



SOCIAL CLAUSES IN THE IMPLEMENTATION OF THE 2014 PUBLIC PROCUREMENT DIRECTIVES



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Introduction

The present Report has been developed within the second phase of the ETUC project on “Securing Workers Rights in subcontracting chains”, and deals with the implementation of the social clauses inserted in the 2014 Public Procurement Directives¹ in four Member States (France, Germany, Italy and Spain)².

As widely recognised³, the 2014 Directives have abandoned the market-oriented approach that featured in the previous regulations, according to which a public procurement shall achieve only the lowest price while purchasing works, supplies or services. The overall objective of the 2014 Directives «is to obtain better value for public money, to deliver better outcomes for societal and other public policy objectives while increasing efficiency of public spending» (European Commission 2017a, p. 3). Indeed, according to the socially responsible public procurement (SRPP) framework, «public buyers are not just interested in purchasing at the lowest price or best value for money, but also in ensuring that procurement achieves social benefits and prevents or mitigates adverse social impacts during the performance of the contract» (European Commission 2021, p. 2).

The Public Procurement Directives introduce specific rules for procurement procedures that directly pursue social policy objectives, as the social inclusion of people with disability (Articles 74-77 of the Directive 2014/24/EU on social services). Besides, they impose to respect certain social and labour standards in all procurement procedures, establishing a level-playing field in order to avoid labour costs being used as the main element of competition among bidders. In this way, the 2014 Directives do not burden public administrations with additional goals to achieve; they just point out that, when public administrations outsource works, supplies or services, certain standards must be respected. Indeed, public administrations are not profit-making enterprises, but shall serve the public interest. Consequently, as stated by the Commission and supported by the European trade unions (ETUC 2021a and 2021b; EFBWW 2021; EFFAT 2021), legislation on public procurement shall set example: it shall support «social policies and accelerates the transition to more sustainable supply-chains and business models» (European Commission 2017a, p. 13). For this reason, public procurement clauses have been inserted also in some important EU initiatives, as the proposal for a Directive on adequate minimum wages in the European Union (COM(2020)682)⁴, the proposal for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (COM(2021)93)⁵ and the Parliament’s proposal for a Directive on corporate due diligence and corporate accountability (*European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL))⁶.

¹ Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement, and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

² On the implementation of the EU Directives see, in general, Treumer, Comba 2018.

³ See, among others, Sánchez Graells 2018; Calleja 2015; Sjøfjell, Wiesbrock (2015).

⁴ «In accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU, Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist» (Article 9).

⁵ «1. The appropriate measures that the Member States take in accordance with Article 30(3) of Directive 2014/23/EU, Article 18(2) of Directive 2014/24/EU and Article 36(2) of Directive 2014/25/EU, shall include measures to ensure that, in the performance of public contracts or concessions, economic operators comply with the obligations relating to equal pay between men and women for equal work or work of equal value. 2. Member States shall consider for contracting authorities to introduce, as appropriate, penalties and termination conditions ensuring compliance with the principle of equal pay in the performance of public contracts and concessions. Where Member States’ authorities act in accordance with Article 38(7)(a) of Directive 2014/23/EU, Article 57(4)(a) of Directive 2014/24/EU, or Article 80(1) of Directive 2014/25/EU in conjunction with Article 57(4)(a) of Directive 2014/24/EU, they may exclude or may be required by Member States to exclude any economic operator from participation in a public procurement procedure where they can demonstrate by any appropriate means the infringement of the obligations referred to in paragraph 1, related either to a failure to comply with pay transparency obligations or a pay gap of more than 5 per cent in any category of workers which is not justified by the employer on the basis of objective, gender-neutral criteria. This is without prejudice to any other rights or obligations set out in Directive 2014/23/EU, Directive 2014/24/EU or Directive 2014/25/EU» (Article 21).

⁶ «1. Member States shall provide for proportionate sanctions applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those sanctions are enforced. [...] 2. The competent national authorities may in particular impose proportionate fines calculated on the basis of an undertaking’s turnover, temporarily or indefinitely exclude undertakings from public procurement, from state aid, from public support schemes including schemes relying on Export Credit Agencies and loans, resort to the seizure of commodities and other appropriate administrative sanctions» (Article 18).



We should also mention the ongoing initiative to adopt a Regulation on the access of third-country goods and services to the Union's internal market in public procurement⁷. The proposal aims at creating a level-playing field in international procurement, providing the Commission with the power to initiate an investigation into alleged third country measures or practices and to restrict the access of operators, goods or services from third-countries to procurement procedures in the EU. It would be of paramount importance that, in this proposal, not only impairment of access for Union economic operators or Union goods, but also unfair competitive advantages for companies established in third countries where environmental and social standards are much lower, are considered (ETUC 2021b)⁸.

This Report aims at examining how, and how far, the four Member States here considered (France, Germany, Italy and Spain) have exploited the social clauses present in the Public Procurement Directives⁹. In particular, the national Reports focus on the Directive 2014/24/EU and consider: Articles 18 (Principles of procurement), 56 (General principles on the choice of participants and award of contracts), 57 (Exclusion grounds), 63 (Reliance on the capacities of other entities), 67 (Contract award criteria), 69 (Abnormally low tenders), 70 (Conditions for performance of contracts), and 71 (Subcontracting).

⁷ Amended proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM(2016)34). On this topic see Corvaglia 2017; Martin-Ortega, Methven O'Brien 2019.

⁸ It is worth mentioning that, according to the Commission, a Member State cannot require to economic operators of Member countries of the WTO Government Procurement Agreement or countries having a bilateral agreement with the EU which includes a procurement chapter, to respect, as tender requirements, national social and labour law or collective agreements where the contract is delivered remotely (European Commission 2021, p. 65). In this way, the Commission applies to third country operators the rule elaborated by the European Court of Justice in *Bundesdruckerei*, a case that concerned a subcontractor established in a Member State different from the one that had launched the tender (European Court of Justice, 18 September 2014, C-549/13).

⁹ According to the Commission, «55 % of procurement procedures still use the lowest price as the only award criterion». Therefore, «most economically advantageous tenders on the basis of a cost effectiveness approach which may include social, environmental, innovative, accessibility or other qualitative criteria are still underused» (European Commission 2017a, p. 5; see also European Economic and Social Committee 2020, § 3.3 and 4.6). This is probably due to the budgetary restrictions and the consequent economic pressure shifted on the contracting authorities (Wixforth, Cremers 2015).

In each national Report, the relevant ECJ decisions are also presented. Besides, the national Reports examine the role played by national trade unions in the implementation process.

Some national Reports reflect as well on the effects of the dematerialisation/digitalisation of public procurement on the enforcement of the social clauses. The issue has been broadly discussed when the proposal for a European service e-card was tabled and should be further explored in relation to the European Single Procurement Document (ESPD) that offers preliminary evidence concerning exclusion and selection criteria so that the full set of underlying documentation only needs being presented by the winning economic operator, unless verification of certain documentation from other participants is need to ensure a proper conduct of the procedure (see European Commission 2017b).

A final Report concerns public procurements and concessions by EU institutions. These procedures are not regulated by the 2014 Public Procurement Directives, but by the EU Financial Regulation which widely reproduces the content of the former. However, several differences that can threaten workers' rights still persist. Also, this Report shortly presents the social conditionality mechanisms recently introduced in several regulations on European Funds.

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Social clauses in French public procurement

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2.1

SHORT DESCRIPTION OF THE IMPLEMENTATION PROCESS IN FRANCE

As of 1st April 2016, Directives 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport, and postal service sectors (henceforth: Procurement Directives) as well as Directive 2014/23/EU on concession contracts (henceforth: Concessions Directive) have been fully transposed into French law, before the 2-years deadline imposed by the European Union¹⁰.

Before the transposition, public procurement in France has always been divided into three types of contracts (public procurement contracts, public-private partnership contracts, concessions contracts) and the legal framework was governed by a number of different regulations which made it complex to implement. Public procurement contracts were governed by the 2006 Public Procurement Code and by Ordinance n°2005-649 of 6 June 2005. Public-private partnership contracts (contrats de partenariat) were governed by Ordinance n°2004-559 of 17 June 2004 and by provisions of the General Public Entities Property Code on long-term lease contracts. French concessions contracts were governed by Law n° 93-122 of 29 January 1993 (the so-called Loi Sapin) governing public service contracts (délégations de service public) and by Ordinance n° 2009-864 of 15 July 2009.

On 12 March 2014, at the end of the conference on the transposition of the Procurement and Concessions Directives in France, former Minister for the Economy and Finance Pierre Moscovici announced¹¹ that the transposition would be carried out in three different stages: in the short term, through the adoption of a decree allowing the transposition of simplification measures concerning the award of public contracts (I); then, via a legislative authorisation to proceed by way of ordinance with regard to the Procurement Directives (a) and the Concessions Directive (b) (II); finally, grouping all the texts in this field in a new Public Procurement Code (henceforth: PPC) (III). These three steps have been eventually respected:

I) Decree n° 2014-1097 of 26 September 2014 on simplification measures applicable to public procurement contracts¹² allowed for the accelerated transposition of certain provisions of the Procurement Directives, which the government has described as urgent, relating to the presentation and selection of candidates, the award of public contracts, and the promotion of innovation and simplification in favour of SMEs. The Decree, entered into force on 1 October 2014, amended the former PPC as well as the implementing decrees of Ordinance N° 2005-649 of 6 June 2005 on contracts awarded by certain public or private persons not subject to the Code.

II) Second stage of transposition followed the summa divisio operated by the Directives between public procurement contracts, on one side, and concession contracts, on the other side. Public-private partnership contracts are no longer autonomously regulated but rather governed by the provisions applicable to public procurement contracts.

a. Law n° 2014-1545 of 20 December 2014¹³ on the simplification of business life empowered the French Government to adopt by ordinance¹⁴ the legislative transposition measures of the Procurement Directives. In application of this measure, the Government adopted the Ordinance n° 2015-899 of 23 July 2015¹⁵ on public procurement contracts transposing the legislative part of the directives and simplifying the legal corpus, as well as its implementing Decrees n° 2016-360 of 25 March 2016¹⁶ on public procurement and n° 2016-361 of 25 March 2016¹⁷ on public defence or security procurement.

¹⁰ The last date for EU Member States to implement each Directive was 18 April 2016. With effect from this date, the “old” procurement Directives were repealed: Directive 2004/17/EC was replaced by Directive 2014/25/EU; Directive 2004/18/EC was replaced by Directive 2014/24/EU; provisions in Directive 2004/18/EC regulating public works concessions were replaced by Directive 2014/23/EU, which also regulates public service concessions for the first time.

¹¹ [Discours de Pierre MOSCOVICI, Ministre de l’Economie et des Finances](#) - Clôture du colloque sur la transposition des directives européennes relatives aux marchés publics - Mercredi 12 mars 2014.

¹² [Décret n° 2014-1097 du 26 septembre 2014 portant mesures de simplification applicables aux marchés publics](#). NB. In French law, a decree is an enforceable act of general or individual scope issued by the President of the Republic or by the Prime Minister exercising regulatory power (Art. 21 and Art. 37 of the Constitution). In this case, it was a decree by the Prime Minister.

¹³ [LOI n° 2014-1545 du 20 décembre 2014 relative à la simplification de la vie des entreprises et portant diverses dispositions de simplification et de clarification du droit et des procédures administratives](#), Articles 42 and 58.

¹⁴ These are ordinances taken on the basis of Article 38 of the French Constitution, i.e. ordinances resulting from a legislative authorisation given to the Government for the implementation of its programme. Article 38 is one of the two procedures that currently allow legislation to be passed by way of ordinance outside exceptional situations.

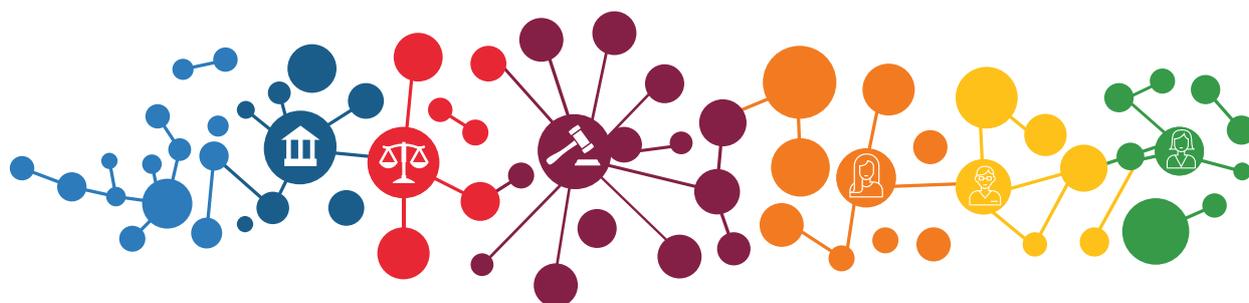
¹⁵ [Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics](#)

¹⁶ [Décret n° 2016-360 du 25 mars 2016 relatif aux marchés publics](#)

¹⁷ [Décret n° 2016-361 du 25 mars 2016 relatif aux marchés publics de défense ou de sécurité](#)

b. Law n° 2015-990 of 6 August 2015¹⁸ for growth, activity, and equal economic opportunities (the so-called Loi Macron) empowered the French Government to adopt by ordinance the legislative transposition measures of the Concession Directive. In application of this measure, the Government adopted the Ordinance n° 2016-65 of 29 January 2016¹⁹ relating to concession agreements and its implementing Decree n° 2016-86 of 1st February 2016²⁰.

