

EU PUBLIC PROCUREMENT LAW

Can sustainability lawfully limit competition?

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Abstract

This thesis has as a purpose the investigation of sustainable requirements compliance with regards to competition in public procurement contracts. This paper looks into Directive 2014/24 and notably its primary law influence in order to understand the legal foundations underlying sustainability and competition. It showcases, firstly, that Article 18(1) wording and legal interpretation provides a legal compliance of sustainable requirements if they remain in accordance with the fundamental principles of procurement law and therefore, can lawfully reduce competition. It also highlights that the primary sources of law (Art. 52 TFEU) provide for the exemption an 'overriding reasons in the public interest,' which sustainability measures could be part of, and therefore requiring a higher legal constraint than competition. In the same way, case law elaborates on the general principles of public procurement as deemed to be respected and are the ones highlighted when assessing the impact of sustainability. Finally, this paper provides for a broader perspective of sustainability compliance in the Member States and their various character with jurisdictions like Scotland making sustainability increasingly binding while some like Hungary only constrain competition.

Keywords: public procurement, sustainability, public procurement law, open competition

Abbreviations

EU	European Union
CSSS	Compulsory social security services
GPA	Government Procurement Agreement
MEAT	Most economically advantageous tender
ECJ	European Court of Justice
CJEU	Court of Justice of the European Union
SRPP	Socially responsible public procurement
TFEU	Treaty of Functioning of the European Union
TEU	Treaty of the European Union
GWB	German Competition Act

1. Introduction

1.1 Background

Public procurement has always been an important tool governments can leverage in order to provide important services and supplies to the public. In an era where sustainability is an important matter, Directive 2014/24/EU,¹ in contrast to Directive 2004/18/EC,² has been crucial at adding aspects of sustainability in the public procurement procedure. Indeed, besides harmonising the public procurement procedure further, the Directive aims at adding environmental, social policies and promoting jobs and innovation.³ Hence, after the amendment of Directive 2004/18/EC, public procurement can still apply the *value for money* concept to choose the best tender, but contracting parties are entitled to add sustainability requirements or conditions.⁴ However, competition between the tenderers is being encouraged and promoted by the European Union and is likely to clash with the introduction of sustainable criteria.

In the public procurement context, the introduction of sustainability criteria will have different legal impacts and could, in each step of the process, potentially reduce competition. If the legal compliance of competition vs. sustainability remains vague, a reduction of competition based on environmental or social demands could be challenged by a bidder who would consider the requirements as

¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance) [2014] OJ L 94/65

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114

³ Rui Medeiros, “2nd European Conference on e-Public Procurement,” The new Directive 2014/24/EU on public procurement: a first overview. (2014) <https://www.servulo.com/xms/files/00_SITE_NOVO/Arquivo/THE_NEW_DIRECTIVE_2014_Rui_Medeiros.pdf> accessed May 5, 2022

⁴ Dir 2014/24 (n 1) Recital 91. Although preambles are not legally binding, it is the first source of interpretation of the Directive for the CJEU.

an infringement of its ability to be treated equally to another bidder,⁵ or who would challenge the ability of the contracting authority to act proportionately.⁶

The European Union introduced the ‘principles of procurement’ in Article 18 of Directive 2014/24, in which the ‘artificial reduction of competition’ and sustainability legal compliance at Member State level are presented respectively in first and second paragraph. The interpretation of the term ‘artificial narrowing competition’ has, however, been left out to national jurisdictions discretion and is hence applied differently although both sustainability and competition are presented under the ‘principles of procurement’ heading in the EU legislation. Each national jurisdiction may provide for a similar although different compliance level for two concepts that appear to produce the same legal effect. Therefore, while sustainability and competition seem to be at the centre of procurement procedures, one may wonder about the legal legitimacy of a procurement setting reduced from 5 to 2 companies because of sustainable criteria. Would that enter into the ‘artificial’ setting of competition reduction or is there another area to explore, such as the reduction of competition ‘purposefully’?

Consequently, with open competition being at the core of procurement, and sustainability becoming a growing concern, it is relevant to investigate how these concepts legally interact with one another. More specifically, as they conflict with each other, to what extent can competition be reduced? Is one contracting authority legally entitled to limit competition in public procurement through sustainability as per Article 18(2) of the Public Procurement Directive 2014/24, or will it fall within Article 18(1) ambit?

1.2 Purpose and research question

The purpose of this paper is thus to analyse the potential of integrating sustainability into public procurement and to compare its legal confrontation with competition on a legal basis. In other words, to analyse to what extent a reduction in competition due to sustainability requirements is aligned with the EU general

⁵ Be it considered as a national discrimination or non-discrimination case

⁶ Dir 2014/24 (n 1) art 18. See also Case C-414/97 *Commission v Spain* ECLI:EU:C:1999:417; C-376/08 *Serrantoni v Consorzio stabile edili* ECLI:EU:C:2009:808

principles applied to public procurement, Directive 2014/24 and case law. To fulfil this purpose, the following research questions will be answered:

- I. How do the primary law and the general principles of EU law influence the importance of competition in the Public Procurement Directive 2014/24?
- II. Does sustainability contribute to reducing competition 'artificially' or is there scope for a legitimate competition reduction which will not fall into the scope of Article 18(1) of Directive 2014/24?
- III. How do Member States incorporate Directive 2014/24 in their national legislation notably when it comes to the compliance of sustainable and competition criteria?

1.3 Delimitations

The current thesis will be focused on the sustainability requirements in terms of the definition of the subject-matter and technical specifications, in the selection or exclusion criteria, choice of the most advantageous tender or price (award criterion) and performance of the contract in the context of EU public procurements. The inclusion of social criteria is also made possible in reserved contracts which will be presented in this thesis. However, the award of contracts for social services, reserved contracts for certain services⁷ and the specific case of compulsory social security services (CSSS) will not be covered. These are intended for specific purposes of positive discrimination in favour of social services or target publics and, in the case of CSSS, non-economic services of general interest which would need further explanation that would go outside the scope of this thesis.⁸

The main purpose is to understand the legal interpretation of EU provisions about sustainability and competition i.e., international conventions will not be under the scope of this thesis. This thesis will thus not be focusing on free trade agreements or on WTO's plurilateral Government Procurement Agreement (GPA) whose companies' social obligations are equally important for the European Union.

⁷ Dir 2014/24 (n 1) arts 74 to 76 and art 77 respectively

⁸ For instance, Article 77 was motivated by the United Kingdom Kingdom which had as its aim to solve an internal challenge by socially promoting the privatisation or control of certain governmental social services by the private market.

The procurement directive under interest in this thesis will be the public regime one i.e., Directive 2014/24. Although the procurement directives also comprise the utilities regime, the concession regime and the defence and security contracts regime, those directives will solely be cited for information's sake.⁹ The analysis of primary law influencing the public regime will also be performed. A more in depth look in Article 18(1) and Article 18(2) will be performed in order to understand the role of competition and its nature or predominance in the Directive 2014/24.

1.4 Materials and method

This paper will be based on the doctrinal method of research¹⁰ as part of a EU legal research method. The main purpose of this paper is to answer the research questions based on a review of existing articles, literature, statutory provisions in the European Treaties and Directive 2014/24, Advocate General opinions and case law.¹¹ The jurisdictions whose legislation will be described and analysed will be Belgium, Austria, France Czech Republic, Germany, Italy, Hungary, Scotland and Spain as available in Baker McKenzie Resource Hub. Therefore, the purpose of this thesis is to analyse current laws, pertinent cases, and authoritative sources on the competition reduction by sustainability in Directive 2014/24 as per Article 18(1). This doctrinal legal study is thus a "research in law" instead of a "research about law" because of its positivist jurisprudential foundation.¹²

The legal research literature of Abby Semple, Marta Andhov, Sue Arrowsmith or Albert Sanchez-Graells provide insight into the issue under inquiry and allow for a thorough analysis into the literature review. The literature study will be conducted in order to offer an assessment and synthesis of the many

⁹ Ibid; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance) [2014] OJ L 94/243; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance) [2009] OJ L 216/76

¹⁰ Amrit Kharel, "Doctrinal Legal Research" [2018] SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130525> accessed April 27, 2022

¹¹ The main case law used will be the Gebroeders Beentjes, Concordia Bus Finland, Dutch coffee, EVN AG Wienstrom, RegioPost, Storebaelt bridge, and Ruffert cases.

¹² Amrit Kharel, "Doctrinal Legal Research" (n 7)

interpretations of law by legal academicians. Following that, a critical analysis will be conducted in order to present a stance within the context of the literature.

1.5 Structure

The thesis will be structured as follows. There will be first an introduction of the Directive 2014/24 and its primary source of law influence i.e., the general principles of procurement law so as to understand the foundations of the legislation and therefore its interaction with the concepts of sustainability and competition. After understanding the context in which the compliance of sustainability and competition takes place, the nature and scope of these concepts in the EU and for the procurement directives will also be outlined. Thereafter, Article 18 will be analysed on a legal perspective in order to comprehend the legal compliance it ensures to both competition and sustainability at the EU level. The manner in which Member States lawfully add sustainability requirements or preferences in public procurement contracts will be analysed subsequently as well as the European Court of Justice (ECJ) opinions on cases related to reduction of competition due to sustainability. This thesis will conclude with a general conclusion and discussion.

2. Directive 2014/24 and its primary source of law influence: ensuring legal compliance with competition and sustainability?

2.1 Introduction

The chapter will introduce the Public Public Procurement Directive 2014/24 and will provide for a sustainability definition as it is understood by the EU and applied to the public procurement as well as the significance of the competition in the internal market. It will cover this before drawing a conclusion with the main insights and a first answer to the main research question. The purpose of this chapter is to establish an understanding of the context under which sustainability requirements impact competition. Indeed, the design of Public Procurement legislation in the EU is done under a certain legal framework and a theoretical overview of it will enable the reader to understand the respective importance of competition and sustainability within it.

2.2 The structure of the 2014/24/EU Public Procurement Directive

The definition of the Public Procurement Directive 2014/24 can be found under Article 1.2 as *“the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.”* In other words, a public procurement is a contractual transaction between a public entity (contracting authority)¹³ and a contractor (economic operator)¹⁴ in which the contractor will provide services,

¹³ Dir 2014/24 (n 1) art 1.1(1) defines ‘contracting authorities’ as ‘the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law’

¹⁴ *ibid* art 1.1(10) defines ‘economic operator’ as ‘any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market.’

goods or works to the public entity, that can be as broad as building a public swimming pool, constructing new railways or providing new IT equipment for a police station.¹⁵ For a contract to be considered public, it needs to be signed by one or more contracting authorities and one or more economic operators. Art. 2 (1)(5) highlights that a written contract is required and there must be a monetary interest in the contract.

When a public contract authority issues a call for tenders and the public contract (supply, construction, or service contract included in the procurement directives) exceeds the stated thresholds, European procurement law applies. The Commission Regulation¹⁶ releases the thresholds applicable to the Directive frequently. For instance, central governments are not bound by the EU Directive up to €139,000 of supplies or services and €5,350,000 of works. The contracting authority also needs to set an award procedure¹⁷ and make it available at the European level for a public procurement to apply.

It is important to emphasise that although contracts below the mentioned thresholds are legislated under national procurement law, contracting authorities are still bound by the general principles of public procurement law. The public entities have to respect transparency and equal treatment (Arts. 49 and 56 TFEU) as well as non-discrimination on grounds of nationality.¹⁸

In the reservation (or set-aside) regime, certain thresholds can be higher notably in the light-touch regime which concerns provision of services such as health-care, education, community and cultural, administrative, hotel and restaurant, prison-related, investigation and security, postal and certain legal services.¹⁹ The Directive provides for a second set-aside which permits reservation for sheltered workshops, employment programmes, or economic operators whose main aim is

¹⁵ European Commission, “Public Procurement” (*Trade*) <https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/public-procurement_en> accessed May 18, 2022

¹⁶ Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the threshold for concessions (Text with EEA relevance) C/2019/7691[2019] OJ L279/23

¹⁷ Dir 2014/24 (n 1) art. 2(1)(5); See also Case C-9/17 *Tirkkonen* ECLI:EU:C:2018:142

¹⁸ Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU) Art. 18. See also Case C-324/98 *Telaustria and Telefonadress* ECLI:EU:C:2000:669

¹⁹ Dir 2014/24 (n 1) Annex XIV

the social and professional integration of disabled or disadvantaged persons. The sole condition is that at least 30% of the employees taking part in the procurement are disabled or disadvantaged workers. Reserved contracts are not, however, a waiver of competition; contracts must still be advertised and awarded in the traditional manner, but competition may be limited to entities that meet the applicable criteria.

The Procurement Directive provides for a set of procedures to be followed. The Directive, indeed, sets the grounds on how to buy and not what to buy. The contract's subject matter is, firstly, defined by the technical specifications. The ability to fulfil these specifications is a requirement for consideration as a contract applicant. Only products or services that meet the requirements will be recognised.

Art. 58 of the Directive 2014/24 establishes, then, the selection criteria which includes in paragraphs 2, 3 and 4 some requirements for participation such as economic operator's financial standing or human and technical resources. Economic operators shall automatically be excluded²⁰ in the case of participation in a criminal organisation, corruption or child labour, for instance. The selection criteria are thus legal, technical or economic.

The criteria for contract award, then, outlines the 'most economically advantageous tender' (MEAT) condition on which contracting authorities need to assign the contract. The MEAT condition also allows for the incorporation of environmental and social elements. Indeed, it "*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.*"²¹ Lastly, the Directive also lays down conditions for contract performance (Art. 72) i.e., the conditions for the contract to operate successfully thereafter and whether the contract can be modified or not during its term.

