducing social and environmental rules.

2.1. Technical specifications (Article 42)

Technical specifications¹¹ define the characteristics required of a works, service or supply. They can include requirements relating to a specific production process, such as taking account of environmental or social aspects.

If, for example, a contracting authority wants to favour local products over ‘exotic’ products, it can include costs of transport in the costs, while ensuring that it does not discriminate between operators. It can stipulate in the technical specifications that purchased products should not contain toxic chemicals or that they should be produced using environmentally efficient machinery creating minimum waste. However, the technical specifications cannot stipulate that the product must be fair trade or that a minimum price must be paid to the producer. In other words, ethical dimensions cannot be defined at this stage.

Evaluation of the measure

We must welcome the fact that technical specifications, which define the characteristics required of a works, service or supply, are included in the contract documents. These can therefore cover environmental and climatic performance levels, design (including accessibility for disabled people), production processes and methods at any stage of the life-cycle of works, packaging, and production processes and methods. However, technical specifications cannot ‘artificially narrow down competition through requirements that favour a specific economic operator’ (recital 74). They cannot therefore refer to a specific

¹¹. The definition of certain technical specifications is given in Annex VII to Directive 2014/24/EU.

make, source or process or to a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products.

2.2. Labels (Article 43)

As a reminder, a quality label is a mark or sign of authentication allowing the consumer to identify a product or service meeting certain quality criteria (social, environmental, type, etc.). It is distinct from corporate social responsibility, which is a voluntary undertaking by a company to include social and environmental concerns in its conduct, and from the social and environmental statement, which is an *ex post* photograph of a company's sustainable development activity.

In a judgment of 10 May 2012¹², the Court of Justice found that a public purchaser could not refer to specific labels of the 'Max Havelaar' type¹³ in order to award a number of additional points when choosing the most economically advantageous tender. However, the Commission insisted that certification systems used should cover characteristics connected with the subject-matter of the contract and be designed based on scientific data established through an open and transparent procedure, accessible to all interested parties. This dual requirement was debated both in Parliament and in the Council.

However, the Community court wanted a link to be established between the recognised social or environmental dimension of the product and the subject-matter of the contract. This concept could not therefore cover the specification of criteria relevant to the production cycle (a particular type of packaging, for example), which would be useful in trade, but alien to the subject-matter of the contract. This 'subject-matter of the contract' concept, criticised by those who considered that it significantly limited the development of labels, such as the European eco-label, was defended by those who did not want any discrimination between good products or good services.

In the end, the co-legislators settled on an optional system allowing a specific label to be required as evidence that the services or supplies in question comply with the required environmental or social characteristics.

However, the label must fulfil five conditions, which were somewhat relaxed during the negotiations:

- the label requirements must concern only criteria which are linked to the subject-matter of the contract;
- these requirements must be based on criteria which are objectively verifiable by the contracting authority and non-discriminatory;

12. Case C-368/10, *European Commission v Kingdom of the Netherlands*, known as the *Max Havelaar* judgment.

13. Taken from the title of the eponymous novel written in 1860 by Eduard Douwes Dekker, Max Havelaar is a branch of the international association Fairtrade Labelling Organizations International (FLO), which works to promote fair trade.

- the labels must be established in an open and transparent procedure in which all relevant stakeholders, including government bodies, social partners and NGOs, may participate;
- the labels must be accessible to all interested parties;
- the label requirements must be set by a third party over which the economic operator cannot exercise a decisive influence.

Evaluation of the measure

The use of labels has raised great hopes within civil society. However, both the proliferation of labels and their sometimes self-proclaimed or unverifiable nature have prevented significant progress from being made in the debate. Although we must welcome this provision, which codifies the Court of Justice case-law and therefore represents a real step forward, it is to be regretted that the co-legislators did not further extend this measure, which has the potential to support sustainable development. Its implementation will in fact prove difficult, given the five conditions which must be met, and its optional nature will reduce the scope of the provision.

3. Choice of participants and award of contracts

The choice of tenderer and award of the contract are based on transparent criteria, which must be verified by the contracting authorities. In addition to the exclusion grounds which they must apply, contracting authorities have the choice between various award criteria, in relation to the most economically advantageous tender.

3.1. General principles (Article 56)

The Directive provides that contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the latter has not complied with the obligations laid down by Union legislation on social and labour law or environmental law or with the international provisions on social and environmental law listed in Annex X to Directive 2014/24/EU.