III) As for the third stage of transposition, in order to bring together in a single text all the rules relating to public procurement for the purposes of standardisation and harmonisation, Law n° 2016-1691 of 9 December 2016²¹ on transparency, the fight against corruption and the modernisation of economic life authorised the Government to proceed by ordinance. All the above-mentioned texts have been therefore withdrawn on 1st April 2019 through the publication of a PPC²² based on Ordinance n° 2018-1074 of 26 November 2018²³ (legislative part) and Decree n° 2018-1075 of 3 December 2018²⁴ (regulatory part). Decree n° 2018-1225 of 24 December 2018²⁵ on various measures relating to contracts within the PPC and Decree n° 2019-259 of 29 March 2019²⁶ amending various provisions codified in the regulatory part of the PPC were then enacted to complete it. Relevant dispositions of the PPC will be analysed in Part II of this report.



As for the involvement of trade unions in this process, starting from December 2014 the Legal Department of the Ministry of Economy and Finance (Direction des Affaires Juridiques, from now on DAJ) opened a public consultation²⁷ on the draft texts transposing the directives. The Government did not carry out any genuine prior concertation with the employees' and employers' organisations, not being obliged to do it since this issue is not directly covered by Article L. 1 of the French Labour Code. Indeed, in this case the Government merely organised an online consultation instead of a consultation with the institutional consultative bodies, firstly in application of Law n° 2011-525 of simplification and improvement of the quality of law²⁸, and then in application of Article L. 131-1 of the code of relations between the general public and the administration of 2015²⁹.

¹⁸ [LOI n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques](#), Article 209.

¹⁹ [Ordonnance n° 2016-65 du 29 janvier 2016 relative aux contrats de concession](#)

²⁰ [Décret n° 2016-86 du 1er février 2016 relatif aux contrats de concession.de l'Arrêté du 21 mars 2016 fixant le modèle d'avis pour la passation des contrats de concession.](#)

²¹ [LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique](#), Article 38.

²² [Code de la commande publique ; https://www.economie.gouv.fr/daj/code-commande-publique-et-autres-textes](#)

²³ [Ordonnance n° 2018-1074 du 26 novembre 2018 portant partie législative du code de la commande publique](#)

²⁴ [Décret n° 2018-1075 du 3 décembre 2018 portant partie réglementaire du code de la commande publique](#)

²⁵ [Décret n° 2018-1225 du 24 décembre 2018 portant diverses mesures relatives aux contrats de la commande publique](#)

²⁶ [Décret n° 2019-259 du 29 mars 2019 portant modification de diverses dispositions codifiées dans la partie réglementaire du code de la commande publique](#)

²⁷ <https://www.associations.gouv.fr/consultation-sur-la-transposition-des-directives-marches-publics.html>

²⁸ [LOI n° 2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit](#)

²⁹ [Code des relations entre le public et l'administration](#)

The Economy and Finance Documentation Centre (CEDEF) and the DAJ have been contacted in order to get access to the minutes of proceedings of the abovementioned consultations and to the responses of the social partners, but unfortunately no comprehensive report has been established at that time³⁰.

In the absence of official consultation, the major French trade union confederations were contacted in order to organise interviews to clarify, on the one hand, their involvement in the implementation process, and on the other hand, which were the main problems concerning labour law considered in this process. Both the Confédération générale du travail (CGT) and the Confédération française démocratique du travail (CFDT), the largest French trade union organisations, granted an interview with their Services for European and International Affairs. As for the CFDT, the trade unionist interviewed³¹ stated that, while its member the Fédération CFDT construction et bois was not directly involved in the Government's consultations at the time of the transposition, it has been actively involved in the discussions at EU level at the time of the adoption of the directives via the European Federation of Building and Woodworkers. Moreover, the CFDT Federation has produced a Guide for socially responsible public procurement (CFDT 2015) following the transposition, proposing a number of recommendations concerning areas directly or indirectly affecting working conditions. As for the CGT, the trade unionist interviewed³² stressed that, while its organisation has not been involved in the transposition process at national level, it directly contributed to the relevant study group of the European Economic and Social Committee, which released a comprehensive opinion (EESC 2012) about the proposals for the three directives, trying to secure the incorporation of social standards in the text. As for the federal level, while the Fédération CGT des services publics has been actively involved during the drafting of the directive at EU level, it disregarded the transposition dossier at national level, merely monitoring the proceedings without playing a major role in the negotiations with the Government. These interviews brought to light a double pattern in industrial relations in France in this field: on the one side, a lack of coverage of EU issues at national level by the trade unions, in favour of their prior involvement in the negotiating process at European level; on the other side, a democratic deficit, since the Government does not formally involve trade unions in the transposition process of EU directives, or it carries out purely formal consultations.

2.2

SOCIAL CLAUSES IN THE PUBLIC PROCUREMENT LEGISLATION

In this Section, which is based on a matrix prepared by the European Commission (EC 2019), we will focus on the transposition of social clauses set by Directive 2014/24/EU into French law, presenting the regulations aimed at guaranteeing and promoting worker rights.

Explanatory table:

VOCABULARY	DEFINITION
Public buyer	Public administrative body awarding a public contract.
Contracting authority	Public administrative body awarding a concession contract.
Tenderer / Candidate	Economic operator submitting an offer.
Holder	Economic operator awarded the contract.
Contractor	Economic operator awarded the contract and subcontracting a part of it.

³⁰ The summary documents of the consultations are available online, but unfortunately they do not reflect the positions and contributions of the social partners.

³¹ Mathilde Frapard, European and International Affairs Adviser (CFDT).

³² Denis Meynent, European and International Affairs Adviser (CGT) and member of the European Economic and Social Committee.

Article 18(2): Principle of procurement

As for the preparation of the public procurement, Article L. 2111-1 PPC states that the nature and extent of the requirements to be met shall be accurately determined by the contracting authorities before launching the consultation, considering sustainable development objectives and appropriately integrating environmental, social and labour requirements into public procurement procedures. Contracting authorities subject to the PPC adopt and make public a Public Procurement Scheme for promoting socially responsible public procurement, comprising elements aimed at contributing to the social and professional integration of disabled or disadvantaged workers, when the total annual amount of their purchases is greater than 100 million € (L. 2111-3 PPC).

When drafting the contract clauses specifying the contract performance conditions, the contracting authority may take into account the social dimension of public procurement, namely social issues, employment and the fight against discriminations (L. 2112-2 PPC). At the same time, the public buyer may require the contract (or a part of it) to be performed on the territory of an EU Member State, so that minimum European labour and social standards can be guaranteed (L2112-4 PPC).

During the tender phase, irregular, unacceptable, or inappropriate offers must be rejected by the public buyer (L. 2152-1 PPC). An irregular offer is an offer that, inter alia, fails to comply with applicable social legislation (L. 2152-2 PPC). This provision is designated to require tenderers to comply with applicable obligations in the fields of social and labour law.

Article 56 (General principles on the choice of participants and award of contracts)

According to L. 3 PPC, public buyers and contracting authorities are required to respect the principle of equal treatment of candidates for the awarding of a public contract, implementing the principles of freedom of access, transparency, and equality.

Article L. 2152-7 PPC requires that the public contract shall be awarded to the tenderer offering the most economically advantageous tender on the basis of one or more objective, precise criteria related to the subject-matter of the contract notice or its execution conditions. The link with the subject-matter of the contract or its conditions of performance shall be assessed in accordance with above mentioned Articles L. 2112-2 to L. 2112-4.



Article 57 (Exclusion grounds)

Contracting authorities are required to exclude economic operators from tenders if they have been convicted of any of the offences listed by Articles L. 2141-1 to L. 2141-11 PPC.

According to L. 2141-2 PPC, the contracting authority shall exclude from the competition any economic operator who has not fulfilled its duties with regard to tax matters or social security contributions³³. However, this exclusion is not applicable to operators who, before the date on which the public buyer decides on the admissibility of their application, have fulfilled their payments, or have established guarantees, or have concluded and complied with an agreement with the debt recovery bodies to pay taxes or social security contributions, as well as any interest accrued, penalties or fines.

Article L. 2141-3 PPC excludes from the competition tenderers who are subject to judicial liquidation, personal bankruptcy measure or insolvency procedure.

Articles L. 2141-4 and L. 2141-5 PPC exclude from the competition tenderers who have been sanctioned for breaches of certain obligations in the area of labour law, provided for in Articles L. 8221-1, L. 8221-3 and L. 8221-5 (undeclared work), L. 8231-1 (supply of manpower with the aim or the effect of violating labour rights or evading legal provisions or collective labour agreements), L. 8241-1 (illegal for-profit lending of labour), L. 8251-1 and L. 8251-2 (employment of foreigners without a work permit or not authorised to work) of the labour code, as well as tenderers who have been found guilty under Article L. 1146-1 of the labour code (gender discrimination at the workplace) and under Article 225-1 of the penal code (discrimination). Tenderers who, on 31 December of the year preceding the year of launch of the procurement procedure, failed to comply with the obligation to negotiate with trade unions provided for in Article L. 2242-1 of the labour code³⁴, are to be excluded from the competition (Article L. 2141-4, 2°, PPC). Via this provision, PPC stabilises and promotes collective bargaining.

In exceptional circumstances, contracting authorities may authorise an economic operator who find itself excluded under the abovementioned provisions on the condition that this is justified by compelling reasons of general interest, or that the contract in question can be entrusted only to this single economic operator and that a definitive ruling of a court of a Member State of the EU does not expressly exclude the operator from public procurement contracts (Article L. 2141-6 PPC).

Eventually, Articles L. 2141-7 to L. 2141-10 PPC provide for grounds for exclusions at the public buyer's discretion (serious or persistent breaching of contractual obligations when executing a previous public procurement contract; undermining the transparency of the award procedure; accessing to confidential information enabling them to obtain an advantage over their competitors; distorting competition through an agreement with other economic operators; conflict of interest).

Article 63 (Reliance on the capacities of other entities)

Tenderers may rely on the capacities of other economic operator(s), irrespective of the legal nature of their links (Article R. 2142-3 PPC). In this case, the tenderer must provide for evidence of the capacity of the economic operator(s) for the performance of the contract (Article R. 2143-12 PPC). Moreover, the contracting authority may require the economic operators concerned to be jointly and severally liable in so far as this is necessary for the proper performance of the contract.

Similarly, groups of economic operators may participate in procurement procedures (Article R. 2142-19 PPC). If an exclusion ground concerns a member of a group, the contracting authority shall require him to be replaced by another economic operator (Article L. 2141-13 PPC). For service or works contracts and supply contracts requiring installation operations or the provision of services, the contracting authority may require that certain essential tasks be performed by one of the members of the group (Article R. 2142-27 PPC).

Article 67 (Contract award criteria)

Article R. 2152-7 PPC requires contracting authorities to base the award of public contracts to tender or tenders who have submitted the most economically advantageous offer. The Article does not prohibit the use of award

³³ The list of these taxes, contributions or social security contributions is set out by an order of the Minister for the Economy and is appended to the PPC.

³⁴ According to this article, in undertakings where one or more trade union sections of representative organisations have been formed, the employer shall initiate at least once every four years: 1) Negotiations on remuneration, working hours and the sharing of added value in the company; 2) Negotiations on equality between women and men at work, including measures to eliminate pay gaps, and the quality of life at work.

criteria based solely on price (provided that the sole purpose of the contract in question is the purchase of standardised services or products whose quality is not susceptible to variation from one economic operator to another), but contracting authorities can also award contracts on the basis of a cost ratio (determined according to a global approach that can be based on life-cycle costing defined in Article R. 2152-9) or a best price-quality ratio. The best price-quality ratio embraces a plurality of non-discriminatory criteria related to the subject of the contract or its conditions of performance, including the criterion of price or cost coupled with one or more other criteria such as social, environmental, innovative aspects and operational characteristics, once the criteria are linked to the subject-matter of the contract.

Article 69 (Abnormally low tenders)

According to Article L. 2152-5 PPC, an abnormally low offer is an offer whose price is clearly undervalued and likely to compromise the correct performance of the contract. Contracting authorities are obliged to examine tenders which they consider abnormally low (Article L. 2152-6 PPC) and to require economic operators to provide details and justifications about the proposed pricing or costing, when it appears to be abnormally low in relation to the works, supplies or services, including the part of the contract they intend to subcontract (Article R. 2152-3 PPC).

Public buyers shall reject any tenderer which did not provide for sufficient evidence to explain the low basis of its submitted pricing or costing, as well as when the contracting authority has established that the abnormally low offer results from non-compliance with environmental, social and labour applicable obligations under French law, including the applicable collective agreement(s), or under EU law, or under international agreements and treaties mentioned in a notice annexed³⁵ to the PPC (Article R. 2152-4 PPC).

Tenderers whose offers are abnormally low due to State Aids shall be rejected, unless they are able to demonstrate that the aid in question meets the conditions of compatibility with the internal market as defined in Article 107 TFEU (Article R2152-5 PPC). A public buyer who rejects an offer under these conditions must inform the European Commission.