Contracting authorities need to be objective in their criteria and act accordingly to the doctrine of equivalence so that they can be held accountable for their actions.

²⁰ *ibid* arts. 57(1)(a), 57(1)(b) and 57(1)(f)

²¹ *ibid* art. 67(2)

Indeed, when adding technical specifications or criteria which mention a certain product, know-how or brand (for instance, a certain trade mark), unless the substance and nature of the contract justify these stipulations, contracting authorities need to add the words ‘or equivalent’, allowing substitutes for the given criteria while not impeding competitiveness. Without this measure, contracting authorities would be left with unlimited power to reduce competition and establish contracts based solely on their tastes or personal motivations.

The 2014/24/EU Directive does provide for exemptions. For instance, the purchase of land or an interest in land is excluded from the scope of the Directive.²² Public contracts for financial services related to the issuance, sale, acquisition, or transfer of securities or other financial instruments²³ are not included in the Directive's 2014/24/EU ambit. Although exceptions exist, public-public cooperation is excluded from the scope of the Directive insofar as it concerns horizontal cooperation²⁴ and vertical cooperation.²⁵ The Directive, however, emphasises that exemptions should not lead to a distorted competition by privileging a private provider.²⁶

As procurement law encompasses the operation between public authorities and companies in the case of a public contract in accordance with the procurement directives, these include the public regime i.e., governmental and other public bodies under Directive 2014/24, which will be the Directive under interest in this thesis. It also comprises the utilities regime pertaining to water, energy, transport, and post.²⁷ The concession regime,²⁸ for its part, involves the concessions awarded by entities following the public regime as well as those following the utilities

²² *ibid* art. 10

²³ Within the meaning of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (Text with EEA relevance) OJ L 173/349, central bank services and operations conducted with the European Financial Stability Facility and the European Stability Mechanism.

²⁴ Dir 2014/24 (n 1) art. 14(4)

²⁵ *ibid* art. 12(1). For instance, the contracting authority must control the activities of the economic operator and 80% of the contracting authorities account for at least 80% of the managed entity's economic activities.

²⁶ *ibid* Recital 31

²⁷ Dir 2014/25 (n 12)

²⁸ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L 94/1

regime. Finally, the defence and security contracts are legislated under Directive 2009/81/EC.²⁹

The public procurement transaction value accounted for €2,448 billion in 2019.³⁰ Because of its economic importance and public nature, the public procurement directives provide for a highly detailed step-by-step guide on how to proceed in a public procurement. Although the contractual authorities face a significant legislative environment, they have an extended range of options in terms of their buying choices. For instance, they can decide to add environmental or social requirements as well as to choose the different procurement procedures.

The different procurement procedures³¹ will lawfully allow contracting authorities to tailor the procedure according to their own needs while not contesting the legitimacy of a downsized competition. In the same way, sustainability requirements which will modify the procedure stages may also be promoted by the EU's institutions and accepted under certain conditions as it will be investigated in the next points.

2.3 How are sustainability and competition articulated and implemented in the primary sources of law influencing Directive 2014/24?

2.3.1 The nature and scope of competition and sustainability in the EU and for the procurement directives

Firstly, the EU internal market is defined as “*a single market in which the free movement of goods, services, capital and persons is assured, and in which citizens are free to live, work, study and do business*”. The EU emphasises that “[s]ince its creation in 1993, the single market has opened itself more to competition” putting this in parallel with increased employment and decreased trade obstacles.³² The

²⁹ Dir 2009/81 (n 12)

³⁰ This is approximately 16% of the 2017 European GDP. See Jörg Becker, Marco Niemann and Sebastian Halsbenning (2019) publication <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/631048/IPOL_STU\(2018\)631048_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/631048/IPOL_STU(2018)631048_EN.pdf)> accessed May 4, 2022

³¹ Dir 2014/24 (n 1) arts. 27-32 They are presented as open procedure, restricted procedure, competitive procedure with negotiation, and competitive dialogue, innovation partnership and negotiated procedure without prior publication.

³² “Internal Market” (Summaries of EU Legislation) <https://eur-lex.europa.eu/summary/chapter/24.html?expand=2401#arrow_2401> accessed May 13, 2022

harmonisation of public sector directives thus allows for a better integration in the internal market, and competition has been a supporting tool in this process. The Court of Justice of the EU (CJEU) has on numerous occasions reaffirmed that the EU Public Procurement Directives are strongly rooted in internal market legislations, stating that the goal of public procurement is to ‘*open up the internal market to undistorted competition in all Member States*’.³³

Sustainable development in an economic and legal framework is defined as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”.³⁴ Sustainability as a EU objective has been included in the Treaties, notably in Art. 11 TFEU, which is probably the most important Treaty article about environmental protection and sustainable development. Indeed, it makes sustainability aspects pervasive and a key objective of EU policies. Although this article has been used by the CJEU in multiple cases,³⁵ its enforceability at national level is unclear³⁶ since the extent of its application and the effects it provokes are binding for EU institutions.³⁷ Moreover, the integration of sustainability has been intensified only in the past decade, notably since the presentation of the policy plans of the European Green Deal in 2019 during which the EU took a strong stance towards a sustainable Europe.

³³ See Case C-26/03 *Stadt Halle and RPL Lochau* ECLI:EU:C:2005:5, para 44; Case C-553/15 *Undis Servizi* ECLI:EU:C:2016:935 para 28; Case C-144/17 *Lloyd's of London* ECLI:EU:C:2018:78, para 33.

³⁴ Publications Office of the European Union, “Sustainable Development” (*Glossary of summaries*) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM%3Asustainable_development> accessed April 19, 2022

³⁵ See, for example, Cases C-62/88 *Chernobyl I* ECLI:EU:C:1990:153; C-379/98 *PreussenElektra* ECLI:EU:C:2001:160. Also pointed out by Suzanne Kingston, “3,” *Greening EU Competition Law and policy* (Cambridge University Press 2012)

³⁶ See Peter G.G.Davies, “European Union Environmental Law: An Introduction to Key Selected ISS” (Taylor & Francis May 30, 2017) <<https://doi.org/10.4324/9781315255835>>; accessed May 12, 2022 ; David Grimeaud, “The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?” (2000) 9 *European Energy and Environmental Law Review* 207 <<https://kluwerlawonline.com/journalarticle/Europe+Energy+and+Environmental+Law+Review/9.7/275567>> accessed May 5, 2022

³⁷ Anja Wiesbrock, “An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU” (2013) 40 *Legal Issues of Economic Integration* 105 <<https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/40.2/LEIE2013007>> accessed April 28, 2022, 109

In the context of public procurement, inclusion of scopes other than pure economic ones are done as part of a ‘strategic public procurement’.³⁸ The 2014 Directive is aligned with broader scopes, notably social and environmental ones as stated in the Europe 2020 Communication which states a need for ‘*better use of public procurement in support of common societal goals*’.³⁹ The Commission in the last years increased its efforts to promote sustainability in public procurement which also translated into Directive 2014/24.⁴⁰

Besides its communications on green public procurement, the Commission works on practical projects such as the urban Agenda on partnership on innovative and responsible Public Procurement, which is intended to further develop local competence centres. The Commission has also initiated the Big Buyers initiative which encourages large public buyers to work together on strategic public procurement.⁴¹

One of the guidelines the Commission released recently aims at taking into account social considerations in public procurement. The guidance discusses the changes brought by Directive 2014/24 which established a flexible legal framework for the use of socially responsible public procurement (SRPP).⁴² The document is supposed to work as a complement to the Directive 2014/24 which established an adjustable legal foundation for the use of SRPP. However, the document remains non-binding, which questions its enforceability at the national level. Sustainability appears to be a secondary goal that contracting authorities are not required to meet. Procurement directives are, indeed, directly bound by

³⁸ European Commission, “Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth” (2017) 12 *European Procurement & Public Private Partnership Law Review* 219 <<https://eppl.lexxion.eu/article/EPPPL/2017/3/5>> accessed May 7, 2022

³⁹ Commission, ‘Europe 2020 on a strategy for smart, sustainable and inclusive growth’ (Communication) COM(2010) 2020 final

⁴⁰ Commission, ‘The European Green Deal’, (Communication) COM(2019) 640 final; it stated for instance: “Public authorities, including the EU institutions, should lead by example and ensure that their procurement is green. The Commission will propose further legislation and guidance on green public purchasing”.

⁴¹ The different working groups are supposed to reflect on electric vehicles, circular construction materials and zero emissions construction sites.

⁴² See *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (Publications Office of the European Union 2011) <<https://op.europa.eu/en/publication-detail/-/publication/cb70c481-0e29-4040-9be2-c408cddf081f>> accessed May 14, 2022

primary law which may have other objectives than the sustainability application, as will be discussed in the next point.

2.3.2 The importance and differences of legal statutes

Before understanding the influence of primary sources of law on Directive 2014/24, it is first necessary to understand how sources of law influence a legislative act. Indeed, when a concept is included in the legal texts, notably in the Directive 2014/24, it can take the form of a general principle, a discrete provision or a regulatory goal which will create different legal effects. Understanding the interplay between competitiveness and sustainability, and whether one should take precedence over the other in the public procurement process, requires recognising the impact of several legal factors.

The general principles of law are of great importance in interpreting the legal provisions of the Treaty. They are classified higher than secondary measures and legislation, for instance.⁴³ As such, principles have the role of legal basis *in the absence* of legal provisions and are employed as a means of interpretation in the presence of legal provisions.⁴⁴ The general principles of law (written or unwritten) are, for instance, to be considered in the same way as the Charter of Fundamental Rights.⁴⁵ In the same way, principles are considered at the same level as the Treaties as per Art. 6 Treaty of European Union⁴⁶.

A regulatory goal is an important instrument in creating an immediate source of law and to be able to take reference to an existing provision when needing to interpret the law. It must be able to rely on the primary law provisions but reflect on the actual needs of specific legal issues. Therefore, a regulatory goal can complement a principle for more legal certainty. If, for example, competition would be included as a regulatory goal, any public procurement provision would, in its essence, have as a purpose the fulfilment of competition objectives.

⁴³ Paul McMahon, “Principles of EU Law” (*Brexit*) <<https://brexitlegal.ie/principles-of-eu-law/>> accessed May 19, 2022

⁴⁴ The general principles could be seen as an interpretation of law and the law in itself.

⁴⁵ See case C-101/08 *Audiolux and Others* ECLI:EU:C:2009:626

⁴⁶ Consolidated version of the Treaty on European Union [2012] OJ C 326/13

When it comes to the discrete provisions, these are incorporated in the law only for providing some consideration for the subject matter in specific cases. As such, they are irrelevant to include when a topic such as sustainability or competition is added as a regulatory goal because they will merely generate confusion.

Sustainability and competition concepts can also be included in the preamble. This part of a secondary legislation has no binding nature and is not supposed to contain normative provisions. Their role is to set the grounds for the secondary legislation i.e., provide background for the legislation without repeating or paraphrasing its terms.⁴⁷ Recitals are, however, important as they support the interpretation of the legislation, although the ECJ has emphasised that it does not constitute a rule as such. Indeed, they are unable to overrule the substantive provisions.⁴⁸ The objective of a legislation⁴⁹ or the extent to which it applies⁵⁰ are valid reasons to use the preamble.⁵¹

The significance of the different legal status of provisions is crucial as it will influence the manner in which the law will be interpreted. With regard to Article 18 of the Directive under interest, competition and sustainability are both presented under the title of ‘Principles of procurement’. Their categorisation as principles has, however, never been clarified in jurisprudence. Moreover, as will be clarified in the next section, the general principles of law influencing procurement law are equal treatment, transparency and proportionality.⁵²

Discrete provisions about competition and sustainability (environment and social measures) are integrated in the Directive, making it thus inconsistent to consider

⁴⁷ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJ C 73/1, Recital 10

⁴⁸ Case C-215/88 *Casa Fleischhandels* ECLI:EU:C:1989:331, para 31

⁴⁹ Case C-173/99 *BECTU* ECLI:EU:C:2001:356, paras 37-39

⁵⁰ Case C-435/06 *C* ECLI:EU:C:2007:714, paras 51-52

⁵¹ The ECJ also ruled that the preamble cannot be enforced and cannot be used to justify departing from the act's actual provisions or interpreting those provisions in a way that is obviously opposed to their text. See Cases C-162/97 *Nilsson* ECLI:EU:C:1998:554, para 54; C-412/93 *Edouard Leclerc-Siplec* ECLI:EU:C:1995:26, para. 47; C-110/05 *Commission v Italy* ECLI:EU:C:2009:66, Opinion of AG Léger, paras 64-65.

⁵² Dir 2014/24 (n 1), art 40 provides that contracting authorities can do market preliminary consultations insofar as it “*does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.*” This phrasing highlights the different status of competition vs. the general procurement principles.

sustainability or competition as regulatory goals. For instance, Article 68(1)(b) pertaining to life-cycle costing integrates the ‘environmental externalities’ concept and how it should be computed. This provision is putting environmental factors in contrast with non-discrimination condition. Article 67(2), for its part, which defines the most economically advantageous tender (MEAT) as also being allowed to incorporate environmental and/or social aspects, is contrasted by Article 67(4) which states that contracting authorities must guarantee that effective competition is possible.

Sustainability as well as competition are included in multiple recitals from the preamble, making them discrete provision most likely following the rationale established in this section. Then, while sustainable concepts seem to be valued, they are counterbalanced by principles such as equal treatment⁵³ more often than competition. These latter are principles of law well established in jurisprudence, and the next point will illustrate the distinction between sustainability and general legal principles rather than competition.