This provision aims to ensure compliance with the essential obligations arising from the EU's social or environmental legislation and to prevent social and environmental dumping with regard to operators from third countries.

In particular, Article 56 states: 'Contracting authorities may 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 the applicable obligations referred to in Article 18(2)'.

Evaluation of the provision

The application of paragraph 1 requires a contract to be awarded based on the most economically advantageous tender (Article 67), in accordance with the provisions prohibiting abnormally low tenders (Article 69) and requiring compliance with collective agreements, labour legislation and the new provisions of the Directive on subcontracting (Article 71). This is an important step forward in the Directive.

This paragraph covers all social criteria (social clauses, subcontracting, 'social antidumping' measures, etc.) and makes them compulsory at all stages of the public procurement procedure.

However, the second subparagraph of paragraph 1 weakens the scope of the principle established in the first subparagraph, by giving contracting authorities an option as they ‘may decide’ not to award the contract to the tenderer who has not submitted their tender in accordance with Article 18(2), i.e. complying with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by international provisions.

This disparity between an ambitious principle and its optional application reduces the scope of the provision, but does not make it meaningless as the final responsibility will lie with the contracting authorities and Member States which may decide to bring it to life. However, the level playing field at Community level risks being damaged given that certain Member States or certain contracting authorities may choose not to implement this principle.

3.2. Exclusion grounds (Article 57)

Article 57(2) of the proposal states that an economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.

The binding provisions (compulsory exclusion) of the article require the Member States to make contracting authorities responsible for the choice of tenders. Therefore, a contracting authority must exclude a tenderer where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect.

The article makes a distinction between compulsory exclusions for serious offences (terrorist financing, trafficking in human beings) and voluntary exclusions for offences presented as being less serious (cases of conflict of interest, infringement of social laws).

Evaluation of the measure

This provision is an important asset of the Directive given that it is binding. However, it could be weakened as a dishonest operator could resort to delaying tactics in order to postpone the final judgment on the case, therefore giving rise to other frauds or serious offences.

3.3. Contract award criteria (Article 67)

Article 53 of Directive 2004/18/EC left it to contracting authorities to choose either between various criteria (including quality, price, environmental characteristics, etc.), where the contract was awarded to the most economically advantageous tender, or the lowest price only.

Under Directive 2014/24/EU, contracting authorities must base the award of public contracts on the most economically advantageous tender (MEAT), identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include 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. Such criteria may comprise, for instance: quality, accessibility, and social, environmental and innovative characteristics; organisation, qualification and experience of staff, where the quality of staff can have a significant impact on the level of performance of the contract; and after-sales service, technical assistance and delivery conditions.

Consequently, the 'lowest cost' concept has been preferred to the 'lowest price' concept in order to expand the options available to contracting authorities, by allowing them to base their decision on a more comprehensive assessment than just price. Even though the difference between the two concepts is somewhat blurred, all the comments favoured an expanded assessment of the tender by contracting authorities.

Evaluation of the measure

This article constitutes a major step forward in the new legislation, as Member States 'may provide' that contracting authorities may not use price only or cost only as the sole award criterion. The award criterion will be determined according to the most economically advantageous tender. Its value must be assessed based on the lowest cost, but the monetary value should be weighted on the basis of quality characteristics.

As an example, a contracting authority may, with regard to the most economically advantageous tender:

- require, for works contracts, measures to prevent industrial accidents and specific storage conditions for hazardous products in order to protect the health and safety of workers;
- require products to have certain ergonomic characteristics in order to ensure their accessibility for all categories of people, including disabled people;
- require tenderers, in a contract involving the supply of recruitment tests and the provision of services to the public sector, to ensure that these services and these recruitment tests are designed and conducted in such a way that they guarantee equal opportunities for all participants, whatever their age, gender, ethnic origin or religious belief.

3.3.1. Life-cycle costing (Article 68)

Directive 2014/24/EU enshrines a concept which did not exist in Directive 2004/18/EC, namely life-cycle costing (LCC) in works and services. The aim is to send a political signal to public purchasers. The life-cycle concept covers all internal costs borne during the life-cycle of works, supplies or services, such as costs imputed to environmental externalities, which include pollution caused by the extraction of raw materials or collection and recycling costs.