Abnormally low offers from subcontractors are considered as well. Where the amount of the subcontracted services appears abnormally low, the public buyer requires the contract holder to provide details and justifications (Article L. 2193-8 PPC) and implements the provisions of the abovementioned Articles R. 2152-3 to R. 2152-5 (Article R. 2193-9 PPC). If public buyers establish that the pricing or costing of the subcontracted services is abnormally low, they shall reject the tender – when the request for subcontracting is made at the time of the submission of the offer – or shall not accept the proposed subcontractor – when the subcontracting declaration is presented after the notification of the contract (Article L. 2193-9 PPC).

In any case, the definition of “abnormal” remains a major issue that makes these provisions hard to enforce. The Council of State, France’s highest administrative court, specified the characteristics of an abnormally low offer through its case law. In a 2019 technical fact sheet based on the PPC and the related case law (DAJ 2019), the DAJ has identified four types of indicators that can be used to detect an abnormally low tender: the financial undervaluation of the services in relation to the initial estimate; a mathematical formula for determining a threshold of anomaly; the comparison with other tenders³⁶; and the comparison with the obligations imposed on tenderers in social and environmental matters. Having identified potentially abnormally low tenders, the public buyer is obliged to ask for explanations from the tenderers and to put in place an adversarial procedure to assess their relevance, in order to take a decision to accept or reject them.

³⁵ PPC, Annexe n°10, [Avis relatif à la liste des dispositions internationales en matière de droit environnemental, social et du travail permettant de rejeter une offre comme anormalement basse en matière de marchés publics](#).

³⁶ [Council of State, 29 May 2013, Sté Artéis, n° 366606](#) and [Council of State, 3 November 2014, ONF, n° 382413](#): When a tender appears to be abnormally low, the contracting authority must ask the tenderer for any details and justifications likely to explain the price proposed. It is not enough to observe the significant price difference between the tenders without investigating whether the price in question is itself manifestly undervalued and thus likely to compromise the proper performance of the contract; more recently: [Paris Administrative Court of Appeal, 20 octobre 2020, 18PA20001, société Idea Sécurité](#): The price difference of 45% between two tenders is not sufficient to characterise a tender as abnormally low. This is only an indication permitting to suppose it.

The provisions of Article L. 2193-3 PPC establish, subject to compliance with the conditions laid down by Law n° 75-1334, the right of the holder of a public contract to subcontract the performance of some of the services covered by the contract⁴⁰ under his responsibility⁴¹. The contracting authority cannot therefore require the holder to perform all the services under the contract himself. In this regard, the abovementioned Article R. 2142-3 PPC authorises tenderer to rely on the economic and financial or technical and professional capacity of other economic operator(s), regardless of the legal nature of the links between these economic operators and the tenderer. According to Article R. 2151-13, the contracting authority may ask tenderers – via the tender notice or in another consultation document – to indicate in their tender the part of the public contract that they intend to subcontract to third parties, especially when it comes to SMEs.

The principle of freedom to subcontract suffers from an exception under Article L 2193-3, which allows the contracting authority to require the contract holder to perform certain essential tasks⁴² of the contract. On this basis, the public buyer may legitimately invoke the essential nature of certain tasks in order to not allow the holder to subcontract. The principle of transparency of procedures obliges the public buyer to indicate – via the tender notice or the consultation rules – which tasks are to be considered as essentials, and these limitations must be justified by objective means in case of legal dispute. In any case, according to Article 1 of the Law n° 75-1334, the holder cannot subcontract the entire execution of a public contract for which it has been selected. Failure to comply with this provision justifies the termination of the contract to the detriment of the holder⁴³. However, neither the Law n° 75-1334 nor the PPC specify the minimum part of services that the holder must perform in-house⁴⁴, but it seems to be the responsibility of the contracting authority to avoid accepting that more than 95% of the contract it concludes be performed by subcontractors⁴⁵.

The use of subcontracting is subject to the implementation of various formalities. According to Article L. 2193-10 PPC, the holder is allowed to subcontract only if he has obtained the public buyer's acceptance of the list of subcontractors and the approval of their payment terms⁴⁶. In addition, the acceptance and the approval of the payments terms by all the subcontractors are required (Article L. 2193-4 PPC). These two formalities must be fulfilled simultaneously for the subcontracting to be considered regular⁴⁷, and must be carried out before the subcontractors begin to perform the services⁴⁸.

The subcontract declaration⁴⁹ shall be made at the time of submission of the tender or later in a special act, if it occurs during the execution of the public contract (Article L. 2193-5 PPC), and it shall contain the list of subcontractors (name; corporate or legal name; address), the nature of the subcontracted services and the capacities of the subcontractor(s), the maximum amount of money to be paid to the subcontractor and the terms of payment (Article R. 2193-1, paragraph 1, PPC). The tenderer shall also provide the public buyer with a declaration by the subcontractor demonstrating compliance with the selection requirements and stating that it is not subject to one of the abovementioned exclusion grounds (Article R. 2193-1, second paragraph, PPC). If a subcontractor is found to be subject by an exclusion ground, the contracting authority shall require the tenderer to replace it (Article L. 2141-14 PPC).

⁴⁰ [Rép. min. n° 101807 : JOAN Q 5 juillet 2011, p. 7314.](#)

⁴¹ Lyon Administrative Court of Appeal, 14 January 2019, N° 16LY04384: The holder remains personally liable towards the buyer for the proper performance of the contract, both for his work and for that which he has subcontracted. Thus, the contracting authority cannot exercise control over the quality of the services performed by the subcontractor. This is also why the retention of guarantee (Article R. 2191-34 PPC) does not apply to subcontractors, but only to the contract holders. See [DAJ, Les garanties financières, April 2019](#), p. 4.

⁴² The notion of “essential tasks” depends on the subject-matter of the public contract and is therefore subject to a case-by-case assessment.

⁴³ Bordeaux Administrative Court of Appeal, 15 December 1997, ‘SA Thermotique c/ ville de Nîmes’, n° 94BX01637

⁴⁴ Under these conditions, it will be up to the judge, in the event of a dispute, to assess on a case-by-case basis, with regard to the conditions of execution of the public contract, whether the public contract complies with the aforementioned provisions.

⁴⁵ Rép. min. n° 22541, JO Sénat du 10 May 2007, p. 967.

⁴⁶ Nantes Administrative Court of Appeal, 28 février 2018, n° 16NT01170: the special act of acceptance of a subcontractor and approval of its payment conditions must be signed not only by the holder but also by the contracting authority

⁴⁷ [Council of State, 13 June 1986, OPHLM du Pas-de-Calais c/ Société Franki-Fondations-France, n° 56360.](#)

⁴⁸ [Council of State, 3 April 1991, Syndicat intercommunal d'assainissement du plateau d'Autrans Meaudre, n° 90552 ; Paris Administrative Court of Appeal, 1er December 2005, Société des services pétroliers Schlumberger, n° 01PA01691.](#)

⁴⁹ The subcontract declaration can be made via the [DC4 application form](#), available on the DAJ website.

Procedures

Article L. 2120-1 PPC clarifies that a public contract can be awarded either without prior publication or competitive tendering, or according to an “adapted procedure”, or a “formalised procedure”, depending on their value, their subject or the circumstances in which they are concluded. First, the procurement can be negotiated without prior advertising and tendering procedures when the value of the contract is below € 40,000 (Article R. 2122-8 PPC) as well as when it fulfil strict criteria mentioned in Article L. 2122-1 PPC, namely due to the existence of an unsuccessful initial procedure, or in case of extreme urgency, or when its subject-matter or estimated value, compliance with such a procedure is pointless, impossible, or manifestly contrary to the interests of the public buyer or to a reason of general interest. Second, the public contract can be awarded using an “adapted procedure” in the cases mentioned in Article L. 2123-1 PPC, namely when its estimated value is between € 40,000 and the “formalised thresholds”⁵⁴, or due to the procurement subject-matter⁵⁵, or when (even though the estimated value is equal to or higher than the EU thresholds) the value of certain lots is less than a threshold set by regulation. In these cases, the public buyer can freely determine appropriate awarding procedure, in accordance with the general principles of public procurement. Third, when the estimated value of the public contract exceeds the abovementioned thresholds, contracting authorities must use a “formalised procedure” (Article L. 2124-1 PPC). In this case, three types of procedures can be used: the call for tenders with no negotiation whereby the public buyer chooses the most economically advantageous offer on the basis of objective criteria previously known by the candidates (Article L. 2124-2 PPC); the competitive procedure with negotiation whereby the public buyer negotiates the terms of the contract with one or more economic operators (Article L. 2124-3 PPC); the competitive dialogue whereby the public buyer develops solutions likely to meet its needs through a dialogue with the candidates admitted to participate, who will then be invited to submit a tender on this bases (Article L. 2124-4 PPC).

According to a Guide developed by the French Economic Observatory of Public Procurement (OECF 2018), the PPC offers public buyers several opportunities to give the widest possible scope to social clauses, which imply the use of different procedures.

On the basis of Article R. 2152-7 PPC coupled with Article L. 21112-2 PPC, contracting authorities can include a **social criterion** among the **award criteria** for the public contract. This allows the criterion for the professional integration of disadvantaged people to be considered in the selection of tenderers, in addition to other traditional selection criteria such as price, technical merit or completion time. The application of social award criteria has been framed by the case law (DAJ OEAP 2015, Catel 2017, Karamitrou 2019), which has never been completely in favour of this practice. Indeed, the administrative judge has considered for a long time that the use of social criteria was illegal because of their lack of link with the subject-matter of the public contract⁵⁶. However, since a judgment of 25 March 2013⁵⁷, the position of the administrative courts seems to have become more flexible. In this decision, the Council of State accepted that, when the contract was likely to be carried out, at least in part, by people engaged in a professional integration process, this social criterion could be used, provided that this was not discriminatory and made it possible to objectively assess the offers. This “relaxation” by the Council of State followed the development of the case law of the European Court of Justice in 2012⁵⁸ as well as a judgment of 18 December 2012⁵⁹ in which the lower courts had retained a broad acceptance of the concept of the subject-matter of the contract. Following these judgements, the social criterion could now be used in contracts whose purpose is not solely social. Still, in a more recent decision⁶⁰, the Council of State recalled that a criterion relating to the company’s general social policy cannot be used on its own but must be

⁵⁴ Thresholds are mentioned in a notice annexed to this code: [Avis relatif aux seuils de procédure et à la liste des autorités publiques centrales en droit de la commande publique](#).

⁵⁵ Subject-matters are listed under Article R. 2123-1 PPC, which includes social services and other specific services and legal advice services.

⁵⁶ Douai Administrative Court of Appeal, 29 November 2011, N° 10DA00608: The Court considered that the contracting authority could not base its assessment of the most economically advantageous tender on the performance of the candidates in terms of the integration of disadvantaged people, as this criterion had no link with the purpose of the services expected. Tenders with no link to the subject-matter of the public contract do not meet the needs of the public purchaser and cannot therefore be accepted; Council of State, 15 February 2013, Société Derichebourg polyurbaine, n° 363921: the Council censured the fact that the selection of tenders had been made with regard to the “social policy of the company”, in particular with regard to staff training and health and safety requirements, because it was unrelated to the subject-matter of the contract.

⁵⁷ Council of State, 25 March 2013, n° 364950, Département de l’Isère.

⁵⁸ ECJ, 10 May 2012, Commission c/ Pays-Bas, C-368/10.

⁵⁹ Council of State, 18 December 2012, n° 363208.

⁶⁰ Council of State, 25 May 2018, n°417580. The Council of State clarified that, in this respect, social criteria (relating in particular to employment, working conditions or the professional integration of persons in need) may concern all the activities of the tenderers insofar as they contribute to the performance of the services provided for by the contract.

linked to the subject-matter of the contract or to its performance conditions. Although the administrative judge has recently become more flexible, it seems to be more favourable to the introduction of the social dimension at the level of the execution of the contract than as an award criterion.

Indeed, Article L. 2112-2 PPC allows a social clause to be included as a condition for the execution of the public contract. Providing for a social clause of execution makes it possible to require economic operators to devote a part of the contract, in the form of working hours, to the implementation of a professional integration action for people not in employment. As for the preparation of the procedure, contracting authorities need to indicate in the public tender notice the presence of a social inclusion clause, whether it is included as award criterion or execution criterion. Contracting authorities can as well authorise a “variant”, which is a proposal by a tenderer for new socially responsible ways of performing the services, not provided for by the public buyer. The use of variants thus gives public buyers the opportunity to rely on the initiatives of economic operators to diversify their proposals. From a procedural point of view, public buyers may authorise the presentation of variants under the conditions set out in Article R. 2151-8 PPC. Once the contract is signed, variants definitively become social clauses of execution.