2.3.3 The general procurement principles of equal treatment, transparency and proportionality and their implication

Instead of relying on competition law, Directive 2014/24 relies on Article 53(1), Article 62 and Article 114 of the Treaty of Functioning of the European Union (TFEU). The Public Procurement Directive thus makes reference to the ‘four freedoms of the EU’ i.e., free movement of goods, the freedom to provide services and the freedom of establishment.⁵⁴ The non-discrimination as well as the principles of transparency, equal treatment, proportionality and mutual recognition must all be respected.⁵⁵ These principles are being considered from multiple case laws as allowing for a fair and genuine tender procedure which will provide for a competitive environment. For instance, transparency is leading to the effect of

⁵³ *ibid* Recital 37 sets the need for compliance with environmental, social and labour measures in accordance with the basic principles of Union law. Recital 101 reminds that when applying facultative grounds for exclusion (which can also apply to sustainable requirements), the contracting authority should behave in a proportional manner. Recital 92 is the only one to contrast environmental and social criteria (in the context of the price quality ratio for award criteria) with competition expectations.

⁵⁴ TFEU (n 18) arts 34, 56 and 49

⁵⁵ *ibid* respectively arts 18, 49 and 56. As a matter of fact, the TFEU does not include specific provisions related to public procurement in contrast to competition law or state aid law.

price competitiveness⁵⁶ since economic operators have a complete overview of contracting authorities' expectations and can thus act accordingly.

Having regard to Article 53(1) of the TFEU, this Article is essential as the principle of mutual recognition of diplomas and certification from the whole EU applies to tenderers' skills and knowledge when establishing their services in another country. Economic operators must be able to rely on the free movement principle in the whole EU.

Furthermore, when analysing Article 62 of TFEU one needs to have a closer look at Articles 51 to 54. Articles 51 and 52 express the exception of the right of establishment in the EU i.e., the exercise of an official authority which may be restricted to some national bodies and that, for reasons of public policy, public security, or public health, foreign nationals obtain different treatment. The ECJ establishes that Article 51 and 52 are the only basis of discrimination on the right of establishment⁵⁷ and *de facto* on the right to provide services. This is an important statement since it reduces the scope of competition restriction imposed for reasons of sustainability which have a greater impact on the non-national companies than national ones.

The grounds stated in Article 52 TFEU are referred to as "allowable derogations" and allow foreign nationals to receive special treatment under matters of public policy, public security or public health. Exceptions applied to the Public Procurement Procedure can, however, also be in the public interest, in which case they are referred to as "justified" measures.⁵⁸ This means that the ECJ has to review contested decisions on a case-by-case basis and general interest measures do not possess any legal exception provisions.

The ECJ already mentioned that a derogation to Article 52 would be accepted only if a specific matter needs to be attained in a consistent and systematic way.⁵⁹

⁵⁶ Christopher Bovis, "The principles of public procurement regulation," *Research handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016)

⁵⁷ Case C- 221/12 *Belgacom* ECLI:EU:C:2013:736, paras 37– 38 and Joined Cases C- 344/13 & C- 367/13 *Blanco and Fabretti* ECLI:EU:C:2014:2311.

⁵⁸ See e.g. Case C- 463/13 *Stanley International Betting* ECLI:EU:C:2015:25, para 47.

⁵⁹ See, to that effect, judgments in Case C- 64/08 *Engelmann* ECLI:EU:C:2010:506, para 35; C- 390/12 *Pfleger* ECLI:EU:C:2014:281, para 43.

It needs to fit on the principles of proportionality and solid evidence on the importance of this method.⁶⁰ As such, the ECJ evidenced that only ‘*genuine and sufficiently serious threat affecting one of the fundamental interests of society*’ could be used when referring to Article 52.⁶¹

In the same way that Article 53 allowed citizens with diplomas, certificates and other evidence of formal qualifications from another member state the right to establish themselves in the country of their choice, Article 53, as reflected in Article 62 of TFEU, allows for the freedom to offer services with diplomas and certificates other than those present in the host country. Finally, Article 54 refers to freedom of establishment i.e., individuals or companies must be treated in the same way as nationals of Member States.

Freedom of establishment is intended to promote competition in the award of a public contract since limiting this would impede companies’ abilities to establish themselves in another Member State and provide services. Although Member States fall under EU legislation above certain thresholds, the award of public contracts can be examined as per primary law for matters such as right of establishment, general principle of equal treatment, and the obligation of transparency.⁶²

Considering the limited grounds for exceptions stated in Articles 51 and 52, sustainability requirements provided in the context of a public procurement are limited when affecting international contractors. However, Member States can exercise non-discriminatory measures when limiting the right of establishment (restrictive measures). Nonetheless, some measures are not considered to be discriminatory but exercise a particularly disadvantageous effect for the application of EU main freedoms. These measures provoke two opposite points of view. The first states that these measures should be seen as discriminatory anyway (albeit indirectly discriminatory) and the other promotes a broad interpretation of

⁶⁰ Case C- 319/06 *Commission v Luxembourg* ECLI:EU:C:2008:350, para 51.

⁶¹ Case C- 546/07 *Commission v Germany* EU:C:2010:25, paras 48– 9; C- 509/12 *IPTM* ECLI:EU:C:2014:54, para 20

⁶² Teleaustria case (n 18), para 60, and Case C- 425/14 *Impresa Edilux* ECLI:EU:C:2015:721, para 21

a “restrictive measure” i.e., each measure expressed neutrally be it restricting fundamental freedoms.⁶³

While sustainability requirements in public procurement are accepted if they do not provide for discriminatory effects, the position of the ECJ is crucial to understanding whether sustainability in public procurement should be limited or promoted, although it does not discriminate but create a particularly negative impact on the application of EU fundamental freedoms. While the case law is interpretable in different ways, the Court has generally accepted the broad reading and has been ready to consider restrictive measures that may have a discriminatory effect not only in the meaning of Article 52 TFEU but also in light of ‘overriding reasons in the public interest’.⁶⁴

Therefore, while general principles of public procurement are of particular importance in the application of the 2014/24/EU Directive, and contracting authorities need to comply with equal treatment, transparency and proportionality principles which potentially lead to pro-competitive effects, a flexibility margin exists even when it comes to derogations from these principles. As seen previously, sustainable requirements in public procurement are contrasted with general procurement principles which implies that their compliance may be the most important hindrance to sustainable requirements. However, considering the previous acceptance of ‘overriding reasons in the public interest’ by the ECJ, a broader, more systematic, restrictive measure can encompass sustainable requirements which might then be accepted in public procurement, even when they provoke a particularly negative impact on the application of EU fundamental freedoms.

⁶³ The position of the Court remains unclear in this respect although it may tend towards a narrower integration of restrictive measures. Indeed, in case C- 375/14 *Laezza* ECLI:EU:C:2016:60 (para 31), the ECJ stated that ‘overriding reasons in the general interest’ reasoning will be applied only when it happens in a non-discriminatory way. As such, it can be expected that an ‘overriding reason in the general interest’ in a discriminatory context will be assessed in the light of the Treaty.

⁶⁴ See e.g. Case C- 509/12 *Instituto Portuário e dos Transportes Marítimos* EU:C:2014:54. The issue involved an ambiguously applicable yet indirectly discriminatory residency requirement. See also Belgacom case (n 57)

2.4 Summary and conclusions

Directive 2014/24 defines the level playing field with regard to public procurement in the public regime. A clear step-by-step procedure and financial thresholds are provided for national implementation although public authorities have some flexibility. The discretionary power of public entities to call for tenders and set conditions or requirements that go beyond the supply of services, goods or works *stricto sensu* has been pointed out in the literature.⁶⁵ The Directive provides for a set of procurement procedures where competition is reduced. Although the Directive provides for a limited scope of uses of procedures diminishing competition, contracting authorities have a certain degree of choice when it comes to the procedure selection provided that they do so for transparent reasons and the procedure is based on non-discriminative and reasonable justifications.

The harmonisation of the procurement procedures in the EU has been executed with the purpose of a more integrated internal market. To achieve this, competition promotion has been an efficient tool. However, over the past decade it is clear that a new objective and challenge has emerged: sustainability. The Commission is promoting this in various ways and notably through a flexible legal framework for the use of socially responsible public procurement (SRPP). Nonetheless, these measures remain non-binding which calls into question their enforceability at the national level. Sustainability appears to be a secondary goal that contracting authorities are not *per se* required to meet. However, while these guidelines remain non-binding, primary law is a fundamental source of legislation on which the procurement directives have to rely.

The Public Procurement Directive relies on the fundamental freedoms of the EU i.e., the free movement of goods, the freedom to provide services and the freedom of establishment. The non-discrimination principle/s as well as the principles of transparency, equal treatment, proportionality and mutual recognition have also been recognised in the case law as general principles of procurement law. Moreover, while the case law has been somewhat ambiguous, the Court has

⁶⁵ See for instance Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vols 1 & 2 (3rd edn Sweet & Maxwell 2018) which points out that the role of a government is double: purchaser and regulator. He emphasises, however, that the distinction between the two is not clear cut which makes a regulation of its discretionary power difficult.

generally accepted a broad interpretation of exemptions and has been ready to consider restrictive measures that may have a discriminatory effect, not only in meaning of Article 52 TFEU but also in light of ‘overriding reasons in the public interest’ of which sustainability measures could be part of.

The promotion of sustainability requirements (or preferences) that will modify the procedure stages and limit competition is allowed, provided that the contracting authorities respect the general principles of public procurement law. Although sustainability seems to remain a requirement falling to the individual appreciation of contracting authorities, its implementation in the context of a public procurement procedure is accepted and promoted by the Commission. Indeed Article 18(1) of the Directive 2014/24 is promoting the observance of general principles of law and the promotion of competition while Article 18(2) is promoting the compliance with environmental, social and labour law by Member States. The position of the EU on sustainability criteria in case law will be analysed in the next chapter, so as to understand the practical application of general principles of procurement and competition to sustainability.

3. The contradiction at the core of Article 18 and the effects of competition and sustainability

3.1 Introduction

The main article under interest in this thesis will be Article 18.⁶⁶ As this article states on what public procurement should be based, it outlines an important divergence marked in bold below.

Article 18

Principles of procurement

1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement **shall not** be made with the intention of excluding it from the scope of this Directive or of *artificially narrowing competition*. Competition shall be considered to be artificially narrowed where **the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators**.

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.

Article 18(1) indicates that the way in which procurement occurs should not ‘artificially narrow competition’. The legislator uses the term ‘artificially’ when referring to the reduction of competition and explains the context in which an artificial reduction of competition is considered to be happening. The second step of understanding this article's scope and interpretation is thus to define the different elements under interest. A literary analysis as well as the manner in which it applies to the explanation of this provision will be performed. The current legal status of competition and sustainability in the context of Article 18 will also be investigated.

⁶⁶ Dir 2014/24 (n 1)

3.2 What effects do Article 18(1) produce on competition and Article 18(2) on sustainability?

3.2.1 The consideration of competition at the core of Article 18(1)

The term ‘artificially’ can be defined in three ways as per Cambridge Dictionary: (1) “*in a way that uses an industrial process or substance, rather than being natural*”, (2) “*in a way that has been intentionally caused by people's actions, rather than happening naturally or by chance*” and (3) “*in a way that is not sincere*”.⁶⁷ Since public procurement legislates contracting authorities' contractual behaviour with economic operators, the 1st definition does not appear to be consistent with the activity of the contracting entities whose role is to ask for services or goods from economic entities.

The 2nd definition makes reference to the ‘intention’ of parties to produce an outcome rather than letting the normal course of events occur. In the context of open competition and free market, this definition fits since interfering with the free market will distort competition; something happening ‘naturally’ then referring to the free market.

The 3rd definition highlights the notion of ‘sincerity’ which is vague and broad. Indeed, one may wonder what ‘to not be sincere’ means in the context of a less competitive environment. For clarity sake, ‘sincere’ is defined by the Cambridge Dictionary as ‘*not pretending or lying; honest*’. In the context of competition, it is reasonable to believe that contracting authorities who artificially decrease competition are lying or being dishonest when doing so. The reduction in competition has been accompanied with *dishonest* behaviour.

In the context of public procurement, a contracting authority may act in a dishonest way if it decides to invoke a Restricted procedure or a Competitive procedure with negotiation instead of the open procedure for fictitious motives.⁶⁸ Likewise, narrowing competition artificially could mean that the contracting authority is *not pretending* to act consistently in favour of competition i.e., the contracting authority has not put enough effort into the achievement of

⁶⁷ Cambridge Dictionary, “Artificially” (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/artificially>> accessed May 17, 2022

⁶⁸ This will imply fewer economic operators competing since the procedures are more selective than the open procedure one.

competition objectives. However, the assessment of the ‘effort’ directed to competition has to be analysed on a case-by-case basis.

The 2nd definition appears to be more oriented towards the free market and is also easier to prove while the 3rd tends to give a room for manoeuvre to the contracting authority. Indeed, the sole action of competition reduction could fall into Article 18(1) (only the intention matters, be it honest or dishonest) when the last definition needs to prove the lack of sincerity of the contracting party to act in a procompetitive way.

A simplistic way to choose between the 2nd or 3rd definition would be to compare the wording of the explanatory sentence of Article 18(1) with the definitions of ‘artificially’. Considering that Article 18(1) specifically includes the term ‘intention’ which matches with the second interpretation, one could simplistically assume that the 2nd definition is an adequate translation of the term ‘artificially’.