Consequently, contracting authorities may determine the MEAT by taking account of the life-cycle costing.

Evaluation of the measure

This measure must be welcomed as it will improve environmental protection and aid the fight against climate change. Accordingly, the LCC will cover, insofar as these are relevant, the ‘cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs’ (Article 68(1)(b)). This is clearly a powerful lever to change the production and consumption habits of public authorities, which will have value as an example. However, we should note that social protection and employment promotion have not been included in the calculation of the life-cycle cost¹⁴.

The method chosen in the end by the co-legislators for assessing the costs imputed to environmental externalities¹⁵ must in particular be based on objectively verifiable and non-discriminatory criteria, may not unduly favour or disadvantage certain economic operators and must be accessible to all interested parties.

3.3.2. Abnormally low tenders (Article 69)

Article 69 is a major asset of Directive 2014/24/EU as it allows for the exclusion of any tenderer who tries to win a public contract by exploiting floor prices.

Article 69(1) stipulates that: ‘contracting authorities shall [imperative] require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services’. This may relate to, for example, the economics of the manufacturing process, of the services provided or of the construction method, or the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work.

¹⁴. Nor will it be possible to authorise the use of a criterion connected with the wage level of staff of candidates as this would contravene the GPA, Directive 96/71/EC on the posting of workers and the *Ruffert* judgment (3 April 2008 in Case C-346/06).

¹⁵. Article 68(2), second subparagraph, (a), (b) and (c).

The most significant step forward – which we could call a quantum leap – in this provision is the fact that the exclusion of abnormally low tenders may relate to compliance with the obligations laid down in Article 18(2) on the fight against social and environmental dumping or compliance with the obligations laid down in Article 71 (subcontracting).

The second subparagraph of Article 69(4) obliges contracting authorities to reject a tender where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex X.

Where contracting authorities consider that a tender is abnormally low, they must, however, request an explanation from the tenderer before rejecting the tender¹⁶. The Directive stipulates that these explanations may refer (among other aspects) to compliance with provisions on the protection of employees and working conditions in force at the place where the service is to be provided.

A tenderer must be excluded if, after such an investigation, the tender proves to be abnormally low due to the tenderer's non-compliance with the rules in force on worker protection, non-payment of social security contributions or non-compliance with collective labour agreements. A tenderer must also be excluded for infringing environmental legislation. The practical rules for this verification will be laid down by national legislation.

Evaluation of the measure

Together with Article 18(2), Article 69 constitutes the other major step forward in the new Directive. It will be compulsory to reject an abnormally low tender in cases where the contracting authority finds that the abnormally low price or costs are due to failures to comply with obligations arising from Union law or national law compatible with Union legislation in the field of social and labour law or environmental law, or international labour law provisions.

16. In the case of working conditions, for example, it may be relevant to obtain this information from trade unions or associations on the ground. However, if the contracting authority obtains this information from other sources, the Directive requires it to verify this information by consulting the tenderer and by taking account of the evidence provided.

4. Contract performance

The conditions for performance of contracts set out specific requirements connected with the performance of contracts. Unlike the award criteria, which are used as the basis for a comparative assessment of the quality of tenders, the conditions for performance of contracts constitute objective requirements which have no impact on the assessment of tenders, provided that they are non-discriminatory and linked to the subject-matter of the contract.

4.1. Conditions for performance of contracts (Article 70)

The Directive authorises contracting authorities to lay down 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 procurement documents. Article 70 stipulates: ‘Those conditions may include economic, innovation-related, environmental, social or employment-related considerations’.

The conditions for performance of contracts relate to compliance with social clauses by third countries and with Annex X, which is compulsory for tenderers.

4.2. Subcontracting (Article 71)

The rules on subcontracting are a new provision and constitute a significant step forward in public procurement legislation, to which the rapporteur, Marc Tarabella, attached particular importance.

The text stipulates the following:

‘1. Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.

2. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.’

These requirements will apply to all subcontractors in the same way as to the main contractor. The provision on subcontracting also covers all types of contract – works, supplies and services – without the application of the legislation being restricted to the condition that the contracting authority may exercise control over the place of performance of the contract.

Furthermore, Member States may provide that, at the request of a subcontractor and where the nature of the contract so allows, the contracting authority transfers due payments directly to the subcontractor.