A special case of a clause of execution is the so-called “**Molière**” clause, which requires the exclusive use of the French language on construction sites. This clause requires that workers assigned to the execution of a public contract can understand and speak French, or, failing that, that an interpreter is present at the place of execution. In the latter case, the case law⁶¹ talks about “**interpreting clause**” requiring the contract holder to engage an interpreter on the site, in order to explain to workers their labour and social rights and the health and safety rules they must observe. On the contrary, the “Molière” clause – enacted on the basis of Article L. 2112-2 PPC – raises serious doubts as to its compatibility with public procurement law and EU law. Indeed, even if the obligation to master the French language can be presented as contributing to compliance with safety rules in the workplace (L. 4531-1 of the Labour Code), this leads to a form of discrimination by excluding companies that make use of posted workers, in order to favour a form of protectionism. The development of such clauses has triggered a ministerial instruction of 27 April 2017⁶² calling on prefects to consider these practices as illegal. As an exception, the ministerial instruction envisaged the legality of such a clause, provided that it is related to the subject-matter of the contract and necessary for its execution. The Council of State⁶³ later confirmed this interpretation, further adding that this clause must be applied indistinctly to any company, whatever the nationality of its workers, and it must not be discriminatory or constitute an obstacle to the free movement of workers.

Another way of incorporating social criteria into public procurement is through **reserved contracts** governed by Articles L. 2113-12 to L. 2113-16 PPC, transposing Article 20 of the Procurement Directive. According to these provisions, contracting authorities can reserve the right to participate in public procurement procedures to “adapted companies”⁶⁴ and to services for support through work⁶⁵, where the employees concerned are persons with **disabilities**, and they can as well reserve this right to services for integration through economic activity⁶⁶ employing **disadvantaged** workers. According to Article R. 2113-7 PPC, in order to benefit from this reservation, these establishments must employ more than 50% of disabled or disadvantaged workers. Moreover, a public contract relating exclusively to health, social or cultural services, regardless of its estimated value, may be reserved by a contracting authority for **social economy enterprises**⁶⁷. However, this opportunity is doubly limited by the short duration of these contracts (3 years) and by the impossibility of awarding the contract to a company which, in the three years preceding the call, has already benefited from an award on the same basis.

Furthermore, social clauses can be integrated as the specific subject-matter of a public contract. Contracting authorities may notably set up **public contracts whose subject-matter is a social service or other specific**

⁶¹ Council of State, 4 December 2017, n° 413366, *Ministre de l’intérieur c/ Région Pays de la Loire*.

⁶² [Instruction interministérielle du 27 avril 2017 relative aux délibérations et actes des collectivités territoriales imposant l’usage du français dans les conditions d’exécution des marchés](#). NOR : ARCB1710251J ; D. Necib, *Quand Molière joue dans les têtes d’affiche*, Éditorial, RLC 2017/60.

⁶³ Council of State, 4 December 2017, n° 413366, *Ministre de l’intérieur c/ Région Pays de la Loire*; D. Necib, *Les clauses d’interprétariat volent la vedette à la clause « Molière »*, RLC 2018/69.

⁶⁴ Article L. 5213-13 of the Labour Code.

⁶⁵ Article L. 344-2 of the Code of social action and families.

⁶⁶ Article L. 5132-4 of the Labour Code.

⁶⁷ Article 1 of the Law n° 2014-856.

service⁶⁸. These are public service contracts whose purpose is the requalification and professional integration of people in need. In these cases, the contracting authority makes a professional integration purchase, i.e., his need is to reintegrate people not in employment who will be able to acquire, thanks to the performance of the services covered by the contract, the skills needed for a long-lasting professional integration. Thus, as soon as a public service contract has such a purpose, it can be awarded, regardless of its estimated value, with the adapted procedure governed by Article L. 2123-1 PPC. In any case, the abovementioned restriction justifies the fact that these contracts are rarely used by public buyers.

2.3

E-PROCUREMENT

E-procurement in France is governed by Articles R. 2132-1 to R. 2132-14 PPC. The use of e-procurement in France has been mandatory since 1 October 2018 for all contracting authorities involved in public procurements exceeding the value of € 25,000 excluding VAT, then € 40,000 since the 1 January 2020 (Article R. 2132-2 PPC). Contracting authorities must publish on their profile⁶⁹ the list of essential data and documents related to their public or concession contracts. At all stages of the procurement procedure, communications and exchanges of information during the award of a contract exceeding € 40,000 shall take place electronically (Article R. 2132-7 PPC), and public buyers can no longer accept paper offers, which will be automatically declared irregular. Article R. 2132-12 PPC set a list of exemptions from the obligation to use e-procurement.

Article R. 2143-4 PPC states that any economic operator can present his application through a European Single Procurement Document⁷⁰ (ESPD). The ESPD can integrally replace the standard application documents mentioned in Article R. 2143-3 PPC⁷¹. The ESPD Service⁷² is a dematerialised service which, like the DAJ's DC1, DC2 and DC4 forms, enables economic operators to prove in a simple manner and in accordance with the law that they meet the selection criteria for a tender and do not fall within any of the exclusion grounds provided for in the PPC. Even if the use of the ESPD is not mandatory, it can be used in any public procurement procedure, regardless of the threshold, and the public buyer is always obliged to accept it. In the framework of the formalised procurement procedures, the ESPD Service allows candidates to avoid having to provide for any document already transmitted to a public administration before (Articles R. 2143-13 and R. 2143-14), in accordance with the "Tell us once" programme⁷³. The certificates that no longer need to be re-submitted are listed in an annex⁷⁴ to the PPC, which namely refers to tax and social security declarations and contributions, pension contributions and regularity of the employer's situation with regard to the obligation to employ disabled workers. In this sense, the dematerialisation of the procedures does not negatively affect the integration of social standards in public procurement. Quite the opposite, the relevant documentation ceases to be a burden for the economic operator, who relies on the fact that the contracting authority can access it automatically in the case of e-procurement. More generally, it seems that the use of e-procurement procedures by economic operators keeps their obligations regarding social clauses unchanged, and that the dematerialisation does not lead to a lowering of social standards compared to traditional public tenders.

⁶⁸ PPC, Annexe n° 3, [Avis relatif aux contrats de la commande publique ayant pour objet des services sociaux et autres services spécifiques](#).

⁶⁹ Article R. 2132-3 defines the "buyer profile", which is the dematerialisation platform enabling contracting authorities to make the consultation documents electronically available to economic operators and to electronically receive the documents transmitted by candidates and tenderers.

⁷⁰ Established in accordance with the model set by the European Commission Implementing Regulation (EU) 2016/7 of 5 January 2016.

⁷¹ A declaration on honour to prove that the tenderer does not fall into any of the exclusion grounds and that he satisfies the obligations concerning the employment of disabled workers (Articles L. 5212-1 to L. 5212-11 of the Labour Code); the information requested by the public buyer for the purposes of verifying the applicant's ability to carry out the professional activity and its economic, financial, technical, and professional capacity.

⁷² [Document unique de marché européen - DUME](#)

⁷³ « Dites-le-nous une fois »

⁷⁴ PPC, Annexe 4, [Arrêté du 22 mars 2019 fixant la liste des impôts, taxes, contributions ou cotisations sociales donnant lieu à la délivrance de certificats pour l'attribution des contrats de la commande publique](#), Article 4.

2.4

CONCLUSION

This national report gave an overview of the transposition of social clauses embedded in 2014 EU directives on public procurement in France. Although, as discussed, the role of trade unions has remained marginal during the transposition process, the legislative texts adopted by the Government, later systematised in the 2019 Public Procurement Code, have comprehensively and timely implemented social standards in France. Several provisions have been designed to impose tenderers (and subcontractors) to comply with applicable obligations in the fields of social and labour law, such as the buyer's obligation to refuse offers considered irregular as they fail to comply with applicable French social legislation, or to reject abnormally low offers resulting from non-compliance with social and labour obligations under French law, applicable collective agreements, as well as under EU law or applicable international agreements and treaties. In terms of exclusion ground, economic operators that have not fulfilled their duties with regard to social security shall be excluded from tenders, as well as economic operators that have been sanctioned for breaches of certain obligations in the area of labour law or that failed to comply with certain obligations to negotiate with trade unions. Subcontracting-related provisions seem to be convincing in their protective effectiveness toward subcontractors as well, even in case of "cascade subcontracting". Public buyer's acceptance of the list of subcontractors and their payment terms is required in advance, while a mandatory buyer's direct payment system for subcontractors has been put in place, so that they are not under the holder's influence in terms of payment. As second-tier subcontractors do not benefit from the direct payment system, first-tier subcontractors shall provide them with a personal and joint and several guarantee or a delegation of payment, allowing them to be directly paid by the buyer as well.

On the basis of the new provisions, contracting authorities have developed practices mainly related to professional integration for people not in employment as well as for people with disabilities and disadvantaged workers, both during the selection of tenderers and during the execution of contracts, or by specifically reserving certain public contracts for companies committed to improving the social conditions of these categories. A large body of case law has been developed on these practices, and yet French administrative judges find it difficult to recognise social clauses as autonomous criteria for awarding contracts.

However, according to a study released by the Economic, Social and Environmental Council (Conseil économique, social et environnemental 2018), social standards in public procurement are insufficiently exploited, since figures show that the percentage of public contracts with a social clause was 8% in 2015 and 10% for environmental clauses. There has been an increase since 2010, when the percentage of social clauses was 2% and 5% for environmental clauses, but the figures are still extremely low compared to the social challenges. The updated results for the State and its public bodies show that since 2009 there has been an increase in the environmental and social performance of public procurement insofar as, in 2016, the 12.2% of State contracts contained an environmental performance clause, while only the 4.4% contained a social clause; other public bodies, on the other hand, performed better with 24% and 12% respectively. Despite the progress noted, the objectives set by the second National Action Plan for Sustainable Public Procurement for 2020 were still far from being achieved, as the latter had set a target of at least 25% of contracts awarded during the year should have been included at least one social provision. According to a report released by the General Inspectorate of Social Affairs (Inspection générale des affaires sociales 2016), this limited progress also stems from the fact that recent changes in legal texts reinforcing the integration of social clauses in public procurements did not impose any obligation of result on public buyers, on whose voluntarism the achievement of the objectives set by the Government remain entirely based. Therefore, the lack of enforcement measures represents a significant shortcoming in this framework.

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Social clauses in German public procurement - towards a Post-Rüffert regime?

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3.1

INTRODUCTION

In Germany, public authorities spend every year between 300 and 500 billion Euros on public contracts (Solbach 2018, OECD 2019).⁷⁵ This corresponds to between 13 and 15 per cent of Germany's Gross Domestic Product (GDP). As Germany has a federal political system with strong regional and local governments and a high degree of fiscal autonomy at lower governance levels, public procurement is organised very decentrally. There are approximately 30.000 contracting authorities which perform about 2.4 million procurement procedures per annum. Only about 12 per cent of public procurement activities take place at the federal level. A further 30 percent is realised at the level of the German Federal States, while the largest share of 58 percent is organised at municipal level (Solbach 2018, OECD 2019). Moreover, only 10 per cent of the procurement procedures (accounting for 25 percent of the overall financial volume for procurement) are above the EU thresholds where EU public procurement rules are relevant.⁷⁶ The vast majority of 90 percent of all procurement procedures (accounting for 75 percent of the overall financial volume) are below the EU thresholds and are only subject to German procurement rules (Solbach 2018).

Public authorities have always seen public procurement as a potential instrument to influence the economy at national, regional, or local level. In the last two decades, however, the strategic use of public procurement to promote a more socially and environmentally sustainable development has gained more and more importance in Germany (Sack et al. 2016). Hereby, procurement practices have become increasingly confronted with two conflicting approaches:

On the one hand, public authorities are often confronted with severe budgetary restrictions and, therefore, still tend to use the lowest price as the most important if not decisive criterion to award public contracts. In Germany the "lowest-price-approach" was strongly supported by more neoliberal economists who had dominated the public discourse with their plea for austerity policies especially in 1990s and 2000s. Their views corresponded quite well with the position of many legal experts in procurement law who see the price as the only objective criterion and strongly refused the consideration of social or environmental aspects as they would make the criteria for the award of a public contract less clear and susceptible to non-transparent decisions.

On the other hand, there is an alternative approach, which became more and more influential during the last decade, which demand contracting authorities to give public contracts no longer simply to suppliers with the lowest price but with the *most economically advantageous offer*. For calculating the latter one has to take into account not only the direct costs of the public contract but also its life-cycle costs and its potential follow-up costs for the environment and the social security system. Moreover, there has also been growing support for the view that the state should be a model by following good economic practices with high environmental and social standards.

From a legal point of view Germany's public procurement legislation has already for a long time allowed to follow the approach of a most economically advantageous procurement policy. Especially the use of social clauses in public tenders has already a long tradition in Germany (Schulten 2012a). The influence of European integration, however, has been rather ambivalent. On the one hand, the adoption of the new EU procurement directives from 2014 into German procurement law has definitively strengthen the idea of a strategic procurement policy by considering environmental and social aspects.

On the other hand, there has been some important case law from the European Court of Justice (ECJ) which had – at least temporarily – a very limiting effect on the use of social clauses in German public procurement. This holds true, in particular, for the famous Ruffert case (C-346/06) from 2008. In this judgement the ECJ saw a specific clause in the regional procurement act of the German Federal State of Lower-Saxony, that allows to give public construction contracts only to companies which agree to pay their employees at least the rate set

⁷⁵ As Germany still does not have a comprehensive statistic on public procurement, all figures available are based on estimations made by the German government or international organisation such as the EU or the OECD. Only since 2020 Germany has started to set up a new legal reporting system on public procurement in order to get better and more detailed data in future (Bundesregierung 2019).