However, when considering the whole portion of the sentence i.e., *intention of unduly favouring or disadvantaging certain economic operators*, a probably key element to look closer at is ‘unduly’. ‘Unduly’ is defined as ‘*more than is necessary, acceptable, or reasonable*’⁶⁹. This notion is vast and vague (as it has not been expressly defined, but left to the interpretation of the court) and relates to an extreme that must be analysed on a case-by-case basis. However, the addition of this adjective implies that only a specific sort of favouritism or disadvantage will fall in this Article: the one which is excessive. The EU or national court must therefore classify cases of ‘ordinary’ or ‘insufficient’ intention as not falling within the scope of Article 18(1).

As such, because intentions with a duly or appropriate outcome are falling outside the scope of artificially narrowed competition, the 2nd definition does not seem to be applicable. The 3rd definition will therefore be used in the context of this thesis. However, it is important to emphasise that the EU tends to lean more on the second definition in its ruling for cases such as *Dutch coffee*, *Rüffert* or

⁶⁹ Cambridge Dictionary, “Unduly” (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/unduly>> accessed May 17, 2022

Bundesdruckerei and on the last one for cases such as *Beentjes* or *Concordia Bus*⁷⁰, as will be explained later.

Moreover, 'narrowing competition', by definition, indicates that a public procurement setting before and after the restricted competition would result in fewer economic operators competing against one another. Indeed, the contracting authorities are tied by the principles of equal treatment, transparency and proportionality (general procurement principles) so as to provide a non-discriminatory ground and equal access to all tenderers.

Furthermore, the 'design [of the procurement]', although possessing multiple definitions, most likely refers to "*the way in which something is planned and made*"⁷¹ i.e., Article 18(1) here refers to the preparatory and executive phase of public procurement. 'Intention' relates to '*something that you want and plan to do*'⁷² i.e., a thought that is potentially concretised into a particular action. The word 'intention' here suggests that the discretion of the contracting authority must be limited as it does not have the complete power to set out the rules of the procurement process. Indeed, contracting authorities need to create equal access for tenderers as well as render the procurement process transparent.⁷³

Considering the EU's explanation of an artificial reduction in competition, where unduly favouring or disadvantaging certain economic operators is not allowed, a rephrasing of artificially narrowing down competition, in the context of this thesis, can be stated as follows: *a contracting authority should not reduce competition in a way that is not sincere i.e., the reduction in competition has been accompanied with dishonest behaviour or the contracting authority did not pretend to act consistently in favour of competition by extremely favouring or disadvantaging certain economic operators.*

⁷⁰ Cases C-368/10 *Commission v The Netherlands (Dutch Coffee)* ECLI:EU:C:2011:840; C-346/06 *Rüffert* ECLI:EU:C:2008:189; C-549/13 *Bundesdruckerei* ECLI:EU:C:2014:2235, C-31/87 *Gebroeders Beentjes* ECLI:EU:C:1988:422; C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495

⁷¹ Cambridge Dictionary, "Design" (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/design>> accessed May 17, 2022

⁷² Cambridge Dictionary, "Intention" (Cambridge Dictionary) <<https://dictionary.cambridge.org/dictionary/english/intention>> accessed May 17, 2022

⁷³ Marta Andhov, "Article 18 PUBLIC PROCUREMENT PRINCIPLES," *European Public Procurement: Commentary on directive 2014/24/EU* (Edward Elgar Publishing 2021)

The terms of this clause being clarified, it is critical to understand its legal precedence. Legal statutes, as previously stated, do not have the same scope and application and whether competition is classified as discrete or regulatory provision or principle of law will create diverse legal implications. General principles of law, for instance, have the same significance as primary law.⁷⁴ These are elaborated in case law and are, for instance, the principle of proportionality and subsidiarity,⁷⁵ mutual recognition,⁷⁶ the rule of law⁷⁷, non-discrimination⁷⁸ etc. Whether competition should be considered as a principle is an element brought about by academicians and can be argued by Article 18(1).⁷⁹ However, although Article 18 is presenting the ‘principles of procurement’, its current legal status may be different from that of the general principles of law.

First, Directive 2014/24 provides for provisions which do not place competition as a principle to be upheld in any circumstances whatsoever⁸⁰ while general principles of law or procurement law have a status applied within any context. Then, considering the definition assumed in this thesis, relying unconditionally on competition as an interpretation of law can misrepresent the scope of Article 18(1), since the reduction of competition enters into the scope of this article only in cases of extreme favouring or de-favouring of certain economic operators. The general principles of procurement law and EU law seem thus to create a context of competition between the economic operators, but should be the only source of interpretation of the articles in case of uncertainty.

⁷⁴ TEU (n 46) art 19

⁷⁵ *ibid* art 5

⁷⁶ See C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42

⁷⁷ TEU (n 46) art 2 and See e.g. Case C-550/09 *E and F* ECLI:EU:C:2010:382, para 44; Case C-583/11 *P Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625, para 91

⁷⁸ TFEU (n 18) art 157

⁷⁹ Albert Sanchez-Graells, “Some Reflections on the ‘Artificial Narrowing of Competition’ as a Check on Executive Discretion in Public Procurement,” *Discretion in EU Public Procurement Law* (Hart Publishing 2019)

<<https://www.bloomsburycollections.com/book/discretion-in-eu-public-procurement-law/ch4-some-reflection-s-on-the-artificial-narrowing-of-competition-as-a-check-on-executive-discretion-in-public-procurement>> accessed May 12, 2022

⁸⁰ Dir 2014/24 (n 1) art 50 on contract award notices, for instance, states that ‘certain information on the contract award or the conclusion of the framework agreement *may* be withheld from publication where its release would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of a particular economic operator, public or private, or *might prejudice fair competition between economic operators.*’

Therefore, competition appears to be of significant importance in Article 18. However, its reduction is unlawful only when one party has been extremely advantaged or disadvantaged in the procurement process, and its promotion is encouraged via the equal treatment, non discrimination, transparency and proportionality principles.⁸¹ As such, while Article 18 supports competition, it does not seem to provide a principle status. Directive 2014/24 may hold comparable or opposing views on sustainability as will be analysed in the next section.

3.2.2 The consideration of sustainability at the core of Article 18(2)

Article 18(2) contrasts with Article 18(1) as it lays down obligations in the fields of environmental, social and labour law by the economic operators. Directive 2014/24 added it as a general procurement principle, which would imply a strong emphasis on sustainable measures in public procurement compared to Directive 2004/18/EC. However, the fact that the provision mentions the ‘Member States’ and not the ‘contracting authorities’ as it is in Article 18(1) puts into question the enforceability of this provision. What ‘Member States’ entails has been clarified in the *Jiménez Melgar* case.⁸² The ECJ states that the directives are ‘*binding on all authorities of Member States, including decentralised authorities such as municipalities*’.⁸³ This case may so emphasise the significance of this article at the EU level, as well as the EU's willingness to implement it. Recital 37 of the Public Procurement Directive noting ‘*Member States and contracting authorities* [that must] *take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law*’ also suggests that contracting authorities in general are implied by Article 18(2).

Furthermore, Article 18(2) makes reference to ‘appropriate measures’ that Member States should do. These terms are not defined in the Directive and leave a broad scope of interpretation to EU jurisdictions. Article 18(2) transposition in

⁸¹ These principles have been established in case law while competition as a principle has never been identified in the CJEU jurisprudence.

⁸² Case C-438/99 *Jiménez Melgar* ECLI:EU:C:2001:509

⁸³ *ibid* para 32; Case C-243/09 *Günter Fuß v Stadt Halle* ECLI:EU:C:2010:609. The Member States have some flexibility to implement this directive in their national legislation with regard to the definition of the ‘authorities’ comprising the provision.

Member States' legislation is unlikely to produce significant change⁸⁴ as will be seen in the national analysis part. Indeed, Denmark and the United Kingdom (when a EU member state) adopted Article 18(2) as a tool to guarantee that subcontractors follow the requirements too (and not only the direct contractors), and to implement Article 69 (abnormally low tenders) in the event that Article 18(2) is not followed.

Article 18(2) sets the sustainable requirement for the 'performance of public contracts', suggesting that only the last stage of public contracts are covered by this provision. One contracting authority should not be required to observe applicable obligations in the fields of environmental, social and labour law in the selection, technical requirements or contract award phase. Recital 40 provides additional information and states that the selection process, award of contract, exclusion criteria or measures related to abnormally low tenders are entitled to be provided with sustainable criteria. Although, as seen in the first chapter, recitals are not legally binding, a further explanation is useful in the potential interpretation that the Court might do over the provision terms.

Article 18(2) makes reference to the sources of the applicable obligations which are covered in Annex X (European and international regulations). These include the core ILO Conventions.⁸⁵ However, enforcement with these conventions is difficult in that they are frequently written in broad words and do not provide for any remedies. Articles 42, 67, 68 and 70 are permitting contracting authorities to require more stringent environmental and social criteria.⁸⁶ Indeed, contract compliance (Art 67) can include not just considerations for unemployment, but also for promoting equal opportunity, eliminating sexism or racism discriminations in the relevant market, and ensuring environmental conditions, for instance.

⁸⁴ Anja Wiesbrock, "Socially Responsible Public Procurement – European Value or National Choice?," *Sustainable Public Procurement under EU law: New Perspectives on the state as stakeholder* (Cambridge University Press 2016), 80

⁸⁵ Respectively: ILO, Forced Labour Convention (1930) 29; ILO, Freedom of Association and Protection of the Right to Organise Convention (1948) 87; ILO, Right to Organise and Collective Bargaining Convention (1949) 98; Equal Remuneration Convention (1951) 100; ILO, ILO, Abolition of Forced Labour Convention (1957) 105; Discrimination (Employment and Occupation) Convention (1958) 111; ILO, Minimum Age Convention (1973) 138; ILO, ILO, Worst Forms of Child Labour Convention (1999) 182.

⁸⁶ Andhov Article 18 PUBLIC PROCUREMENT PRINCIPLES (n 73)

To be considered as to be embodying a principle, Article 18(2) would have to exhibit some other qualities. The CJEU, to a significant proportion, creates principles, as seems to be the case with environmental and social factors in public procurement.⁸⁷ However, it is important to mention that the general principles of law have been enforced in a mandatory way in case law⁸⁸ while sustainability has been considered as a part of a discretionary decision of contracting authorities in the Directive⁸⁹ and case law.

For instance, as seen in the first chapter, the Commission has released guidelines which aim at taking into account social considerations in public procurement and are subject to the preference of contracting authorities to implement them or not. Moreover, in the *Concordia Bus*⁹⁰ case, contracting authorities *may* take environmental preservation requirements into account if they wish to do so. Therefore, the leeway of interpretation (the provision contains vague and undefined terms) as well as the permissive character of sustainability in case law does not provide for conclusive arguments in favour of a principle status of sustainability.

3.3 How do Member States lawfully add sustainability requirements or preferences in public procurement contracts?

3.3.1 What legal grounds does Directive 2014/24 provide for sustainability addition?

Sustainable conditions can be included in public procurement in different manners during the process of the procurement procedure. Although an overall overview of Directive 2014/24 has been provided, sustainability inclusion in practice has only been introduced. Since Article 18(2) positions sustainability as one of the underlying tenets of the Directive, it does not have a specific action plan for

⁸⁷ See e.g. *Gebroeders Beentjes* case (n 70); *Concordia Bus Finland* case (n 70), *Dutch coffee* case (n 70); C-448/01 *EVN AG and Wienstrom* ECLI:EU:C:2003:651; C-115/14 *RegioPost* ECLI:EU:C:2015:760.

⁸⁸ For instance, in the T-203/96 *Embassy Limousines & Services v Parliament* ECLI:EU:T:1998:302, the General Court held that authorities must provide the tenderers with timely and accurate information about the procedure's execution.

⁸⁹ Dir 2014/24 (n 1) art 56, for instance, states 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 tender does not comply with the applicable obligations referred to in Article 18(2).

⁹⁰ *Concordia Bus Finland* case (n 70), para 64

achieving it. Therefore, a deeper dive-in into sustainability adoption is necessary. Moreover, CJEU's decisions relate to the implementation of sustainability (environmentally and socially) as in the different steps of the procurement process and will be explained in more detail thereafter.

In a nutshell, the European public procurement directives contain provisions of both mandatory and discretionary exclusion of bidders during the selection process.⁹¹ Contracting authorities can also set labels as requirements in award criteria.⁹² The addition of social conditions is also available as technical specifications (requirements) and contract award criteria (preferences).⁹³ Finally, criteria added as contract performance conditions allow those to be better enforced throughout the lifespan of the contract.⁹⁴

First, exclusion is achievable if the contracting authority can demonstrate that an operator is in violation of applicable environmental, social, or labour law or collective agreements by any methods available.⁹⁵ Exclusion cannot however be indefinite, the longest time for exclusion is five years at the time of conviction or three years from the date of the relevant misconduct, unless a longer sentence has been enforced by a final decision.⁹⁶ This provision counterbalances the potential harm on competition occurring when companies are excluded from the market.

Furthermore, the selection criteria of economic operators can be done through their technical and professional abilities such as competences in social matters.⁹⁷ Although the Directive provides for a list of economic and financial standards, the ECJ recognised that it had a non-exhaustive character⁹⁸ since contracting

⁹¹ Member States can decide to make the discretionary provisions mandatory as well.

⁹² *Dutch Coffee* case (n 70), the Court stated that a 'Fair trade' label could be used as a performance of the contract criteria but as a technical specification. Contracting authorities could also use it as an award criteria.

⁹³ Dir 2014/24 (n 1) art 42(3)(a)

⁹⁴ *Regiopost* case (n 87) Its enforceability has been proven with that case in which the ECJ made clear that, when required so, bidders that could not provide a declaration of compliance with the contract terms could be rejected from the tender.