Finally, the contracting authority shall require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors.

Evaluation of the measure

Firstly, observance of Article 18(2) is a strict obligation in subcontracting. This means that subcontractors in a contract for services, supplies or works must respect the social, environmental and labour law dimensions.

This principle is in fact reinforced by a provision¹⁷ which stipulates that:

- where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2);
- contracting authorities may verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57.

To sum up, the European Union has equipped itself with a provision allowing it to more effectively fight subcontracting chains.

¹⁷. See paragraph 6 of Article 71.

5. Reserved contracts

Under the new Directive, Member States may reserve the right to participate in public procurement procedures to certain operators.

5.1. Reserved contracts for sheltered workshops or disabled or disadvantaged workers

Article 20 of Directive 2014/24/EU allows Member States to 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, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers. However, it is entirely possible for a Member State to set a higher percentage of disabled or disadvantaged workers (50% for example).

5.2. Award of contracts for social services (Articles 74 to 76)

During the negotiations between the three institutions, one of the main bones of contention was positive discrimination in favour of social services or target publics (unemployed, disadvantaged people, etc.). Certain Member States and certain political groups (EPP, ALDE and ECR) felt that positive discrimination might in some way infringe internal market rules and should be limited as far as possible so as not to harm the principle of free competition.

The new rules laid down in Articles 74 to 76 will be more flexible than those currently in force, even if this will consequently increase the administrative burden on contracting authorities prior to the award of this type of contract, in the name of transparency.

Three safeguards have been introduced by Parliament and the Council to ensure the continuity of social services:

1. Member States remain free to provide social services themselves or to organise them in a way that does not entail the conclusion of public contracts (recital 114).
2. When determining the procedures to be used for the award of contracts for services to the person, Member States should take Article 14 TFEU and Protocol No 26 on services of general interest into account (third paragraph

of recital 114). Article 14 therefore provides that, given the role that these services play in promoting social cohesion, the Member States shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. In other words, the Member States shall guarantee the viability and operation of services of general economic interest.

3. The Member States may also provide that the choice of health or social service-provider is made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria.

5.3. Reserved contracts for certain services (Article 77)

This article appeared late in the negotiations, on the initiative of the United Kingdom which wanted to solve a domestic problem, namely socially supporting the privatisation or management by the private sector of certain public social services¹⁸.

The United Kingdom therefore wanted to include in the public procurement Directives a specific provision laying down a transitional framework, which would allow it to simultaneously:

- offer a second chance to people made redundant by a social public body during a privatisation programme and who could therefore be taken on by an employee ownership or participatory body under a fixed-term contract¹⁹; and
- ensure the continuity of public service missions.

These provisions seem alien to the scope of the Directive. However, the EPP and ALDE groups regarded the rapporteur's agreement to this amendment as a red line, meaning that it was difficult, if not impossible, for Parliament and the Council to object to it without endangering the entire compromise.

Immediately denounced by civil society and the European Trade Union Confederation (ETUC) as a form of latent privatisation of social security, two of the conditions were particularly criticised:

1. The condition that, in order to benefit from this provision, organisations must not have been awarded a contract by the contracting authority concerned within the past three years (Article 77(2)(d)).
2. The fact that the maximum duration of the contract must not be longer than three years (Article 77(3)).

¹⁸. See, in this respect, Plimmer (2014): 'UK plans to adopt the changes ahead of schedule as it pushes ahead with plans to outsource more services and at the same time tries to allay fears that taxpayers' money is being badly spent. Ministers will be able to outsource healthcare, social care, education and prison services more quickly under a new "light-touch" regime.'

¹⁹. According to Gill Plimmer (2014): 'There are a number of other significant changes [in the UK] ... More than 80 public sector mutuals have already been created, introducing more competition to the market, the Cabinet Office said.'

This three-year period is probably the most problematic element for two reasons:

1. It introduces a three-year ‘fallow period’ for the organisation concerned before it can again benefit from this provision. This time gap may lead to fears of a breach of the principle of public service continuity, which may be damaging to beneficiaries.
2. It introduces a daunting obstacle to the long-term structuring of the non-market sector.

Evaluation of the measure

Following the energetic activities of the rapporteur and his negotiating team, the provision in Article 77 was relaxed.