⁷⁶ In 2021 the EU thresholds for public procurement are €5,350,000 Euro for works contracts and 750,000 Euro for services contracts with some additional thresholds for special works and services (https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en).

by a collective agreement, as a hinderance to economic freedom and, therefore, as being in contradiction with EU law.

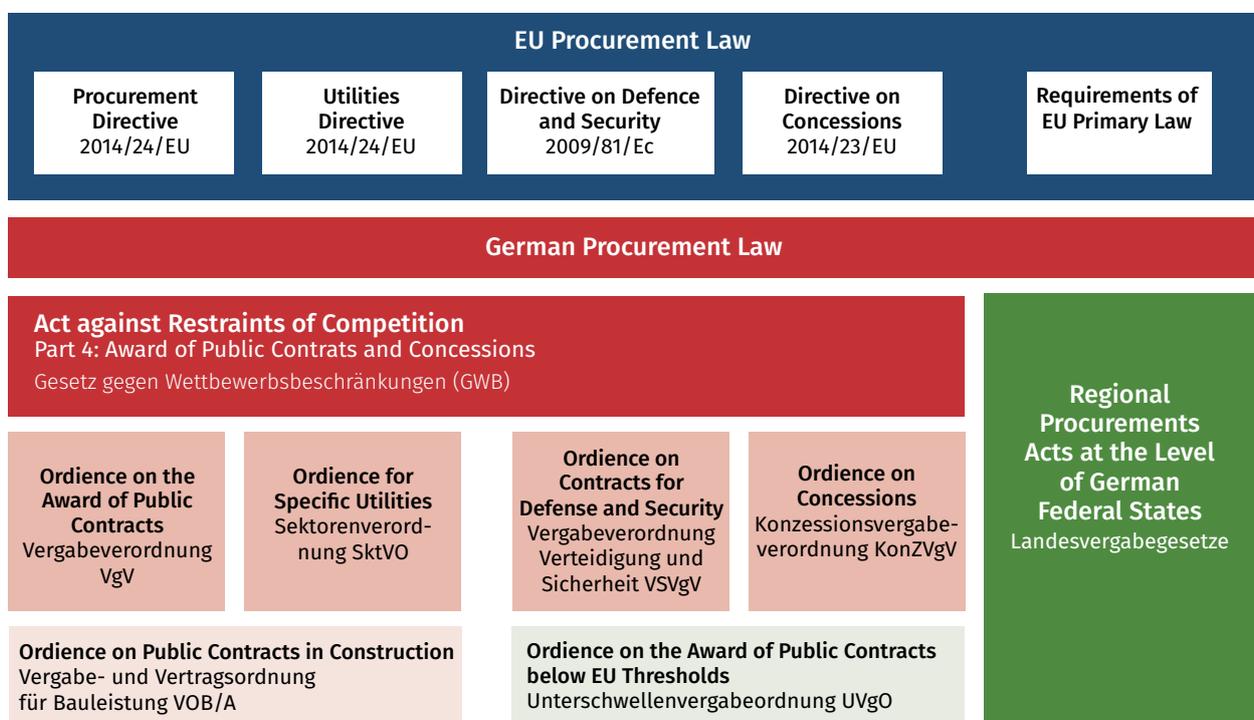
In the following this report will first provide an overview on the current state of German public procurements laws which are largely the result of the implementation of the new EU procurement directives from 2014. Afterwards it will discuss the development and current status of social clauses in German public procurement, including its provisions on subcontracting. Finally, the report will draw on the most recent debates and initiatives which aim a further improvement and strengthening of social clauses. Hereby, the focus will be on a “Post-Rüffert Procurement Regime” with comprehensive labour clauses according to which only those companies are allowed to work under public contracts which guarantee their workers wages and conditions determined by collective agreements.

3.2

GERMAN PUBLIC PROCUREMENT LAW AFTER THE IMPLEMENTATION OF THE NEW EU PROCUREMENT DIRECTIVES

German public procurement law has always consisted of a complex system of various acts and ordinances (OECD 2019: 73ff., see also Figure 1). The current status of Germany’s legal framework is the result of a comprehensive reform of public procurement law with which Germany transposed the new EU procurement directives from 2014 into national law (Kreutzer 2009; Bonhage and Terbrack 2021). In December 2015, the German Parliament (Deutsche Bundestag) adopted the so called “Act for the Modernisation of Public Procurement Law” (*Gesetz zur Modernisierung des Vergaberechts - Vergaberechtsmodernisierungsgesetz-VergRModG*) which contains a fundamental reorganisation of Germany’s major procurement law.⁷⁷

Figure 1: German public procurement law



Source: Own Composition on the basis of OECD 2019

⁷⁷ The act was published in the Official German Gazette Bundesanzeiger: *Bundesgesetzblatt* Part I No. 8 from 23rd February 2016, 203-232. The draft bill including the recitals can be found here: Bundesregierung 2015. All parliamentary documents in relation to the act can be downloaded here: <https://dip.bundestag.de/vorgang/.../68578>

Since the late 1990s the more fundamental legal principles of German public procurement are part of the “Act against Restraints of Competition” (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB), which basically regulates German antitrust and competition law. With the recent legal reform from 2016 many provisions on procurement have been redrafted and regrouped to its current legal form. Today, all fundamental principles of German public procurement can be found in Part 4 of the German Competition Act under the headline “Award of Public Contracts and Concessions” (GWB § 97-§184).⁷⁸

The GWB mainly determines the general principle of the procurement procedures such as transparency, equal treatment and non-discrimination of bidders. It also defines the contracting authorities and the nature of public contracts. Moreover, it regulates the tendering process and determine the basic criteria for the award of contracts including the possibility to consider environmental or social aspects (for more see below in chapter 3). Following the EU procurement directives, the GWB also contains a commitment for an overall introduction of E-Procurement, so that the whole tender process has to be organised in an electronical form. Also due to the EU directives, the GWB contains an obligation to establish new procurement statistics.

In addition to the more general principles regulated by the GWB, in April 2016 the German government also issued three new procurement ordinances which contain more detailed provision for the procurement process and largely correspond to the existing EU procurement directives (see Figure 1). In detail, these are:

1. the ‘Ordinance on the Award of Public Contracts’ (*Vergabeverordnung, VgV*) which mainly covers delivery and services contracts;
2. the ‘Ordinance for Specific Utilities’ (*Sektorenverordnung, SektVO*) which mainly covers procurement in the water, energy and transport sector;
3. the ‘Ordinance on Concessions’ (*Konzessionsvergabeverordnung, KonzVgV*) which covers the award of concessions.

In addition to that, two important older ordinances are still in force:

4. the ‘Ordinance on Public Contracts in Construction’ (*Vergabe- und Vertragsverordnung für Bauleistungen, VOB/A*) in the version of 31 January 2019 which covers work contracts in construction and related trades
5. the ‘Ordinance for Contracts on Defense and Security’ (*Vergabeverordnung Verteidigung und Sicherheit, VSVgV*) from 12 July 2012, which covers all awards relevant for defense and security.

Apart from some very general principles, all provisions laid down in the GWB and the corresponding ordinances are only valid for procurement procedures above the EU thresholds. The vast majority of procurement procedures below these thresholds, however, is still mainly governed by budgetary law at federal, regional or even municipal level. With the ‘Ordinance on the Award of Public Contracts below EU Thresholds’ (*Unterschwellenvergabeordnung, UVgO*) from 2 February 2017, however, the German government has also set a national common legal framework for procurement procedures below EU thresholds.

Finally, with the exemption of Bavaria, 15 out of 16 German Federal States have their own regional procurement acts (*Landesvergabegesetze*) which usually covers both procurements above and below EU thresholds. According to the GWB (§ 129) the German Federal States are explicitly mandated to determine further criteria for the award of public contracts, in particular regarding environmental and social aspects. Within the complex structure of German procurement law the regional procurement acts contain the more concrete and binding social clauses.

⁷⁸ An English version of the ‘Act against Restraints of Competition’ is available here: https://www.gesetze-im-internet.de/englisch_gwb/

3.3

SOCIAL CLAUSES IN GERMAN PUBLIC PROCUREMENT

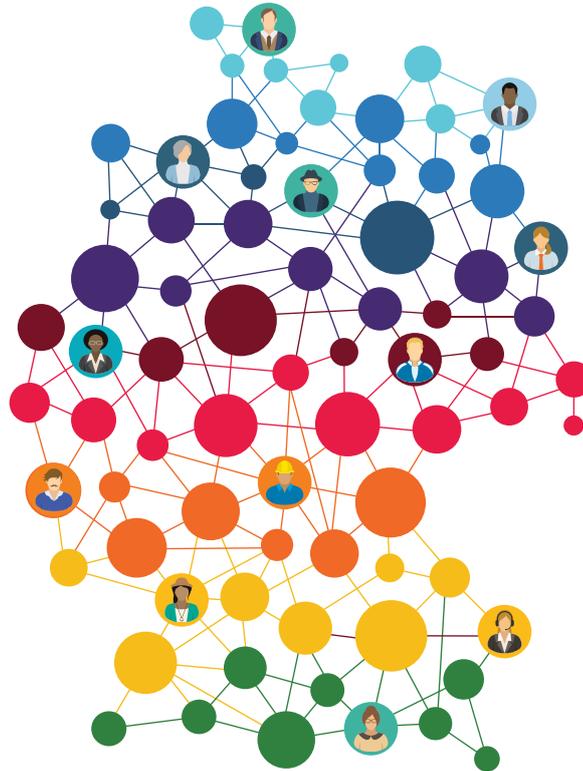
3.3.1 Historical development of social clauses in German public procurement

The use of social clauses in German public procurement has already a very long historical tradition (Schulten 2012a). Regional and local procurement ordinances with references to prevailing wages and working conditions or even to local collective agreements can be found already in late 19th and early 20th century (Abelsdorff 1907). Historians have taken the view that these early procurement ordinances have even played an important role to support the development of a more comprehensive collective bargaining system in Germany (Rudischhauser 2000). When the International Labour Organisation (ILO) has adopted the Convention 94 on Labour Clauses in Public Contracts in 1949, however, the German governments saw no necessity to ratify it, because Germany had already a strong collective bargaining system with a high bargaining coverage that time (Ruchti 2010).

The debate on social clauses in public procurement came back on the agenda in the late 1990s against the background of a declining collective bargaining coverage and an increasing use of migrant workers to undermine collectively agreed working conditions (for the following: Schulten and Pawicki 2008, Schulten 2012a). In the early 2000s some German Federal States started to introduce regional procurements laws with social clauses according to which only those companies were allowed to get a public contract which provide their workers the same wages and working conditions as laid down in local collective agreements. Originally, the so called '*Tarif-treuegesetze*' – which literally means 'acts on loyalty to collectively agreed standards' - were restricted to the construction industry but later on were extended also to other sectors such as public transport, waste disposal etc until they finally determined a general rule for all public contracts. In 2002, the German Federal Government even presented a draft bill for a national law on pay clauses in procurement, which, however, failed to get a majority in second chamber of the German Parliament (Bundesrat), which represents the governments of the Federal States. Instead, more and more German Federal States passed their own regional procurement laws during the 2000s. The development was even enforced after the German Constitutional Court had decided that such social clauses are a legitimate instrument to promote collective bargaining and are in full conformity with the German constitution (Bundesverfassungsgericht 2006).

In 2008, however, this entire development came to a sudden stop after the European Court of Justice (ECJ) took its decision in the so-called Ruffert case (C-346/06). The ECJ stated that the regional procurement law of the German federal state of Lower Saxony, which required contracting companies to comply with local collective agreements, was not in conformity with EU law as it breaches the EU principle of freedom to provide services (for a critical discussion see: Bruun et al. 2010, McCrudden 2011). The problem for the ECJ was that the pay clause referred to collective agreements that were usually not universally applicable. According to a rather contested interpretation of the European Posted Workers Act by the ECJ, restrictions on the freedom to provide services are allowed only if these are based either on statutory minimum wages or on collective agreements which have been declared generally binding.

After the "Ruffert-Shock" (Schulten 2012b) all Federal States had to suspend their social clauses with references to collective agreements. However, it did not take very long until social clauses experienced a broad renaissance in Germany. Although references to non-universally applicable collective agreements were almost no longer possible, a whole range of new social clauses were introduced, which, for example, set specific minimum wages for workers under public contracts, promote certain groups of workers such as long-term unemployed or disabled workers, supported measurement for equal pay and equal opportunities or make sure that public authorities purchase only products which were produced in compliance with ILO core labour standards (Jaehrling et al 2018, Sack and Sarter 2018). The renaissance of social clauses was also strengthened by the implementation of the new European procurement directives from 2014, with which the strategic use of public contracts for social goals became a broadly accepted issue of a modern procurement policy.



3.3.2 The current national legal framework for social clauses

According to §97 of the GWB which regulates the “General Principles for Making Awards” it is stated that “in making the award, aspects of quality and innovation as well as social and environmental aspects shall be considered” (GWB, §97.3). In order to implement this, contracting authorities shall accept the “most economically advantageous tender” which is determined “according to the best price-quality ratio” (GWB, §127.1). For the quality aspect tenders can include environmental or social criteria which, however, “must be related to the subject matter of the contract” (GWB, §127.3).