⁹⁵ Dir 2014/24 (n 1) art 57(4)(a) which makes reference to art 18(2)

⁹⁶ *ibid* art 57(6)

⁹⁷ *ibid* art 58(4)

⁹⁸ See Joined cases C-27/86, 28/86, 29/89 *Construction et Entreprises industrielles S.A. (CEI) v Association intercommunale pour les Autoroutes des Ardennes* ECLI:EU:C:1987:355

authorities can ask for balance sheets or annual turnover in addition to the stated elements.

The addition of sustainability conditions is available in technical specifications (requirements) and contract award criteria (preferences).⁹⁹ Their status differs whether included in the former or last category since a requirement status has a stronger ability to dismiss economic actors than a preference, thereby reducing competition more drastically than conditions integrated in contract award. Therefore, legislators are cautious with the addition of sustainable features in technical specifications. Directive 2014/24 offers a framework for assessing a valid sustainable technical specification in Annex VII.

Characteristics relating to the social or environmental aspects of the economic operator's supply chain cannot, for instance, be added in the technical specifications, but could be included in contract award criteria.¹⁰⁰ Standards incorporated in both categories need to be related to the subject matter of the contract. The award criteria can be determined (however not exempt from a possible verification) as long as it does not provide for an unlimited power of choice to the contracting authority and effective competition is feasible.¹⁰¹

Contracting authorities can also set labels as requirements in award criteria.¹⁰² However, these must be 'accessible to all interested parties'.¹⁰³ Economic operators must be able to prove the certification asked through an 'equivalent' middle if they are unable to obtain such third-party verification due to circumstances beyond their control. In addition to this, the rejection of abnormally low tenders can be done under environmental and social reasons.¹⁰⁴ Indeed, after

⁹⁹ Dir 2014/24 art 42(3)(a)

¹⁰⁰ Abby Semple, "Socially Responsible Public Procurement (SRPP) under EU Law and International Agreements" (2017) 12 European Procurement & Public Private Partnership Law Review 293 <<https://epppl.lexxion.eu/article/EPPPL/2017/3/11>> accessed May 2, 2022; See also *Dutch Coffee* case (n 70)

¹⁰¹ These criteria were established by the CJEU in *Concordia, EVN Wienstrom*, *ibid Dutch Coffee* and C-331/04 *ATI EAC and others* ECLI:EU:C:2005:718 among others.

¹⁰² In the *Dutch Coffee*, the court stated that a 'Fair trade' label could be used as a performance of the contract criteria but as a technical specification. Contracting authorities could also use it as an award criteria. The Dutch coffee was also successful in establishing the 5 conditions for the use of a label in a public procurement procedure.

¹⁰³ Dir 2014/24 art 43(1)(d)

¹⁰⁴ *ibid* art 69

having inspected the reason for the low bid price, the contracting authority can decide to reject it if it is not in compliance with Article 18(2).¹⁰⁵

Finally, criteria added as contract performance conditions allow those to be better enforced throughout the lifespan of the contract.¹⁰⁶ Those conditions are compliant with the Directive if they are not discriminatory in any way and are included in the contract notice or documents.¹⁰⁷ Contract performance conditions considering environmental standards may include, for example, the delivery, packaging and disposal of products, and (for works and services contracts) waste minimisation or resource efficiency.¹⁰⁸

As already implied by the description of each category, the incorporation of sustainable criteria by a contracting authority in each of those categories will lead to different legal outcomes. Technical specifications, for instance, are an important discretion tool for contracting authorities since it provides for a categorical rejection in the event of an omitted attribute. *Beentjes* case¹⁰⁹ has indeed shown that a contracting authority cannot dismiss an economic operator on the grounds of its own assumption that the entity is not able to meet the conditions. When the criteria pertain to the selection process (professional or technical requirements), however, the contracting entity would have virtually unlimited abilities to reject an economic operator. The European Court of Justice is influencing how contracting authorities can incorporate sustainability criteria into the process, and their interpretation is critical in developing new implementations for the Directive. Therefore, this will be analysed in the next point.

¹⁰⁵ See Cases C-599/10 *SAG ELV Slovensko and Others* ECLI:EU:C:2012:191; C-568/13 *Data Medical Service* ECLI:EU:C:2015:166 among others.

¹⁰⁶ Its enforceability has been proven with the *RegioPost* case in which the ECJ made clear that, when required so, bidders that could not provide a declaration of compliance with the contract terms could be rejected from the tender.

¹⁰⁷ Christopher Bovis, "Introduction," *Research handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016)

¹⁰⁸ Dir 2014/24 (n 1) Recital 97

¹⁰⁹ *Gebroeders Beentjes* case (n 70)

3.3.2 The Public Procurement Directive: a binding way to comply with sustainability measures?

The implementation of Directive 2014/24 at the national level is comparable since the Member States rely on the same directive to write their own national legislation. However, in light of the interpretation of provisions directives produce, competition and sustainable development conditions can be implemented differently. As such, an examination of the wording of Directive 2014/24, as well as its national legislations,¹¹⁰ will allow for a better understanding of the application of these concepts in practice and their integration of general principles of procurement as well as competition and sustainability. Therefore, this will be performed now before analysing the jurisprudence in this field and drawing a conclusion as for the chapter.

The EU legislator granted Member States, and thus contracting authorities, considerable discretion in the context of strategic procurement. Member States, more than in other areas of procurement, have the option of deciding whether or not to implement certain requirements. Recital 39 of Directive 2014/24, for instance, 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’. A conditional stance is reflected in the Directive’s wording and application since the Directive establishes a minimum level of social and environmental provisions, but it cannot compel Member States that do not yet have specific social, environmental, or labour law provisions in their national legislation to enforce those provisions, for example, because they are elective.

For example, technical specifications (Art 42) can incorporate elements such as environmental and climatic scores, design (among which accessibility for disabled people), production processes and methods throughout the lifetime of the works, packaging etc. Nonetheless, as per Art. 18, they cannot ‘artificially narrow down competition’ and relate to a certain making source or process or a specific origin in order to support or exclude certain businesses or products. Labels (Art. 43), for

¹¹⁰ The jurisdictions whose legislation will be described will be Belgium, Austria, France Czech Republic, Germany, Italy, Hungary, Scotland and Spain as available in Baker McKenzie Resource Hub.

their part, because of the five conditions to be respected for its use, and its discretionary character, are narrowing the provision's reach. On the other hand, Art. 56(1) on the choice of the participants and the award of the contract makes all social factors binding (social stipulations, measures against 'downward' harmonisation...). However, Art. 56(2) includes an optional element by stating that the contracting authority "may decide" not to grant a contract based on the parameters set forth in Article 18(2). Finally, the translation of Article 20 of Directive 2014/24 addressing reserved contracts, which permits social purchasing, is optional.¹¹¹

The application of Directive 2014/24 is done in a similar manner at the EU level, however variations can occur on the valuation of competition and sustainability in the procurement process. The basic principles underlying the Italian, German and Austrian legal framework¹¹² are quasi identical and include the basic procurement principles of EU law, but also "quality and innovation as well as social and *environmental* aspects". All these jurisdictions integrate the general principles of procurement law as basic underlying principles of their legal framework (although transposed and interpreted in their national legislation) but they also integrate sustainability in their core principles which implies a same level of valuation of sustainability and general principles of law. It can therefore be assumed that these jurisdictions will accept a reduction in competition due to sustainability requirements insofar as they do not enter into conflict with the general principles of law and value them above competition.

In terms of competition valuation, Belgium refers to principles of non-discrimination, transparency but also free competition as general principles governing public procurement procedures. Spain makes reference to the general principles of procurement law as being the consequence of the selection of the

¹¹¹ Éric Van den Abeele, 'Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?.' (2014). european trade union institute Working Paper 2014.08, accessed 19 May 2022

¹¹² Respectively Italian Public Contract Code (LEGISLATIVE DECREE 50/2016, as modified by legislative decree n. 57/2017)
& Regulation on the Award of Public Contracts (VgV) and, for construction contracts, in the German Construction Contract Procedures Part A EU (VOB/A EU)
& Federal Public Procurement Act 2018 (BVerG), the Federal Act on the Award of Concession Contracts 2018 (BVerGGK) and the Federal Act on the Award of Contracts in the Fields of Defence and Security 2012 (BVerGVS) all provided in English by Baker McKenzie Resource Hub

best economic offer and free competition - although not referring to free competition as a principle of procurement law.¹¹³ France adds, among the general principles, an additional principle of ‘best value for public money’.¹¹⁴ Czech Republic asserts that the contracting authority is “bound by [...] prohibition of unreasonable restriction of competition”. What ‘unreasonable restriction of competition’ entails remains unclarified by the provision, while the other principles are explained.¹¹⁵ Italy, finally, sets forth that public contracts may only be awarded on the basis of a competitive award procedure.¹¹⁶ These jurisdictions, contrary to Italy, Germany and Austria, do not provide for a sustainability requirement in their general principles. Nonetheless, their procedure regulation may imply a different application of competition and sustainability conditions and does not prevent sustainability compliance from overtaking competition enforcement as it will be the case with France, for instance.

When it comes to award of the contract, a jurisdiction like Scotland demonstrates a proactive stance, requiring contracting authorities to incorporate environmental or social conditions in public contracts when they are reasonably appropriate for guaranteeing contractors' conformity sustainability legislation.¹¹⁷ Italy and Spain for their part apply the ‘most economically advantageous tender’ (MEAT) criteria with the best price-quality ratio for Italy and environmental and social criteria accepted for Spain. Belgium is providing for a similar system as these latter with a contract award on MEAT criteria which allows for ‘usage costs as well as pollution and recycling costs’ inclusion.

The comparison of the Scottish system with the Italian and Spanish one is insightful. Indeed, it can be argued that Scotland is taking an important stance towards the enforcement of sustainability (and notably Article 18(2)) as a principal legal goal. Italy and Spain, for their part, appear to be more moderate in their ability to implement sustainability, although it was stated in their general

¹¹³ Public Procurement Act (Act of 17 June 2016, MD of 14 July 2017) provided in English by Baker McKenzie Resource Hub

¹¹⁴ The French public procurement code provided in English by Baker McKenzie Resource Hub

¹¹⁵ 134/2016 Coll. ACT of 19 April 2016 on Public Procurement provided in English by Baker McKenzie Resource Hub

¹¹⁶ decree n. 57/2017 (n 112)

¹¹⁷ Public Contracts (Scotland) Regulations 2015 (SI 2015/446) reg 19

procurement principles. Their positions cast doubt on the enforceability of sustainability since an optional condition may render their compliance difficult. Indeed, competition is a well-known and well-established principle and therefore inducing compliance in an easier manner than sustainability. Therefore, it can be argued that environmental or social issues are not enforced as competition and may not limit competition.

Hungary, for instance, is applying the lowest cost or best value-for-money evaluation criteria as a mandatory condition without any application of sustainability. Indeed, tenders that meet formal standards are reviewed further in light of their ‘economical advantageousness.’¹¹⁸ The economic operators will thus solely be assessed on their price. This provision will hence induce a higher competition rate between the bidders and shows the valuation of competition of Hungarian legislative authorities. As such, this legislative system is placing competition as a unique compliance aim.

In Germany, if the contracting authority fails to establish other factors in the tender document, price might be the sole criterion for awarding a contract. When awarding a contract, the German Competition Act (GWB) stipulates that quality, innovation, as well as social and environmental factors, must be considered.¹¹⁹ However, including such factors while determining the most cost-effective offer is optional.¹²⁰ As such, while Germany includes sustainability as a main principle of procurement goal, it binds contracting authorities to minimum price conditions in the case of uncertain criteria and sustainability in procurement enforcement noticeably, has a discretionary status for contract award.¹²¹ The competitive enforcement of procurement suggests that competition remains a primary foundation of the procurement law and objectively aimed by the German legal authorities while sustainability is secondary. As such, competition does have a primary place and would not be let overtaken by sustainable requirements.

¹¹⁸ Act CXLIII of 2015 on Public Procurement provided in English by Baker McKenzie Resource Hub

¹¹⁹ German Act against Restraints of Competition (German Competition Act) Section 97 § 3

¹²⁰ Ibid § 127

¹²¹ Ibid sections 160 ff

However, the strategic public procurement process may be used more extensively by some jurisdictions than others. For instance, in France, its use can be considered to be predominant.¹²² In terms of the environmental factors, measures with the goal of facilitating the integration of sustainable development and environmental protection within procurement law have progressively been integrated. The Public Procurement Code allowed the use of environmental issues as award criteria in 2005, as long as they are related to the contract's subject.

Notably an interesting case may have changed the stance of the French judicial authorities towards competition compliance. Until the *Société Radiometer* case,¹²³ a company that was a candidate for the award of a contract was entitled to bring an action before the judge in charge of pre-contractual summary proceedings. The company could invoke before this judge any failure to comply with the obligations of advertising and competitive bidding to which the award of the contract in question was subject, "even if such a failure has not been committed to its detriment".¹²⁴

In its decision of October 3, 2008, the Conseil d'Etat now requires that the irregularity be likely to have harmed or be likely to harm the company, even if indirectly by giving an advantage to a competing company).¹²⁵ The use of criteria harming competition seems to have evolved in the French jurisprudence. Indeed, even if a failure was not conducted to the prejudice of an economic operator, a breach of competition law could be invoked. Applying the *Société Radiometer* case in the context of sustainability, a competition breach which will not harm the principles of transparency, discrimination or proportionality for which a economic operator is entitled and *de facto* cause no effect to an economic operator would be lawful and, as such, sustainability legal compliance in line with a reduction of competition.