Firstly, the provision will be optional: some Member States may use this article, but those having objected to it will not be obliged to transpose and implement it. Clearly this damages the level playing field at EU level²⁰, but the principle of subsidiarity prevails: each country can keep its level of quality and protection intact. There will be no generalised degradation of the social protection system.

Secondly, the measure has been restricted. Two essential conditions, set out in paragraph 2, must be met before this provision can be used:

- a. The objective of organisations must be the pursuit of a public service mission linked to the delivery of the health, social or cultural services, as defined in paragraph 1 of Article 77 (subparagraph (a)).
- b. The profits (if any) must be reinvested with a view to achieving their objective. Where profits are distributed or redistributed, this should be based on participatory considerations (paragraph 2(b)).

A general provider of private services²¹ cannot therefore replace public authorities or health or social bodies recognised by public authorities in the provision of such services. Any risk of privatisation ‘by the back door’ of the health and social sectors is therefore prevented.

Thirdly, the provision will now apply to any employee ownership or participatory organisation involving employees, users or stakeholders (Article 77(2)(c)).

²⁰. Accordingly, the United Kingdom has indicated that it will use the benefits of this provision in its national law. The level playing field will be affected in that social protection systems will comply with different rules at EU level.

²¹. During the discussions on Article 76a, rumours were rife that the BOUYGUES or MITTAL groups may use this provision to provide health or social services. This will not be the case.

5.4. The specific case of compulsory social security services (CSSS)

The Court of Justice ruled, in its *Poucet and Pistre* judgment²², that compulsory social security services are non-economic services of general interest²³. This settled interpretation means that CSSS must not be subject to internal market and competition rules.

However, in its proposal, the Commission planned to include compulsory social security services in Annex XIV to the Directive and therefore allow them to benefit from a specific threshold and a simplified regime.

As a result, Member States may consider that compulsory social security services are either non-economic in nature, as understood by the Court of Justice case-law, or economic in nature²⁴, if the Member State so chooses.

In other words, the Directive may be applied to CSSS above EUR 750 000 (Article 4(d) of Directive 2014/24/EU). The simplified regime means that contracting authorities having awarded a public contract for the services covered by Article 74 – therefore including CSSS – will publish the results of the public procurement procedure through a contract award notice²⁵.

The inclusion of CSSS within the scope of the Directive may be surprising in that, if CSSS are indeed non-economic services of general interest, there is no reason to include them in the public procurement rules.

Two interpretations were made of this sudden appearance²⁶.

Firstly, some on the left saw this as posing a risk of partial, latent and even premeditated privatisation of compulsory social security services, heralding a possible total privatisation of social security, conducted in stages²⁷.

Secondly, neutral observers wondered whether, if these services were to become the subject of public contracts, even with a higher threshold (EUR 750 000) than that indicated in Directive 2004/18/EC (EUR 200 000),

22. Joined Cases C-159/91 and C-160/91. ECR 1993.

23. This interpretation was confirmed by the Commission in its report to the European Council in 2001 and/or its communication in 2000.

24. The United Kingdom announced that it regarded some of the services within the compulsory social security service as being economic in nature and that it would use the option provided to open said service contracts to competition.

25. The information which must appear in the contract award notice is indicated in Annex V, part J, of Directive 2014/24/EU.

26. In fact, no reference to compulsory social security services appeared in the Annexes to Directive 2004/18/EC. By including them in Annex XIV, the Commission aimed to specifically ensure that they would retain a different status from other service contracts.

27. Accordingly, for SGEIs such as telecommunications, postal services or railways, the Commission has always liberalised these services in stages, before fully liberalising the sectors concerned.

their special and organic nature and their coherent unity could lead to them being gradually weakened through the lowest possible price approach.

Referring to the Court of Justice case-law²⁸, Belgium and France were the quickest to challenge the inclusion of these services in Annex XIV, by invoking the solidarity schemes which they apply and their non-economic nature.

Both these countries asked for these services to be removed from Annex XIV, but, above all, that they be specifically excluded from the scope of the Directive, i.e. through Article 10 (Specific exclusions for service contracts).

In addition, they asked that non-economic services of general interest (NESGI), in particular compulsory social security services, be protected from internal market and competition rules. These requests were immediately relayed by the rapporteur.

Evaluation of the provision

The final result achieved in the new Directive involves a combination of several provisions, which, although not totally watertight in that CSSS are not excluded from the scope of the Directive, at the very least ensure that Member States have some freedom to organise and ensure quality services.