When it comes to the contract performance it is first stated that all companies under public contracts have to comply with all legal obligations including all legal social and labour law provisions such as the statutory minimum wage or statutory maximum working hours. Moreover, they also must comply with collective agreements but only when they are universally applicable (GWB, §128.1).⁷⁹ In addition to that, the contracting authorities have the possibility to determine additional contract performance conditions which “may in particular include economic, innovation-related, environmental, social or employment-related considerations or the protection of information confidentiality” (GWB, §128.2).

In the explanatory memorandum to the reform of the German procurement law from 2016 it is stated “that the specification of performance conditions by public contracting authorities is only permissible if these are already set out in writing in the contract notice or the award documents. Only in this way can an interested party decide on a secure basis whether it can comply with these conditions if it is awarded the contract” (Bundesregierung 2015: 114). In this context it is important to notice that social criteria must be related to the performance of the contract. This means that the contracting authority has no competence to impose requirements on the company with regard to, for example, its general employment policy and working conditions. Instead, it could only set such criteria for the performance of the contract (ibid.).

Finally, the use of additional social or other criteria for the contract performance beyond the legal requirements is a possibility but not an obligation. Whether or not social award criteria are used depends solely on the decision of the individual contracting authority. However, more mandatory contract performance conditions can be determined on the basis of special acts or ordinances at national level or at the level of the Federal States (GWB §129). Since the German Federal States already had a tradition of determining social criteria through regional procurement acts, it is currently up to them to define more binding social clauses.

⁷⁹ In Germany, there is only a small minority of collective agreements which have been declared as generally binding either on the basis of the German Collective Bargaining Act (*Tarifvertragsgesetz*) or the German Posted Workers Act (*Arbeitnehmer-Entsendegesetz*) (Schulten 2018).

3.3.3 Social clauses in the regional procurement acts of German Federal States

As mentioned above, German Federal States have started to adopt their own regional procurement acts since the late 1990s. Currently, all federal States have such acts except for Bavaria which in the 2000s also had a corresponding act, but have abolished it again. A special feature of these regional procurement acts is that they are the only ones that apply to awards above as well as below the EU thresholds.⁸⁰ One of their major functions are to determine additional social (and also environmental) criteria for the performance of public contracts using the leeway explicitly granted to them by national procurement law. The regional procurement acts show considerable differences between the Federal States in terms of scope, reach and concrete regulations on social award criteria (for an overview see *Table 1*). They depend very closely on the political composition of the regional governments as well as on the political engagement of regional trade unions and other social organisation. Hereby, one can observe a clear trend that more left-wing governments have often created more comprehensive and binding social rules (Sack and Sarter 2018).

Analysing social clauses in regional procurement acts, a total of five different types can be distinguished (Schulten 2012a, see also Table 1). The first type is the classical labour clause as defined in the ILO Convention 94 whereby companies are obliged for the performance of public contracts to provide the same wages (and sometimes also other working conditions) as determined by collective agreements. Originally, these labour clauses had referred to the most representative collective agreements used at local level, i.e. the agreements which were signed by the most representative unions and employers' associations and had the coverage at regional level. However, after the ECJ Ruffert judgement these clauses referred only to collective agreements which are universally applicable. As companies are bounded by these collective agreements anyway, the labour clauses have mainly a declaratory character. Therefore, the only added value here is that contracting authorities have the competence to monitor compliance with collective agreements and also to take action in the event of non-compliance, for example through exclusion from public procurement procedures.

The second type is a special labour clause for the public transport sector, which still has the classic form of a provision referring to prevailing but not necessary universally applicable collective agreements. Following the Ruffert case, it became a majority position in Germany that this judgement is not applicable to the transport sector because it has a special legal status in EU law (TFEU, Article 90 -100) (see for example Denzin et.al. 2008). Moreover, there is a special EU regulation on public transport (EC No 1370/2007) which explicitly allows Member States to make reference to collective agreements in the tenders "to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping." On this basis, almost all regional procurement acts contain a classical labour clause for the transport sector.

⁸⁰ Most regional procurement acts have defined their own thresholds above which the laws apply. In most cases these thresholds vary between 10.000 and 50.000 Euro per public award.

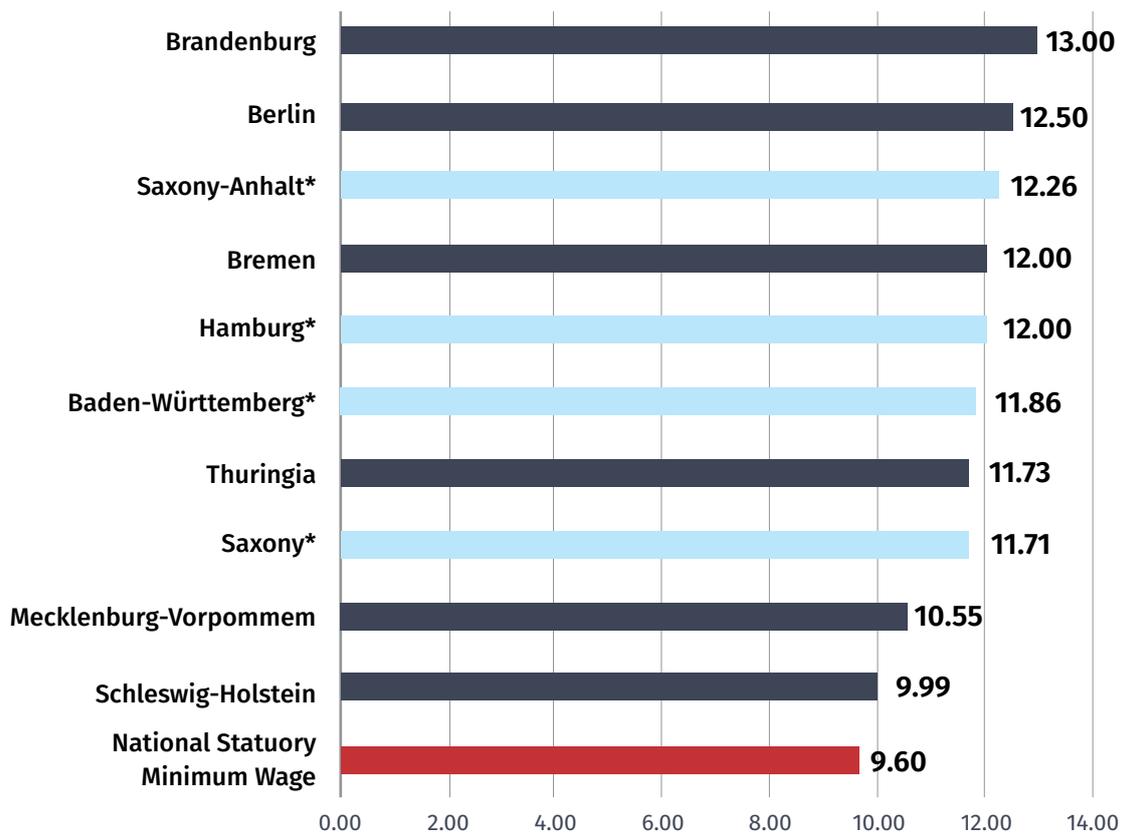
Table 1: Social clauses in regional public procurement acts of German Federal States

FEDERAL STATE	UNIVERSALLY APPLICABLE COLLECTIVE AGREEMENT	PREVAILING COLLECTIVE AGREEMENT IN PUBLIC TRANSPORT	SPECIFIC MINIMUM WAGE FOR WORKERS PERFORMING PUBLIC CONTRACTS	COMPLIANCE WITH ILO CORE LABOR STANDARDS	OTHER SOCIAL ISSUES
Bavaria	No regional procurement act				
Baden-Württemberg	Yes	Yes	Planned	No	No
Berlin	Yes	Yes	Yes	Yes	Equal opportunities
Brandenburg	Yes	Yes	Yes	No	unspecific
Bremen	Yes	Yes	Yes	Yes	Equal opportunities
Hamburg	Yes	No	Planned	Yes	Unspecific
Hesse	Yes	Yes	No	No	Unspecific
Lower-Saxony	Yes	Yes	No	Yes	Equal opportunities
North Rhine-Westphalia	Yes	Yes	No	No	No
Mecklenburg- Vorpommern	Yes	Yes	Yes	Yes	Vocational training Long-term unemployed
Rhineland-Palatinate	Yes	Yes	No	Yes	Vocational training Long-term unemployed
Saarland	Yes	Yes	No	Yes	Unspecific
Saxony	Yes	Planned	Planned	Planned	Planned
Saxony-Anhalt	Yes	Yes	Planned	Yes	Vocational training
Schleswig-Holstein	Yes	Yes	Yes	No	Unspecific
Thuringia	Yes	Yes	Yes	Yes	Equal opportunities

Source: WSI Collective Agreement Archive 2021, Status: July 2021

The third type of social clauses are provisions on specific minimum wages for workers performing public contracts which became widespread in the 2010s. On the one hand, the use of minimum wage requirements was also a reaction to the Rüffert judgement and its limitations for the use of classical labour clauses. On the other hand, the introduction of special minimum wages in procurement acts was strongly influenced by the debate on the introduction of a statutory minimum wage in Germany which came into force in 2015 (Bosch et al 2021). Some Federal States had even minimum wage provisions in their procurement acts before the introduction of the national statutory minimum wage and therewith had influenced the national debate on their side.

Figure 2: Specific Minimum Wages for workers under public contracts according to regional procurement acts of German Federal States (in Euro per hour)



**planned according to the current Federal State government contract* Source: WSI Collective Agreement Archive, Status: October 2021

After Germany had finally introduced the statutory minimum wage at national level, some Federal States have abolished their procurement-related minimum wage provisions while other have continue to use it or have even introduce new requirements as the regional governments have regarded the level of the national minimum wage as too low.⁸¹ Currently there are six Federal States (Brandenburg, Berlin, Bremen, Mecklenburg-Vorpommern, Schleswig-Holstein and Thuringia) with minimum wage requirements for workers under public contracts above the national statutory minimum wage (see *Figure 2*). Four further States (Baden-Württemberg, Hamburg, Saxony and Saxony-Anhalt) have announced in their current government contracts to introduce new minimum wage requirements into their regional procurement laws during the current legislative period.

In order to justify such specific procurement-related minimum wages above the level of the national minimum wage, some States have chosen the lowest wage grade of the public sector collective agreement as a benchmark. The logic here is that to ensure a fair competition between services provided by public entities or by private companies and to avoid the contracting out of public services just for the reason to save labour costs.

The use of minimum wage requirements in public procurement became also legally contested and was finally taken to the ECJ. In its “RegioPost” judgement (C-115/14), however, the ECJ made a (at least partial) revision of its Rüffert judgement and decided that minimum wages requirements in public procurement law are not in contradiction to EU law (Nassibi et al. 2016).

A fourth type of social clauses refers mainly to the purchasing of goods. In principle, public authorities should only buy goods which were produced in compliance with the ILO Core Labour Standards. While a majority of Federal States has introduced such clauses into their regional procurement laws, there are significant differences regarding their degree of legal bindingness whether such provisions “can”, “shall” or “must” be used by the contracting authorities.

Moreover, there are also still many practical problems to implement such clauses. Some products as, for example, clothing have established labels and certificates which can assure the compliance with ILO standards. For other products, however, this might be much more difficult or is still almost impossible as, for example, for IT products. Overall, the use of these clauses depends very much on the engagement of the local contracting authorities (Müngersdorff and Stoffel 2020).

Finally, a fifth type of social clause refers to a broad range “other social issues”. These could include the promotion of vocational training, the hiring of long-term unemployed or workers with disabilities, measures to promote equal opportunities for women and men at work and to reconcile family and work or the equal pay for agency workers. While some regional procurement acts just mentioned these “other social issues” in a rather unspecific, others explicitly make reference to specific issues (Table 1). Since the application of such additional social criteria is largely voluntary, they are usually only considered by the contracting authorities only in the case of otherwise equivalent tenders. There are only a very few examples of more binding provisions, such as, for example, the requirements for measures to promote female workers in the regional procurement act of Berlin.⁸²

In addition to the more explicit social clauses, there are also some other procurement regulations which de facto also affects the conditions of workers under public contracts. One of the most important issues here are the provisions regarding “abnormally low tenders”. According to the German Ordinance on the Award of Public Contracts (§ 60), “where the price or costs of a tender appears to be abnormally low in relation to the performance to be provided, the contracting entity shall seek clarification from the tenderer”, including its compliance with existing social and labour regulation. Some regional procurements acts have even a more specified regulation on “abnormally low tenders”. The procurement act of the Federal State of Bremen, for example, asks all contracting entities to make a special review on all tenders which are more than 20 per cent below its cost estimation or 10 per cent below the next tenderer.⁸³

⁸¹ See for the example of Brandenburg with the currently highest procurement-related minimum wage provision: Schulten 2021.

⁸² In § 13 of the regional procurement act of the Federal State of Berlin (*Berliner Ausschreibungs- und Vergabegesetz, BerlAVG*) it is stated that in all award procedures bidders must submit a declaration on measures taken for the promotion of female workers (<https://www.berlin.de/vergabesevice/vergabeleitfaden/berliner-ausschreibungs-und-vergabegesetz/>).