¹²² European Commission, "Key Facts and Figures in France"
<https://ec.europa.eu/regional_policy/sources/policy/how/improving-investment/public-procurement/study/country_profile/fr.pdf> accessed May 16, 2022

¹²³ Conseil d'Etat, 8 avril 2005, n° 270476, Société Radiometer

¹²⁴ *ibid*

¹²⁵ Translation from the author coming from the Conseil d'Etat, 3 octobre 2008, n° 305420, SMIRGEOMES (Syndicat Mixte Intercommunal de Réalisation et de Gestion pour l'Élimination des Ordures Ménagères du secteur Est de la Sarthe) retrieved from <http://www.marche-public.fr/Marches-publics/Textes/Jurisprudence/CE-305420-SMIRGEOMES-amp-refere-precontractuel.htm> on the 23 May 2022

3.4 The addition of environmental and social requirements or preferences in case law: a legitimate way to reduce competition?

The next two sections will be focused on a case law review and analysis relating the incorporation of sustainability criteria into the procurement process. The way in which the ECJ has ruled each case is crucial since it will create the general procurement principles and set the limits on the discretionary power of contracting authorities. Therefore, the tradeoff between sustainability and competition (or other factors) will provide insights so as to understand whether there is scope for a legitimate competition reduction which will not fall into the scope of Article 18(1) of Directive 2014/24.

3.4.1 The EU jurisprudence of environmental conditions or preferences

First, the *EVN and Weinstrom* case¹²⁶ pertains to the production of electricity from renewable sources. Bidders were asked to provide for the number of consumers they could supply, the contract being awarded to the economic operator with the highest number of consumers supplied. Nonetheless, the threshold was higher than the number of consumers the contracting authority wanted to supply. The ECJ reinforced thus the importance to provide for criteria which are linked to the subject matter of the contract since a supply in excess does not match the contract needs. The ECJ also considered that this was in inadequacy with the *non-discrimination principle* since it favoured bigger companies over smaller since those latter were not able to oversupply.

In the *Dutch coffee* case,¹²⁷ the contracting authority was looking for fair trade and organic vending machine supply. The ECJ ruled that an organic product's requirements was a technical specification since it relates to the manufacturing of the product itself. It could not benefit from the same conditions as fair trade requirements since those relate to performance of the contract.¹²⁸ The ECJ considered, indeed, that fair trade conditions are "conditions under which the supplier acquired [goods] from the manufacturer"¹²⁹ (and thus not how the goods

¹²⁶ *EVN and Wienstrom* (n 87), para 69

¹²⁷ *Dutch Coffee* case

¹²⁸ *ibid*

¹²⁹ *ibid*, para 70

were produced) and are thus not related to the production of the good itself. Under ECJ ruling, a contracting entity would thus not be able to ask for the EKO label (relating to organic food) in a public procurement but would be able to ask for food coming from a fair trade process (fair trade label).

The ECJ ruled that “*there is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof*”¹³⁰ and by that making it also possible to set a fair trade label as a contract award condition. While the Court considered fair trade labels as a condition for the performance of the contract and could be used as an award condition, it did not agree on the same for all labels, notably the EKO label which are classified as technical requirements.

It can be argued that this kind of position would undermine the discretionary power of the contracting authority. By having an increased uncertainty in its label request, the contracting authority would not be able to operate in the most efficient manner.¹³¹ Indeed, Directive 2014/24 is supposed to provide for a procedural framework and not a purchasing framework, allowing contracting parties to set terms and conditions for the award and performance of the contract. In this regard, labels are a straightforward way to accomplish this, since they may help both consumers and suppliers understand the needs and save time.

The *Concordia Bus* case is probably the more interesting case to analyse in the shift of the EU's mission statement from one of competition to one of sustainability. It indeed ruled that the emissions-related criteria formed an ‘*integral part of a system of awarding points*’.¹³² The contracting authority was thus allowed to design a tender procedure of buses with low carbon emissions per person with award criteria points such as low-floor, higher number of seats and tip-up seats and the age of the buses.¹³³ In this case, the ECJ made clear that the

¹³⁰ *ibid*, para 91

¹³¹ Abby Semple, “Grounds for Change: ECJ Judgment in Dutch Coffee Case Points to Need for Reform of Procurement Rules” (May 14, 2012) <<https://www.procurementanalysis.eu/app/download/5804182997/Grounds%2Bfor%2Bchange%2B-%2BCas e%2B368%2Bof%2B2010.pdf>> accessed April 23, 2022

¹³² *Concordia Bus Finland* case (n 70), para 83

¹³³ *ibid*

equal treatment principle was a crucial principle inducing the competition outcome in public procurement.¹³⁴

The Concordia case set important guidelines to assess whether requirements are compatible with the MEAT conditions of contract award. An award criterion must be linked to the subject matter, not grant the authority unrestricted freedom of choice, be specifically indicated in the contract agreements, and conform with all fundamental principles of EU law, including non-discrimination, in order to be compliant with the Directive.¹³⁵ Therefore, the ECJ did not mention a certain compliance with unrestricted competition but general appreciation of the procurement principles suggesting that sustainability principles should not be put in comparison with competition. Following the same logic, sustainability requirements do not need to be limited as a hindrance to competition but to general principles of procurement law.

In both the Dutch coffee and EVN and Wienstrom competition was considered similarly.¹³⁶ Indeed, in the first case, ‘the technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition’¹³⁷ i.e., the contracting authorities need to set proportional specifications in order to allow for a competitive environment. In the second case, “[s]uch a limitation [...] of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening up the market to competition pursued by the directives” i.e., the unproportional requirements contracting authorities used would also lead to an unjustified reduction of competition.

Although in the Concordia case the awarding points of sustainable criteria are deemed appropriate when they are part of a bigger trade-off between the tenders’

¹³⁴ And by that conceding that competition was a result of equal treatment between the tenderers.

¹³⁵ Catherine Weller, Janet Meissner Pritchard, “Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market” (2013) 8 European Procurement & Public Private Partnership Law Review 55 <<https://epppl.lexxion.eu/article/EPPPL/2013/1/165>> accessed April 29, 2022

¹³⁶ Sanchez-Graells, “Some Reflections on the ‘Artificial Narrowing of Competition’ as a Check on Executive Discretion in Public Procurement,” (n 79)

¹³⁷ *Dutch coffee* case (n 70), para 29

various attributes¹³⁸ (and as such, emphasising the competition importance), the discretionary power of the contracting entities has been recognised as being in line with the equal treatment principle. Indeed, the contracting authority was not intending to decrease competition but “these two undertakings have been treated differently because they were not in identical situation”¹³⁹

From Dutch coffee case, creating award criteria which are objective is a condition for having a compliance with the principles of equality, non-discrimination and transparency.¹⁴⁰ The Court explained also the importance of '*ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition.*'¹⁴¹ This comparison of 'objective assessment' and 'effective competition' can be interpreted as effective competition being a subsequent consequence of objective award criteria. The Court may imply that objective criteria will induce competition which will induce compliance with general principles. The Dutch coffee case can be the proof of a principle of competition (in public procurement) inducing compliance with the general principles of EU law.

3.4.2 The EU jurisprudence of social conditions or preferences

In the *Beentjes* case, the contracting authority sought to make sure that at least 70% of the workers working on the land consolidation project were long-term unemployed. For the first time, the ECJ provided for a broader definition of the 'MEAT' conditions and made clear those could encompass more than pure economic characteristics. Therefore, this case highlighted the discretionary power of the contracting authorities and their ability to choose what to buy.

In the *Storebaelt bridge* case, the 'Danish content' clause in the contract made it mandatory for economic operators to provide for Danish materials, consumer goods, labour and equipment. This clause was considered in non compliance with EU law because '*by its nature, was likely to affect both the composition of the*

¹³⁸ Sanchez-Graells, “Some Reflections on the ‘Artificial Narrowing of Competition’ as a Check on Executive Discretion in Public Procurement,” (n 79)

¹³⁹ *Concordia Bus Finland* case (n 70) Opinion of AG Mischo, para 150

¹⁴⁰ *Dutch Coffee* case (n 70)

¹⁴¹ *ibid* para 87

various consortia and the terms of the tenders submitted'.¹⁴² This case was not in compliance with Articles 30, 48 and 59 EC which relate respectively to intra-EU imports and prohibits 'quantitative restrictions and all measures having equivalent effect' between Member States and the four free movements of the EU.¹⁴³

In the *Rüffert* case, the contracting authority wanted to make its contractors compliant with the labour standards set by collective agreements. However, this implied that (sub)contractors not part of the collective agreement sought to comply with the labour standards. The ECJ considered that unlawful since it forced contractors from jurisdictions with lower wages to be excluded from the public procurement and annihilate the competitive advantage of subcontractors providing low-cost labour.

The *Bundesdruckerei* case showcases a similar decision as the one in the *Rüffert* case. Contracting authority cannot ask that a service operated in a foreign Member State (with potentially lower wages and living costs) pays a salary as for the standards of the host country. If doing so, the contracting authority is minimising the competitive advantage of the economic operator and goes beyond the principles of the internal market.

The ECJ is presenting the considerations in terms of the relationship between the sustainable requirement and the contract's subject matter or from the perspective of equal treatment of tenderers. However, competition factors are mentioned in each of the cases¹⁴⁴ which would suggest that competition matters mostly in cases where there is a sufficient link with the subject-matter of the contract and the conditions do not appear to be non-discriminatory (*Dutch coffee*, *Rüffert* or *Bundesdruckerei*).¹⁴⁵ However, the arguments of the ECJ were always strictly based on general principles of procurement law (when not linked to subject matter of the contract) and those would in fine lead to competition. As such, while some

¹⁴² Case C-243/89 *Commission v Denmark* (Bridge over the Storebaelt) ECLI:EU:C:1993:257, para 26.

¹⁴³ Ruth Nilsen, "Discrimination and Equality in Public Procurement." [2005] EU & Arbetsrätt 1 <<https://research.cbs.dk/en/publications/discrimination-and-equality-in-public-procurement>> accessed May 10, 2022

¹⁴⁴ See *Beentjes* case (n 70), para 21; *Storebaelt bridge* case (n 141), para 33; *Rüffert* case (n 70), para 14; *Bundesdruckerei* case (n 70), para 34

¹⁴⁵ Sanchez-Graells, "Some Reflections on the 'Artificial Narrowing of Competition' as a Check on Executive Discretion in Public Procurement," (n 79)

argue that the fact that unreasonable requirements justified by the subject matter or not *per se* discriminatory will not automatically conform with competition-based criteria, the ECJ always referred to principles of procurement law before competition. Therefore, the position of the ECJ can be justified as allowing sustainability as an obstruction to competition as long as principles of procurement are preserved.

3.5 Summary and conclusions

Considering the EU's explanation of an artificial reduction in competition, where unduly favouring or disadvantaging certain economic operators is not allowed, a rephrasing of artificially narrowing down competition, in the context of this thesis, can be stated as follows: a contracting authority should not reduce competition in a way that is not sincere i.e., the reduction of competition has been accompanied with dishonest behaviour or the contracting authority did not pretend to act consistently for competition by extremely favouring or disadvantaging certain economic operators. This definition suggests that competition is legally enforced but a reduction of it will not be scrutinised if it does not happen in the specific context of dishonest behaviour or inconsistency with the aim of competition. As such, considering Article 18(2) of Directive 2014/24 which is subsequent to Article 18(1) and therefore, providing for a further understanding of the purposes of the Directive, the use of sustainable requirements do not seem to be in contradiction with an honest behaviour. Therefore, Article 18(1) wording and legal interpretation provides for a legal compliance of sustainable requirements if they remain in accordance with the fundamental principles of procurement law and therefore, can lawfully reduce competition.

Academicians have raised the question of whether competition should be regarded as a principle, which can be debated under Article 18(1). According to the definition used in this thesis, depending solely on competition to interpret the legislation can distort the scope of Article 18(1), because the reduction of competition only comes into play in circumstances of excessive favouritism or dis-favouritism of specific economic operators. The broad principles of procurement law and EU legislation appear to establish a competitive

environment amongst economic operators, and they should be relied on as the sole basis of interpretation of the articles in the event of ambiguity.

Nor sustainability, nor competition seem to have a general principle status applied to procurement law but rather a discrete provision applicable in particular cases. Contracting authorities are bound to apply competition in order not to create extreme cases of enhanced or deprived economic operators. Competition seems to be bound by the principle of equal treatment while competition issues are ignored when there is no clear mistreatment of specific economic players.

The different manners in which the dispositions of these jurisdictions incorporate sustainability and competition suggest the existence of a large interpretation of Article 18(1) and 18(2) of Directive 2014/24 in the Member States. Their diverging positions creates a dual legislative compliance of sustainability on the one hand in jurisdictions like France or Scotland and competition, on the other hand, in jurisdictions such as Czech Republic or Hungary (or with a more nuanced approach like Germany, Italy, Spain or Belgium).

The contrast of Scotland's system to that of Italy and Spain, for instance, is noteworthy. Indeed, it may be claimed that Scotland is assuming a leading role in enforcing sustainability (specifically, Article 18(2)) as a primary legal goal. Although it was specified in their general procurement guidelines, Italy and Spain appear to be more moderate in their abilities to implement sustainability. Their perspectives raise questions about the enforceability of sustainability, as an optional requirement could make compliance impossible. Competition is a well-known and well-established notion, making compliance easier to achieve than long-term sustainability. As a result, it is possible to argue that environmental or social issues are not enforced as competition and hence do not serve to limit competition.