Recital 5 stipulates, first of all, that ‘nothing in this Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive. The provision of services based on laws, regulations or employment contracts should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services.’

Recital 6 then clarifies that ‘It is also appropriate to recall that this Directive should not affect the social security legislation of the Member States. Nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services. It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive’.

²⁸ See, in particular, Case C-218/00 *Cisal*, but also Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, paragraph 47, Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*, paragraphs 15 and 18, and the Commission’s interpretation communication of 20 November 2007 (COM(2007) 725 final, available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0725:FIN:EN:PDF>).

These two recitals constitute a response to the voices which were raised, particularly around the rapporteur, to denounce the rampant liberalisation and privatisation of health and social services.

Article 1(4) and (5) of the Directive also clearly stipulates, on the one hand:

- that ‘This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they wish to perform public functions themselves pursuant to Article 14 TFEU and Protocol No 26’ (paragraph 4), and, on the other hand,
- that ‘This Directive does not affect the way in which the Member States organise their social security systems.’

Finally, Annex XIV, which provides for a simplified regime for Member States using this provision for their CSSS, is accompanied by a footnote, introduced on the initiative of Belgium, which clarifies that, with regard to compulsory social security services, ‘These services are not covered by the present Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest’.

A combined reading of recitals 5 and 6, Article 1(4) and (5), and Annex XIV, including its footnote, gives a guarantee to Member States that they are free to organise and provide CSSS. We note, however, as with social services, the crack opened in the level playing field, given that Member States may consider that compulsory social security services are either economic in nature²⁹ or non-economic. With regard to the Court of Justice’s findings in the *Poucet and Pistre* judgment, a backward step has been taken even if the essentials have been preserved, namely the freedom of Member States to regard CSSS as non-economic services of general interest and to organise those services without outsourcing them.

29. The United Kingdom announced that it regarded some of the services within the compulsory social security service as being economic in nature and that it would use the option provided to open said service contracts to competition.

Conclusion

The proposal for a directive had the declared objective of simplifying public procurement procedures, making them more transparent, and thus contributing to the EU's growth.

At the end of the negotiations, we can say that the declared objective has been partly achieved, in that the digitisation of procedures will in fact lead to substantial savings in time and money, albeit less than expected³⁰.

However, in reality, the most important result of the work is that the co-legislators have taken advantage of the revision of the Directives to include public procurement within sustainable development and to give it a sense of social responsibility and solidarity. They have partly succeeded in this by introducing, at all stages of the procedure, compliance with social and environmental legislation and labour law: technical specifications, selection criteria, award criteria, etc. Accordingly, Articles 18(2) and 69 require Member States and contracting authorities to include social and environmental dimensions in the public procurement procedure and to combat abnormally low tenders. Article 71 will prevent subcontracting chains.

All the provisions of the Directive give contracting authorities and Member States a lever to introduce more ethics in economic relations.

As is always the case, the glass can be seen as half-empty or half-full. It may be regretted, for example, that several provisions are optional and have been left to the discretion of the Member State or contracting authority. It may also be regretted that the level playing field has not been kept watertight and that a form of competition between the least stringent legislation has been made possible. Finally, it may be regretted that the door has been opened to the privatisation of compulsory social security services and social services.

For our part, we would highlight that Parliament and the Council have managed to partly put aside their antagonisms in order to construct the bases for sustained compliance with social and environmental dimensions. It will be for the contracting authorities and Member States to take advantage of the

³⁰. Accordingly, the European passport for operators in terms of public procurement, regarded as facilitating their identification, was removed from the proposal at the Council's request.

possibilities offered by all the provisions of the new Directive in order to try and ensure that ethics prevail in public procurement.

It goes without saying that the result of the Directive's transposition must be assessed³¹ at the end of the next legislative period, in 2019, on the basis of a robust *ex post* impact analysis, which takes account of the reality on the ground and which allows the results effectively achieved to be measured. We also hope that the Commission, Member States and European Parliament will be able to cooperate fully in order to further improve an instrument which remains to be perfected.

31. It is Title IV of the Directive entitled 'Governance' (Articles 83 to 86 of Directive 2014/24/EU) which covers evaluation reports. It should be noted that the integration of social and environmental dimensions as such is not provided for in the Directive.

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