⁸³ § 14 of the regional procurement act of the Federal State of Bremen (*Bremisches Gesetz zur Sicherung von Tarifreue, Sozialstandards und Wettbewerb bei öffentlicher Auftragsvergabe (TT-VgG)*) (http://www.lexsoft.de/cgi-bin/lexsoft/justizportal_nrw.cgi?xid=39106261):

3.3.4 Social clauses and subcontracting

A long-established and widespread way for companies to circumvent social requirements is the use of subcontractors. A current prominent example for this has been the German meat industry which in the past had largely contracted out major parts of meat production to subcontractors. The latter had hired mostly foreign workers under significantly worse and often illegal conditions. After many rather unsuccessful initiatives to improve working conditions of contract workers, the German government finally adopted the Occupational Safety and Health Inspection Act (*Arbeitsschutzkontrollgesetz*) which introduced a ban on the use of subcontractors in the core areas of meat production from the beginning of 2021 (Erol and Schulten 2021).

While such a legal ban of subcontracting is still a major exception, there are provisions in several laws which regulate the relation between the main company and its subcontractors regarding the compliance with labour and social law. An important principle here is the so-called “general contractor liability” (*Generalunternehmerhaftung*) which was introduced for the construction sector in 2002. As laid down in §28e of the Social Code Book IV (*Viertes Buch Sozialgesetzbuch, SGB IV*) the main contractor is obliged to guarantee the payment of its subcontractor’s social security contributions up to a certain contract sum. A similar regulation can be found in §14 of the German Posted Workers Act (*Arbeitnehmer-Entsendegesetz, AEntG*) as well as in § 13 of the Minimum Wage Act (*Mindestlohngesetz, MiLoG*). According to both acts a contractor who engages another contractor to provide work or services shall be liable for the obligations of that contractor to pay the minimum remuneration. The liability is valid for the full chain as long as the work is performed in Germany.

In German public procurement law, too, there are numerous provisions on subcontracting (for an overview: Deutscher Bundestag 2018). In general, the contracting authorities have the right to know from the contractors which subcontractors they want to use for which activities. To what extent the contracting authorities can make instructions about the use of subcontractors depends first of all on whether the public award is above or below the EU thresholds.

According to the §26.6 of the Ordinance on the Award of Public Contracts below EU Thresholds (UVgO) the contracting authorities have the right to require “that all or certain tasks in the provision of performances be carried out directly by the contractor itself.” In the case of public awards above EU thresholds this right is rather limited to “certain critical tasks for service contracts or critical siting or installation work” (VgV, § 47.5). In addition to that, the possibilities of limiting the use of subcontracting through the public contracting authorities has been rather restricted by the European Court of Justice which has for example declared that a flat-rate limitation of the activities of subcontractors is not in line with EU law (ECJ, C-63/18 Vitali SpA).

More concrete provisions on the use of subcontracting in public procurement can again be found in the regional procurement acts of the German Federal States. Here one can find further provisions about the right of public contracting authorities to get transparency over the use of subcontracting. For example, some Federal States require that companies should already specify the names of the subcontractors in their application for the public tender. They also allow public authorities to refuse single subcontractors. If subcontractors should be changed during the performance of the public contract, this would need the confirmation of the contracting authority.

Regarding social requirements most regional procurement acts make it clear that these also apply to subcontractors as long as they perform their contract in Germany. For subcontractors performing outside of Germany, the ECJ has decided in its “Bundesdruckerei judgement” (C-549/13), that the contracting authorities have no competences to require certain working conditions, such as, for example, the payment of certain minimum wages.

Moreover, most regional procurement acts also support the principle of general contractor liability. Hereby, it is usually the responsibility of the main contractor that also the subcontractors fulfil the social requirements of the public contract. If the subcontractor does not comply with the social obligations laid down in the public contract it is the main contractor who bears the responsibility and may also have to pay a fine.

3.4

OUTLOOK: GERMAN PUBLIC PROCUREMENT – TOWARDS A POST-RÜFFERT REGIME?

During the last decades the use of social clauses has become more and more widespread in German public procurement law. This development has been further strengthened by the adoption of 2014 EU procurement directives which supported the idea of a more strategic use of public procurement to promote a more socially and environmentally sustainable development. However, with its Rüffert judgement the ECJ had set major restrictions when it comes to classical labour clauses and the references to prevailing collective agreements.

There has always been a strong criticism on the Rüffert judgement, in particular, by the German trade unions, which accused the ECJ to privilege economic freedoms over workers protection (DGB 2008). Right from the beginning, there have been many attempts by the unions and others to minimise the impact of the judgement by using the remaining legal leeway. The introduction of many different types of social clauses in German public procurement law can therefore also be interpreted as an attempt to mitigate the effects of the Rüffert judgement (Refslund et al 2020).

Apart from that, however, German trade unions have also always continued to struggle for a more fundamental revision of the restrictions set by the Rüffert judgement. For example, the unions have repeatedly called the German government to ratify the ILO Convention 94 (DGB 2015, 2017) which was completely ignored by the ECJ (Bruun et al. 2010). Although Germany had still not ratified the ILO Convention 94 so far, there have been some more fundamental legal changes in the EU during the last decade which seem to make the use of classical labour clauses possible again.⁸⁴

The changing legal European landscape started with the adoption of the new procurement directives from 2014. They do also not explicitly refer to ILO Convention 94, as demanded by the trade unions, but they contain a clear commitment to the use of social clauses. In the meantime, the European Commission has further approved this view. In its proposal for a directive on “adequate minimum wages in the European Union” the Commission included an article according to which “in accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU, Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area” (European Commission 2020, §9).

Of great importance for the use of the labour clauses public procurement is also the adoption of a revised the European Posted of Workers Directive in 2018 (Seikel 2020). In its Rüffert judgement, the ECJ has argued that the old Posted Workers Directive from 1996 only allow a binding reference to collective agreements, if they were universally applicable. The revised Posted Workers Directive from 2018, however, allows explicitly not only the use of collective agreement which have been declared universally applicable but also of collective agreements “which must be observed by all undertakings in the geographical area and in the profession or industry concerned” (Directive (EU) 2018/957, §3.8). As a result, the restriction made by the Rüffert judgement to limit the use of labour clause in public procurement to collective agreements, which are generally binding, is no longer valid.

Finally, the change of the European legal landscape has also been supported by the ECJ itself, which has significantly modified its argumentation of the Rüffert case. The latter was particularly prominent in its RegioPost judgement (C-115/14) where the ECJ explicitly approved the possibility to determine specific social requirements only for companies under public contracts (Nassibi et al 2016).

Against this background some German Federal States have again started to revise their regional procurement acts and to introduce new labour clauses with references to “general effective” (*allegemein wirksamen*) collective agreements at regional level, which are not necessarily universally applicable. The first was the Federal State of Thuringia which revised its procurement act in 2019 (Langhammer 2020). The revised act contains a new paragraph according to which “state contracting authorities shall only award contracts to enterprises if

⁸⁴ For a more detailed analysis of the legal changes see Krause (2019), Rödl (2020), Klocke (2021).

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Public procurement and subcontracting in Italy: a 'work in progress' between social protection and the compatibility with the European competition principles

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4.1

INTRODUCTION

Like for many other Member States, public procurement in Italy plays a crucial role, as it represents about 11% of the Italian GDP and 20% of the whole public spending (AGCM 2021); these shares are undoubtedly destined to increase as a result of public investments dealing with the economic consequences of the Covid-19 pandemic, both through national funding and through the funds of the European Next Generation EU program.

Nonetheless, current situation notwithstanding, public procurement regulation, including subcontracting, has long received attention by the Italian legislation, albeit with a peculiar perspective: as a matter of fact, limits to subcontracting were introduced for the first time by Art. 18 of Law no. 55/1990, whose goal was to prevent infiltration by organized crime. As the rationale seemed to remain unquestioned – the intrinsic characteristics of subcontracting could turn it into a dangerous means of illegal creeping into public contracts and organizations – the rule was subsequently merged into later Acts and even in the 2006 and 2016 Code of Public Contracts, which implemented, respectively the 2004 and 2014 EU Directives.

More generally, the public interest to lawfulness, but also transparency, efficiency and fairness (as enshrined in the Italian Constitution, Art. 97), has always coexisted with a 'social' perspective on the value of public procurement: a clear example is offered by Art. 36 of 1970 Workers' Statute which, finding its legitimacy in the ILO Convention no. 94/1949, established that legal benefits for entrepreneurs and public tender specifications should impose «the obligation for the beneficiary or contractor to apply their employees conditions not inferior to those resulting from collective agreements applied in the relevant sector and area». The still existing provision – interpreted through time as applicable not only to public contracts, but also to public concessions⁸⁸ – has significantly been described as a mechanism of mediated compliance and reception of collective agreements» (Ghera 2001: 134).

As the European regulation has moved towards a stronger use of public procurement for social purposes – even more evidently when comparing the 2004 and the 2014 Directives – so has the Italian legislation, appointed to implement the EU packages (Tardivo 2021: 287-288); the Code of public contracts of Legislative Decree 12 April 2006, no. 163 has given way to Legislative Decree 18 April 2016, no. 50 and its numerous subsequent revisions and amendments. One could call it a 'work in progress', as proven by the many interpretative issues concerning the regulation and the (often difficult) dialogue between the coded rules and the administrative judges, as well as the cumbersome relationship between the Italian law-maker and the European institutions.



⁸⁸ See Corte costituzionale, 19 June 1998, no. 266.

4.2

THE IMPLEMENTATION OF THE 2014 EU DIRECTIVES ON PUBLIC PROCUREMENT IN ITALY

The Italian implementation of the three EU Directives on public procurement (Directive 2014/24/EU on public procurement in the so-called “ordinary sectors”; Directive 2014/25/EU on public procurement in the so-called “special sectors”, such as water, energy, transport, postal services; Directive 2014/23/EU on concession contracts) appeared to be quite rapid, thanks to a two-step procedure: firstly, the approval of a Parliamentary Act of law (28 January 2016, no. 11) enabled the Government to enforce the regulation and provide an overall reassessment of the legislation on the topic, and later the **Legislative Decree no. 50 of 18 April 2016** singlehandedly provided a “**Code of Public Contracts**”. As fast as the Government completion seemed, it was the Enabling Act no. 11/2016 which took a few months to be passed, as it was substantially modified from its Draft during the parliamentary examination, in relation to the methods and terms, as well as the specific principles and guidelines for the Government intervention. Trade Unions’ involvement was almost negligible, being limited to an informal hearing of three major Federations (Feneal-Uil, Filca-Cisl and Fillea-Cgil, in June 2014) on the future revision of the legislation on public procurement and concessions in view of the EU directives⁸⁹.

The so-called Code of Public contracts therefore applies to public works, supply and service procurements and concessions awarded by contracting authorities and other awarding entities, as defined by the Code, and it abrogated the former legislation contained in the Legislative Decree no. 163/2006.

A number of subsequent Acts have amended the Code, such as the Legislative Decree no. 56/2017 (so-called “Corrective Decree”), Law No. 96/2017 and Law No. 55/2019 (so-called “Sblocca Cantieri”), as well as the emergency legislation adopted in 2020/2021⁹⁰ with a view to impact the awarding procedures for public contracts both above and below the EU thresholds, simplifying and speeding up the tender procedures, in most cases through the introduction of a provisional regime valid until 31 December 2021 (later postponed to 2023); however, numerous amendments have also been brought into the Code permanently (Cusano 2020).

The Code is also complemented by a vast amount of secondary regulation, such as Ministerial Decrees, Acts issued by the Anti-Corruption Authority (ANAC), whose guidelines have also focused on social clauses (Guideline no. 13, 13 February 2019).

Lastly, it is worth mentioning that in June 2021 the Italian Government approved a bill for a further revision of the public procurement Code, to be adopted within six months through one or more legislative decrees: the bill (DDL S. 2330) has been presented to the Senate at the end of July 2021 for its parliamentary course. The principles informing the forthcoming reform are once again simplification, legality, digitization, and sustainability. Remarkably, even if the bill, strictly linked to the National Recovery and Resilience Plan (PNRR), pushes towards mainly a simplification of procedures and development of the electronic procurement⁹¹, the inclusion of social and environmental clauses in the tenders as necessary or rewarding requirements of the offer to promote employment stability, the application of collective agreements, equal generational and gender opportunities⁹² are also suggested.

⁸⁹ The Trade Unions’ preoccupations aimed, among other topics, to limit and rightfully use subcontracting, avoiding social dumping and collective bargaining elusion and calling for a 30% limit on subcontracting, the forbidding of further levels of subcontracting and the direct intervention of the contracting authority in the subcontracting management.

⁹⁰ They are Law Decree No. 18/2020, converted with amendments into Law No. 27/2020 (the “Cura-Italia Decree”); Law Decree No. 34/2020, converted into Law No. 77/2020 (the “Rilancio Decree”); Law Decree No. 76/2020, converted with amendments into Law No. 120/2020 (the “Semplificazioni Decree”); more recently, Law Decree 31 May 2021, n. 77 (governing the “Piano nazionale di rilancio e resilienza”), converted with amendments into Law no. 108/2021.