In Germany, for instance, the competitive enforcement of procurement suggests that competition remains a primary foundation of the procurement law and objectively aimed by the German legal authorities while sustainability is secondary. As such, competition does have a primary place and would not be let overtaken by sustainable requirements.

In France, an interesting case may have changed the stance of the French judicial authorities towards competition compliance. Indeed, the Conseil d'Etat now demands that an irregularity has hurt or will affect the company, even if it does so indirectly by giving a competitor an advantage). In French jurisprudence, the employment of anti-competitive factors appears to have progressed. As such, even if a failure was not caused to an economic operator's detriment, a violation of competition law could be brought up. If one applies the *Société Radiometer* case to sustainability, a competition violation in compliance with the principles of transparency, discrimination, or proportionality to which an economic operator is entitled and creates *de facto* no effect on an economic operator, would not be allowed. Therefore, sustainability legal compliance in line with a reduction of competition would be legal.

What regards the EU jurisprudence, the ECJ has taken a hard line against requirements that would completely exclude specific types or categories of potential tenderers (such as smaller companies in *EVN and Wienstrom*, or economic operators missing a specific label system in *Dutch coffee*) and against requirements that would considerably affect entire categories of tenderers or minimise their motivation to tender (such as cross-border tenderers in *Storebaelt bridge* and *Rüffe*). However, this stance was motivated by principles of EU law first and the non respect of those latter would induce a competition distortion. It is clear that the position of the ECJ in the *Concordia Bus* case sets the grounds for the final context where competition can be reduced by sustainability requirements. Indeed, this case proves that when all of the prerequisites are met i.e., the general principles of law are respected, the contracting authority will be able to set sustainable requirements which will reduce competition.

As such, although contracting authorities discretionary power is bound by the principles of procurement law as well as the link to the subject matter condition, they have an important leeway of competition reduction. However, it is important mentioning that the case of *Dutch coffee*, still calls into questions the ECJ's decision-making factors since it renders the use of labels difficult to achieve¹⁴⁶ although it also helps better codify the expectations of contracting parties towards economic operators. Despite the fact that this rule appears to be inconsistent, the

¹⁴⁶ Indeed, contracting agencies must conform to five stringent conditions.

Court's development of reasoning in the jurisprudence still causes it to assume a lawful reduction of competition based on environmental or social grounds.

4. Summary and general conclusion

The European Union's procurement procedures have been harmonised in order to create a more connected internal market. Competition promotion has proven to be an effective method in achieving this goal. However, it is evident that a new goal and problem has evolved in the last decade: sustainability. In the public sector, Directive 2014/24 establishes a level playing field for public procurement. Although public authorities have some leeway, a precise step-by-step approach and financial thresholds are specified for nationwide implementation.

In the literature, it has been noted that public institutions have the discretionary ability to call for tenders and establish criteria or requirements that go beyond the supply of services, goods, or works strictly speaking. Although the Directive restricts the adoption of procedures that reduce competition, contracting authorities have some discretion in selecting procedures as long as they do so for transparent reasons and the procedure is based on non-discriminatory and lawful justifications. Therefore, the way in which sustainability can lawfully limit competition in the context of public procurement is answered hereunder.

- I. How do the primary law and the general principles of EU law influence the importance of competition in the Public Procurement Directive 2014/24?

The Public Procurement Directive is based on the EU's fundamental freedoms, such as free movement of products, free provision of services, and free establishment. Nondiscrimination, as well as the concepts of transparency, equal treatment, proportionality, and mutual recognition, have all been recognized as fundamental elements of procurement law in recent case law. Despite some ambiguity in the case law, the Court has generally accepted a broad interpretation of exemptions and has been willing to consider restrictive measures that may have a discriminatory effect not only in the context of Article 52 TFEU, but also in light of 'overriding reasons in the public interest,' which sustainability measures could be part of.

While general public procurement principles are particularly important in the application of the 2014/24/EU Directive, there is a flexibility margin even for derogating from these principles. Sustainable requirements in public procurement are in contradiction to general procurement principles, implying that compliance with general procurement principles may be the most significant impediment to sustainable requirements. However, the ECJ's ruling of "overriding reasons in the public interest," set the way for a broader, more systematic, restrictive measure that could include sustainable requirements and could then be accepted in public procurement, even if they have a particularly negative impact on the application of EU fundamental freedoms.

Furthermore, the ECJ which creates the general principles of law (as being the primary source of law of public procurement) seems to agree that competition can be reduced by means of sustainability. The ECJ has taken a strong position against requirements that would fully disqualify particular types or categories of potential tenderers (such as smaller companies in *EVN and Wienstrom*, or economic operators lacking a specific label system in *Dutch coffee*), as well as requirements that would significantly affect entire categories of tenderers or reduce their motivation to tender (such as cross-border tenderers in *Storebaelt bridge and Ruffe*). However, this approach was based on EU law principles first, and the non-observance of those rules would result in a competition distortion. The ECJ's decision in the *Concordia Bus* case clearly lays the groundwork for the eventual setting in which compliance of sustainability can be legally assured. Indeed, this case demonstrates that if all of the qualifications are met, i.e., general legal principles are followed, the contracting authority will be entitled to adopt long-term rules that reduce competition.

As such, although contracting authorities discretionary power is bound by the principles of procurement law as well as the link to the subject matter condition, they have an important leeway of competition reduction. However, it is important mentioning that the case of *Dutch coffee*, still calls into questions the ECJ's decision-making factors since it renders the use of labels difficult to achieve¹⁴⁷ although it also helps better codify the expectations of contracting parties towards economic operators. Despite the fact that this rule appears to be inconsistent, the

¹⁴⁷ Indeed, contracting agencies must conform to five stringent conditions.

Court's development of reasoning in the jurisprudence still causes it to assume a lawful reduction of competition based on environmental or social grounds.

- II. Does sustainability contribute to reducing competition 'artificially' or is there scope for a legitimate competition reduction which will not fall into the scope of Article 18(1) of Directive 2014/24?

Although sustainability appears to be a criteria left to the discretion of contracting authorities, the Commission accepts and promotes its implementation in the context of a public procurement procedure. Indeed, Article 18(1) of Directive 2014/24 encourages Member States to follow general legal principles and promote competition, while Article 18(2) encourages Member States to follow environmental, social, and labour law.

A rephrasing of artificially narrowing down competition, in the context of this thesis, can be stated as follows: a contracting authority should not reduce competition in a way that is not sincere i.e., the reduction of competition has been accompanied with dishonest behaviour or the contracting authority did not pretend to act consistently for competition by extremely favouring or disadvantaging certain economic operators. This definition suggests that competition is legally enforced but a reduction of it will not be scrutinised if it does not happen in the specific context of dishonest behaviour or inconsistency with the aim of competition. As such, considering Article 18(2) of Directive 2014/24 which is subsequent to Article 18(1) and therefore, providing for a further understanding of the purposes of the Directive, the use of sustainable requirements do not seem to be in contradiction with an honest behaviour. Therefore, Article 18(1) wording and legal interpretation provides for a legal compliance of sustainable requirements if they remain in accordance with the fundamental principles of procurement law and therefore, can lawfully reduce competition.

Academics have questioned whether competition should be considered a principle, which can be addressed under Article 18(1). According to the definition employed in this thesis, relying simply on competition to interpret the law can distort the scope of Article 18(1), because competition is only reduced in situations when individual economic operators are given undue favouritism or disfavouritism. In the event of ambiguity, the general principles of procurement

law and EU legislation appear to create a competitive environment among economic operators, and they should be used as the sole basis for interpreting the articles.

Nor sustainability, nor competition seem to have a general principle status applied to procurement law but rather a discrete provision applicable in particular cases. Contracting authorities are bound to apply competition in order not to create extreme cases of enhanced or deprived economic operators. Competition seems to be bound by the principle of equal treatment while competition issues are ignored when there is no clear mistreatment of specific economic players.

III. How do Member States incorporate Directive 2014/24 in their national legislation notably when it comes to the compliance of sustainable and competition criteria?

Because the Member States use the same directive to construct their own national legislation, the implementation of Directive 2014/24 at the national level is comparable. Competition and sustainable development conditions, on the other hand, might be applied differently depending on how legislative guidelines are interpreted.

Scotland, for example, is providing for a legislative system enforcing sustainability (specifically, Article 18(2)) as a primary legal goal while, although it was specified in their general procurement guidelines, Italy and Spain appear to be more moderate in their abilities to implement sustainability. Their viewpoints pose concerns regarding sustainability's enforceability, since an optional requirement could render compliance difficult. Compliance is easier to attain than long-term sustainability because competition is a well-known and well-established concept. As a result, one could claim that environmental or social issues are not enforced as competition and hence do not help to limit competition.

In France, an interesting case may have changed the stance of the French judicial authorities towards competition compliance. Indeed, the Conseil d'Etat now demands that an irregularity has hurt or will affect the company, even if it does so indirectly by giving a competitor an advantage). In French jurisprudence, the employment of anti-competitive factors appears to have progressed. As such, even

if a failure was not caused to an economic operator's detriment, a violation of competition law could be brought up. If one applies the *Société Radiometer* case to sustainability, a competition violation in compliance with the principles of transparency, discrimination, or proportionality to which an economic operator is entitled and creates *de facto* no effect on an economic operator, would not be allowed. Therefore, sustainability legal compliance in line with a reduction of competition would be legal.

However, when comparing the 2014/24 Directive, one should not forget that the EU provisions transposed in national legislation also favour a certain political agenda and national aspirations which differ drastically in the various Member States. Moreover, Member States differ drastically in their economic, political or legal structure which also influences their transposition.

As a concluding remark, while sustainability does not either have a principle status on which contracting authorities could rely on unconditionally when applying procurement law, it appears as a legitimate ground to reduce competition in the contract award and performance of the contract stages at the EU level (however, not *per se* at the national level). As such, considering the growing importance of sustainability in public procurement, notably in the 2014/24/EU directive and the discretionary status of competition in public procurement, sustainability could be growing in importance in the upcoming years and be accepted in technical specifications or selection of candidate

Bibliography

Official Publications

EU official publications:

Commission Delegated Regulation (EU) 2019/1827 of 30 October 2019 amending Directive 2014/23/EU of the European Parliament and of the Council in respect of the threshold for concessions (Text with EEA relevance) C/2019/7691[2019] OJ L 279/23

Commission, ‘Europe 2020 on a strategy for smart, sustainable and inclusive growth’, (Communication) COM(2010) 2020 final

Commission, ‘The European Green Deal’, (Communication) COM(2019) 640 final

Consolidated version of the Treaty on European Union [2012] OJ C 326/13

Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114

Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance) [2009] OJ L 216/76

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L 94/1

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Text with EEA relevance) [2014] OJ L 94/65

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Text with EEA relevance) [2014] OJ L 94/243

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (Text with EEA relevance) OJ L 173/349

Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJ C 73/1

Member States legislation:

Act CXLIII of 2015 on Public Procurement

ACT of 19 April 2016 134/2016 Coll. on Public Procurement

Conseil d'Etat, 8 avril 2005, n° 270476, Société Radiometer

Federal Public Procurement Act 2018 (BVerG)

Federal Act on the Award of Concession Contracts 2018 (BVerGKonz)

Federal Act on the Award of Contracts in the Fields of Defence and Security 2012 (BVerGVVS) French public procurement code (Code de la commande publique of 4 May 2022)

German Act against Restraints of Competition (German Competition Act)

Italian Public Contract Code (LEGISLATIVE DECREE 50/2016, as modified by legislative decree n. 57/2017)

Public Contracts (Scotland) Regulations 2015 (SI 2015/446)

Public Procurement Act (Act of 17 June 2016, MD of 14 July 2017)

Regulation on the Award of Public Contracts (VgV) and, for construction contracts, in the German Construction Contract Procedures Part A EU (VOB/A EU)

International legislation

ILO, Abolition of Forced Labour Convention (1957) 105

ILO, Equal Remuneration Convention (1951) 100; ILO, Worst Forms of Child Labour Convention (1999) 182

ILO, Forced Labour Convention (1930) 29

ILO, Freedom of Association and Protection of the Right to Organise Convention (1948) 87;

ILO, Minimum Age Convention (1973) 138; ILO, Discrimination (Employment and Occupation) Convention (1958) 111

ILO, Right to Organise and Collective Bargaining Convention (1949) 98

Literature

Books:

Andhov M, “Article 18 PUBLIC PROCUREMENT PRINCIPLES,” *European Public Procurement: Commentary on directive 2014/24/EU* (Edward Elgar Publishing 2021)

Andhov M, “Article 70 CONDITIONS FOR PERFORMANCE OF CONTRACTS,” *European Public Procurement: Commentary on directive 2014/24/EU* (Edward Elgar Publishing 2021)

Andhov M, “Contracting Authorities and Strategic Goals of Public Procurement – A Relationship Defined by Discretion?,” *Discretion in EU Public Procurement Law* (Hart Publishing 2018)

<<https://www.bloomsburycollections.com/book/discretion-in-eu-public-procurement-law/>> accessed May 7, 2022

Arrowsmith S and Kunzlik P, *Social and Environmental Policies in EC Procurement Law New Directives and New Directions* (Cambridge University Press 2009)

<<https://www.cambridge.org/core/books/social-and-environmental-policies-in-ec-procurement-law/B09A27A816230BAF8BE037E3C8F99323>> accessed April 24, 2022

Arrowsmith S, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, vols 1 & 2 (3rd edn Sweet & Maxwell 2018)

Bovis C, “Introduction,” *Research handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016)

Bovis C, “The principles of public procurement regulation,” *Research handbook on EU Public Procurement Law* (Edward Elgar Publishing 2016)

European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Directorate-General for the Internal Market and Services, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (Publications Office of the European Union 2011)
<<https://op.europa.eu/en/publication-detail/-/publication/cb70c481-0e29-4040-9be2-c408cddf081f>> accessed May 14, 2022

Kingston S, “3,” *Greening EU Competition Law and policy* (Cambridge University Press 2012)

Sanchez-Graells A, “Some Reflections on the ‘Artificial Narrowing of Competition’ as a Check on Executive Discretion in Public Procurement,” *Discretion in EU Public Procurement Law* (Hart Publishing 2019)
<<https://www.bloomsburycollections.com/book/discretion-in-eu-public-procurement-law/ch4-some-reflections-on-the-artificial-narrowing-of-competition-as-a-check-on-executive-discretion-in-public-procurement>> accessed May 12, 2022

Tomkin J, “Article 51,” *The EU treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019)
<<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198794561.001.0001/isbn-9780198794561-book-part-134>> accessed April 28, 2022

Tomkin J, “Article 52,” *The EU treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019)
<<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198794561.001.0001/isbn-9780198794561-book-part-135>> accessed April 28, 2022

Tomkin J, “Article 53,” *The EU treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019)
<<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198794561.001.0001/isbn-9780198794561-book-part-136>> accessed April 28, 2022

Tomkin J, “Article 54,” *The EU treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019)
<<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198794561.001.0001/isbn-9780198794561-book-part-137>> accessed April 28, 2022

Tomkin J, “Article 62,” *The EU treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019)
<<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198794561.001.0001/isbn-9780198794561-book-part-146>> accessed April 28, 2022

Wiesbrock A, “Socially Responsible Public Procurement – European Value or National Choice?,” *Sustainable Public Procurement under EU law: New Perspectives on the state as stakeholder* (Cambridge University Press 2016)

Online journals:

Andrecka M & Peterkova Mitkidis K, “Sustainability Requirements in EU Public and Private Procurement - A Right or an Obligation” (2017) NJCL 55
<<https://heinonline.org/HOL/Page?handle=hein.journals/>> accesses May 13, 2022

Arrowsmith S and Kunzlik P, “Public Procurement and Horizontal Policies in EC Law: General Principles” (2009) Social and Environmental Policies in EC Procurement Law 9 <<https://ueaeprints.uea.ac.uk/id/eprint/44665/>> accessed May 18, 2022

Becker J, Niemann M and Halsbenning “Contribution to Growth European Public Procurement Delivering Economic Benefits for Citizens and Businesses” (2019)

publication

<[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/631048/IPOL_STU\(2018\)631048_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/631048/IPOL_STU(2018)631048_EN.pdf)>; accessed May 4, 2022

Caranta R, “The Changes to the Public Contract Directives and the Story They Tell about How EU Law Works” (2015) 52 Common Market Law Review 391 <<https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/52.2/COLA2015028>> accessed May 6, 2022

Comba ME, “Variation in the Scope of the New EU Public Procurement Directives of 2014: Efficiency in Public Spending and a Major Role of the Approximation of Laws,” *Modernising Public Procurement: The new directive* (DJØF Publishing 2014) <<https://iris.unito.it/handle/2318/1520921>> accessed May 16, 2022;

Davies PGG, “European Union Environmental Law: An Introduction to Key Selected ISS” (Taylor & Francis May 30, 2017) <<https://doi.org/10.4324/9781315255835>>; accessed May 12, 2022

Dragos D and Neamtu B, “Sustainable Public Procurement: Life-Cycle Costing in the New EU Directive Proposal” (2013) 8 *European Procurement & Public Private Partnership Law Review* 19 <<https://epppl.lexxion.eu/article/EPPPL/2013/1/159>> accessed April 20, 2022

European Commission, “Strategic Public Procurement: Facilitating Green, Inclusive and Innovative Growth” (2017) 12 *European Procurement & Public Private Partnership Law Review* 219 <<https://epppl.lexxion.eu/article/EPPPL/2017/3/5>> accessed May 7, 2022

Grimeaud D, “The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?” (2000) 9 *European Energy and Environmental Law Review* 207 <<https://kluwerlawonline.com/journalarticle/European+Energy+and+Environmental+Law+Review/9.7/275567>> accessed May 5, 2022

Hettne J, “Sustainable Public Procurement and the Single Market – Is There a Conflict of Interest?” (2013) 8 *European Procurement & Public Private*

Partnership Law Review 31 <<https://www.jstor.org/stable/26693927?seq=1>>
accessed April 27, 2022

Kharel A, “Doctrinal Legal Research” [2018] SSRN Electronic Journal
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130525> accessed April
27, 2022

MARTIN-ORTEGA O, “Public Procurement as a Tool for the Protection and
Promotion of Human Rights: A Study of Collaboration, Due Diligence and
Leverage in the Electronics Industry” (2018) 3 Business and Human Rights
Journal 75
<<https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/public-procurement-as-a-tool-for-the-protection-and-promotion-of-human-rights-a-study-of-collaboration-due-diligence-and-leverage-in-the-electronics-industry/5AB2955BF7E7C388647E0A9A460B0424>> accessed April 25, 2022

Nilsen R, “Discrimination and Equality in Public Procurement.” [2005] EU &
Arbetsrätt 1
<<https://research.cbs.dk/en/publications/discrimination-and-equality-in-public-procurement>> accessed May 10, 2022

Sanchez-Graells A, “Competition and Procurement Regulation: a Goal, a
Principle, a Requirement, or All of the above?” [2022] Steen Treumer’s
Mindeskraft <<https://ssrn.com/abstract=4012022>> accessed April 25, 2022

Semple A, “Socially Responsible Public Procurement (SRPP) under EU Law and
International Agreements” (2017) 12 European Procurement & Public Private
Partnership Law Review 293 <<https://epppl.lexxion.eu/article/EPPPL/2017/3/11>>
accessed May 2, 2022

Sjåfjell B and Wiesbrock A, ‘Why Should Public Procurement Be about
Sustainability?’. (2017). University of Oslo Faculty of Law Research Paper No.
2017-17, Sustainable Public Procurement Under EU Law 1
<<https://ssrn.com/abstract=2954499>> accessed May 10, 2022

Stylianou K and Iacovides M, “The Goals of EU Competition Law - a
Comprehensive Empirical Investigation” [2020] SSRN Electronic Journal 1

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735795> accessed May 15, 2022

Uyarra E and Flanagan K, “Understanding the Innovation Impacts of Public Procurement” (2010) 18 European Planning Studies 123
<<https://www.tandfonline.com/doi/abs/10.1080/09654310903343567>> accessed May 15, 2022

Weller C and Pritchard JM, “Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market” (2013) 8 European Procurement & Public Private Partnership Law Review 55
<<https://epppl.lexxion.eu/article/EPPPL/2013/1/165>> accessed April 29, 2022

Wiesbrock A, “An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU” (2013) 40 Legal Issues of Economic Integration 105
<<https://kluwerlawonline.com/journalarticle/Legal+Issues+of+Economic+Integration/40.2/LEIE2013007>> accessed April 28, 2022, 109

Van den Abeele É, ‘Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?.’ (2014). european trade union institute Working Paper 2014.08, accessed 19 May 2022

Online sources

Cambridge Dictionary, “Artificially” (*Cambridge Dictionary*)
<<https://dictionary.cambridge.org/dictionary/english/artificially>> accessed May 17, 2022

Cambridge Dictionary, “Design” (*Cambridge Dictionary*)
<<https://dictionary.cambridge.org/dictionary/english/design>> accessed May 17, 2022

Cambridge Dictionary, “Intention” (*Cambridge Dictionary*)
<<https://dictionary.cambridge.org/dictionary/english/intention>> accessed May 17, 2022

Cambridge Dictionary, “Unduly” (*Cambridge Dictionary*)
<<https://dictionary.cambridge.org/dictionary/english/unduly>> accessed May 17, 2022

“Distinguishing Technical Specifications and Award Criteria on the Basis of Role, Not Content” (*www.clientearth.org* May 2012)
<https://www.epsu.org/sites/default/files/article/files/UPDATED_role-not-content-distinguishing-technical-specifications-and-award-criteria.pdf> accessed May 10, 2022

European Commission, “Key Facts and Figures in France”
<https://ec.europa.eu/regional_policy/sources/policy/how/improving-investment/public-procurement/study/country_profile/fr.pdf> accessed May 16, 2022

European Commission, “Public Procurement” (*Trade*)
<https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/public-procurement_en> accessed May 18, 2022

“Internal Market” (*Summaries of EU Legislation*)
<https://eur-lex.europa.eu/summary/chapter/24.html?expand=2401#arrow_2401>
accessed May 13, 2022

Publications Office of the European Union, “Sustainable Development” (*Glossary of summaries*)
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM%3Asustainable_development> accessed April 19, 2022

McMahon P, “Principles of EU Law” (*Brexit*)
<<https://brexitlegal.ie/principles-of-eu-law/>> accessed May 19, 2022

Semple A, “Grounds for Change: ECJ Judgment in Dutch Coffee Case Points to Need for Reform of Procurement Rules” (May 14, 2012)
<<https://www.procurementanalysis.eu/app/download/5804182997/Grounds%2Bfor%2Bchange%2B-%2BCase%2B368%2Bof%2B2010.pdf>> accessed April 23, 2022

Other sources

Conferences:

Medeiros R, “2nd European Conference on e-Public Procurement,” *The new Directive 2014/24/EU on public procurement: a first overview*. (2014)
<https://www.servulo.com/xms/files/00_SITE_NOVO/Arquivo/THE_NEW_DIRECTIVE_2014_Rui_Medeiros.pdfRui> accessed May 5, 2022

Cases

European Union

Court of Justice of the European Union

ATI EAC and others (C-331/04) ECLI:EU:C:2005:718

Audiolux and Others (C-101/08) ECLI:EU:C:2009:626

BECTU (C-173/99) ECLI:EU:C:2001:356

Belgacom (C- 221/12) ECLI:EU:C:2013:736

Blanco and Fabretti (C- 344/13 & C- 367/13) ECLI:EU:C:2014:2311

C (C-435/06) ECLI:EU:C:2007:714

Casa Fleischhandels (C-215/88) ECLI:EU:C:1989:331

Chernobyl I (C-62/88) ECLI:EU:C:1990:153

Commission v Denmark (Case C-243/89) ECLI:EU:C:1993:257

Commission v Germany (C- 546/07) EU:C:2010:25

Commission v Luxembourg (C- 319/06) ECLI:EU:C:2008:350

Commission v Netherlands (C-368/10) ECLI:EU:C:2012:284

Commission v Spain (C-414/97) ECLI:EU:C:1999:417

Concordia Bus Finland (C-513/99) ECLI:EU:C:2002:495

Construction et Entreprises industrielles S.A. (CEI) v Association intercommunale pour les Autoroutes des Ardennes (C-27/86, 28/86, 29/89) ECLI:EU:C:1987:355

Data Medical Service (C-568/13) ECLI:EU:C:2015:166 among others.

E and F (C-550/09) ECLI:EU:C:2010:382

Edouard Leclerc-Siplec (C-412/93) ECLI:EU:C:1995:26

Embassy Limousines & Services v Parliament (T-203/96) ECLI:EU:T:1998:302

Engelmann (C- 64/08) ECLI:EU:C:2010:506

EVN AG and Wienstrom (C-448/01) ECLI:EU:C:2003:651

Gebroeders Beentjes (C-31/87) ECLI:EU:C:1988:422

Günter Fuß v Stadt Halle (C-243/09) ECLI:EU:C:2010:609

Impresa Edilux (C- 425/14) ECLI:EU:C:2015:721

Instituto Portuário e dos Transportes Marítimos (C- 509/12) EU:C:2014:54

IPTM (C- 509/12) ECLI:EU:C:2014:54, para 20

Jiménez Melgar (C-438/99) ECLI:EU:C:2001:509

Laezza (C- 375/14) ECLI:EU:C:2016:60

Lloyd's of London (C-144/17) ECLI:EU:C:2018:78

Lombardini and Mantovani (C-285/99 and C-286/99) ECLI:EU:C:2001:314;

Nilsson (C-162/97) ECLI:EU:C:1998:554

P Inuit Tapiriit Kanatami and Others v Parliament and Council (C-583/11)
ECLI:EU:C:2013:625

Pfleger (C- 390/12) ECLI:EU:C:2014:281, para 43.

PreussenElektra (C-379/98) ECLI:EU:C:2001:160.

RegioPost (C-115/14) ECLI:EU:C:2015:760.

Rewe v Bundesmonopolverwaltung für Branntwein (C-120/78)
ECLI:EU:C:1979:42

SAG ELV Slovensko and Others (C-599/10) ECLI:EU:C:2012:191

SECAP and Santorso (C-147/06 and C-148/06) ECLI:EU:C:2008:277.

Serrantoni v Consorzio stabile edili (C-376/08) ECLI:EU:C:2009:808

Stadt Halle and RPL Lochau (Case C-26/03) ECLI:EU:C:2005:5

Stanley International Betting (C- 463/13) ECLI:EU:C:2015:25

Telaustria and Telefonadress (C-324/98) ECLI:EU:C:2000:669

Tirkkonen (C-9/17) ECLI:EU:C:2018:142

Undis Servizi (C-553/15) ECLI:EU:C:2016:935

Opinions of Advocate General:

Commission v Italy (C-110/05) ECLI:EU:C:2009:66, Opinion of AG Léger

Concordia Bus Finland (C-513/99) ECLI:EU:C:2002:495, Opinion of AG Mischo