⁹¹ Simplification and digitization are indeed closely linked in the Italian PNRR, as the Plan focuses on combining the pre-existing measures with the digitization and strengthening of the organizational capacities of public administrations, called to launch innovative tenders (the so-called Recovery Procurement Platform). The Plan aims therefore to specifically train procurement operators, to implement the use of ad hoc tender and contract schemes, prepared with the support of Consip (the Ministry of Finance’s body in charge of Central Procurement), to realize an end-to-end digitization of the procurement process (complete digitalization of purchasing procedures, the interoperability of the eProc System with the management systems of public administrations, economic operators and other subjects involved in the procurement processes) (Racca 2020).

⁹² According to Article 47 Law Decree n. 77/2021, all the tenderers shall attached to their offer a Gender Report, presenting the situation of their female or male employees. Moreover, the tenderers shall undertake, in the event of the contract being awarded, to reserve at least 30% of the recruitment required for the performance of the latter for youth and female employment. Additional points may be awarded in case of respect of the anti-discrimination legislation.

4.3

SOCIAL CLAUSES IN THE ITALIAN PUBLIC PROCUREMENT LEGISLATION

As the three EU Directives have been implemented in a single body of rules, we will focus on the general provisions of the Code (art. 1- 113*bis*). All the precepts of Directive 2014/24/EU have been considered and found a place in the Italian implementation.

4.3.1. Principles of procurement

Art. 30 of the Italian Code of public contracts calls for the respect of the principles of free competition, non-discrimination, transparency, and proportionality. In line with the provision of Art. 18.2 of the Directive, cost-effectiveness can be subjected to the consideration of social needs, as well as the protection of health, the environment and cultural heritage and the promotion of sustainable development: in particular, Art. 30(3) states that «*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*», resulting in the exclusion from the tender or the procurement in case of breach: the provision affects other norms of the Code, such as Articles 80(5), letter a); 94(2); 97(5), letter a).

Even more relevant is the fact that among the principles of procurement, Art. 30(4) of the Italian Code explicitly remarks that national and local collective agreements in force for the relevant sector and area, as signed by the comparatively most representative trade unions and employers' associations at national level, are applied to those who are employed in public tenders and concessions of works, services, and supplies. The positioning of the provision makes it possible to read paragraph 4 as a specification of the compliance with the labour law regulations, even if Italian collective agreements lack general effectiveness (Izzi 2017: 459).

Such economic protection - a "**fair treatment**" according to Italian law scholars, which dates back to the aforementioned 1970 Workers' Statute and its Art. 36 requirement for all Public Administrations - appears to move even beyond that the Directive standards (Borgogelli 2016). On the one hand, with reference to the awarding procedure, it sets a "**subjective**" **selective criterion on the representativeness of the signatories of the relevant collective agreements**⁹³; on the other hand, the "objective" selection forecloses the possibility of applying a contract relating to a sector unrelated to the activity covered by the contract and chosen only based on greater economic convenience. It bears remarking that outside Art. 30(4) scope, given the pluralistic model of the Italian IR system, the employer is recognized the choice to apply any collective agreement, even potentially a non "pertinent" one, i.e. of a different economic activity from the one carried out (relevant collective agreements, nonetheless, will serve as a benchmark for the compliance with the right to a fair pay)⁹⁴.

The choice in favor of **collective agreements stipulated by the comparatively more representative trade union organizations**, as enshrined by the Italian Code, appears coherent with the scope of Art. 18 of the Directive. The Italian rule's purpose, specifically to counter forms of downward (wage) competition, embodies the idea that public procurement can be employed as an instrument of social policy, especially in the presence of a large number of collective agreements, often signed by trade unions or employers' association of various, and sometimes dubious, representativeness (Centamore 2020; Alvino 2020)⁹⁵.

However, as it is well known, since Italian collective agreements lack an *erga omnes* effectiveness (as a consequence of a failure to implement the second part of Art. 39 of Italian Constitution), an interpretation of the provision as imposing full compliance with a *specific* agreement may walk a very thin line in relation to the European Court of Justice stand on collective agreements with no general effect, i.e. not comparable to mandatory law provisions in the relevant national system, even after the *RegioPost* case⁹⁶ (Pallini 2016). Accordingly, it has to be noted how the 2014 Directive repeatedly emphasizes that it must be interpreted in the light of the principles governing the internal market (Art. 56 ff. TFEU); also, in the list of «international labor provisions»

⁹³ In the 2006 Code, such criterion was referenced to the phase of performance of the contract (Art. 118, § 6, Legislative Decree no. 163/2006).

⁹⁴ See Cassazione SS. UU, 26 March 1997, n. 2665 which, however, imposed the limit that the chosen collective agreement should not affect the employees' fundamental rights.

⁹⁵ The official database, established by the National Council for Economics and Labour (CNEL), calculates over 800 sectoral national agreements: the archive is available at www.cnel.it/Archivio-Contratti.

⁹⁶ Court of Justice, judgment of 17 November 2015, case C-115/04, *RegioPost*.

contained in the Annex X, as referred in Art. 18.2, there is no mention of the ILO Convention no. 94/49, which refers to non *erga omnes* collective agreements and still binds some States, including Italy (Frosecchi and Orlandini 2020: 13-15). A clearer recognition by the European lawmaker on the topic would have also surpassed the possible friction between a rule on the compliance with specific collective agreements and the general freedom of association (and its pluralistic effect) enshrined in Art. 39 of the Italian Constitution.

Nonetheless, apart from some doubts on the constitutional compatibility of Art. 30(4) with the freedom of association/organization, which scholars have generally scaled down (Proia 2020), its effectiveness is hindered by the Code's lack of explicit references in those rules setting the consequences of the violation of collective source obligations: e.g., Art. 97, indicating the grounds of exclusion in the case of abnormally low offers refers (among other things) to the failure to comply with the obligation under paragraph 3 of Art. 30, but does not mention paragraph 4.

4.3.2. General principles on the choice of participants and award of contracts

Art. 94 of the Italian Code reproduces the content of Art. 56 of Directive 2014/24/EU as it states that contracts shall be awarded on the basis of criteria laid down in accordance with the Code, provided that the contracting authority has verified that a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents and b) the tender comes from a tenderer which is not excluded and that meets the selection criteria.

The social clause expressed in Art. 56 is reproduced in the second paragraph of Art. 94, as «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 30(3)»: as already mentioned, the explicit reference of §3 of the article, as interpreted in relation to the collective agreements' "minimum" standard, rather than §4, which refers instead the protection provided by the most representative collective agreements, makes the provision less incisive (as we will further prove when analyzing the issue of abnormally low tenders).



4.3.3. Exclusion grounds

Art. 80 of the Italian Code establishes three sets of requirements to be met by the tenderers in order to participate in a public procurement procedure, i.e. general morality requirements, economic and financial capacity, technical and professional skills⁹⁷.

In particular, Art. 80(4) sets the exclusion of an economic operator in the event of serious violations, which have been definitively ascertained, with respect to the obligations relating to the payment of taxes or social security contributions, according to the Italian legislation or that of the State in which they are established. The notion of «**serious violations**» of **social contributions schemes** is explained in the provision, by referring mainly to those hindering the issue of the so-called *DURC* (the certification of contribution regularity)⁹⁸. The same paragraph also gives the contracting authority the chance to exclude an economic operator when the authority is aware of and can adequately demonstrate a non-compliance with the obligations relating to the payment of taxes or social security contributions, constituting a serious breach, as here explained. The exclusion, however, does not apply when the economic operator has fulfilled its obligations by paying or by making a binding commitment to pay the taxes or contributions due (including interests and fines) or when the debt is fully extinguished, provided the extinction, payment or commitment have been completed before the expiry of the term for the submission of applications.

The provision, as here outlined, has been amended twice in an attempt to implement the EU principles of Art. 57 of the Directive 2014/24/EU and to respond to the infringement procedure no. 2018/2273 initiated by the European Commission against Italy with a letter dated 24 January 2019. The latter, in particular, arose from the observation that Italy had not fully implemented the aforementioned Directives which provides, alongside the hypothesis of compulsory exclusion for tax irregularities definitively ascertained (hypothesis, this, correctly and promptly acknowledged by the Italian Government), also a “chance” of exclusion in all cases in which the contracting authority was in any case aware of the tax irregularity situation of the economic operator. A first rewriting, imposed by the “Sblocca-Cantieri” Decree in 2019, was not passed into law; Art. 8 of the so-called Decreto Semplificazioni (Law Decree no. 76/2020, passed with Law no. 122/2020) was instead more successful.

However, scholars have noted a possible tension of the reference to «non-definitive violations» with the EU legislation which simply mentions a provable violation, but also with the Art. 24 of the Italian Constitution (guaranteeing the right of defense) (Bavetta and Melandro 2020). Another possible weakness of the provision is the threshold of gravity, which is the same as in the case of ascertained violation (exceeding 5,000 euros), raising the question whether a “fixed” threshold may in fact be considered disproportionate.

Further grounds for exclusions (art. 57.4 of the Directive) are implemented in the Art. 80(5). Specifically, letter a) offers the possibility for the contracting authorities to exclude a tenderer for serious infringements, duly ascertained, to health and safety in the workplace as well as the art. 30(3) breach, which – as already mentioned – should be read in combination with the compliance with the most representative collective agreements. The exclusion operates also when referred to one of the economic operator’s subcontractors as identified in the tender, according to Art. 105(6).

The ANAC has given indications on which evidence is appropriate to demonstrate such exclusions by means of its guidelines currently in force⁹⁹.

4.3.4. Reliance on the capacities of other entities.

Art. 89 of the Italian Code refers to the Reliance on the capacities of other entities (so-called “*Avvalimento*”) and states that the economic operator relying on the capacities of other entities shall attach, additionally to the possible certification of the auxiliary undertaking, a declaration signed by that same undertaking attesting the possession of the general requirements referred to in Art. 80 as well as of the technical requirements and the resources object of the reliance. The economic operator shall prove to the contracting authority that necessary resources are available by producing a commitment signed by the auxiliary undertaking through

⁹⁷ According to the administrative case law, the exclusion grounds should be interpreted as “typical”, i.e. devoid of any interpretation by analogy that may widen their scope; such perspective serves the purpose of favoring the largest participation to the tender (Consiglio di Stato, V sez., 24 June 2020, n. 607).

⁹⁸ See Ministerial Decree, Ministry of Labor and Social policies 30 January 2015.

⁹⁹ See ANAC, Linee guida n. 6, di attuazione del D.Lgs. 18 aprile 2016, n. 50 (as updated on 11 October 2017).

which it commits itself to the tenderer and the contracting station in order to make the necessary resources of whom the tenderer is lacking available for the entire duration of the contract. In case of false declarations, the contracting station shall exclude the tenderer.

The contracting authority shall verify whether the entities, on whose capacity the economic operator intends to rely, fulfil the relevant selection criteria and whether there are grounds for exclusion pursuant to Art. 80. It shall require for the economic operator to replace entities which do not meet a relevant selection criterion, or in respect of which there are compulsory grounds for exclusion. In the call for competition there may also be an indication of cases in which the economic operator shall substitute an entity in respect of which there are non-compulsory grounds for exclusion, provided that technical requirements are concerned. The tenderer and the auxiliary undertaking are jointly responsible towards the contracting station with regard to the provisions object of the contract. The obligations provided by the anti-mafia legislation upon the contractor shall also apply with reference to the auxiliary undertaking on account of the amount of the contract as object of the competition.

While the use of several auxiliary companies is permitted, the auxiliary cannot be available to more than one economic operator: the breach is a cause for exclusion.

Such constraints – similar to those laid down for subcontracting (see *infra*) – were reprimanded in the already mentioned infringement procedure no. 2018/2273 but are still unchanged in the Italian discipline.

4.3.5. Contract award criteria

In line with Art. 67 of the Directive 2014/24/EU, Art. 95 of the Italian Code establishes that public contracts can be awarded on the basis of the «**most economically advantageous tender**» criterion, based on the best quality/price ratio and taking into account both the economic and the technical aspects (i.e., quality, price, technical merit, aesthetic, functional and environmental characteristics), or the «lowest price» criterion. For the contracts to be awarded based on the most economically advantageous tender criterion, Article 95(10bis) sets the limit of the 30% of the overall score to be awarded to the economic component of the tender.

As a general rule, and save for specific exceptions connected with emergency regimes, **in tender procedures above the EU threshold**, the awarding criterion shall be the most economically advantageous tender. In particular, pursuant to Article 95(3) of the Code, the most economically advantageous tender criterion is mandatory for:

1. service contracts relating to social services and catering services in hospitals, care facilities and schools, and other “labour intensive” services, save for amounts below the threshold of EUR 40,000.00; the notion of “labour intensive” services refers to a tender where labour costs amount to at least 50% of the contract;
2. service contracts for the award of engineering, architectural and other technical and intellectual services for an amount equal to or higher than EUR 40,000.00;
3. service and supply contracts characterised by significant technological content, or which are innovative in nature, having an amount equal to or higher than EUR 40,000.00.

Otherwise, services and supply contracts with standardised characteristics or whose conditions are defined by the market, except for “labour intensive” services, may be awarded with the lowest price criterion, but in such case, the contracting authority shall give evidence of the grounds for such choice in the tender documentation¹⁰⁰.

In tender procedures below the EU threshold, save for the cases under Art. 95(3) where the choice of the most economically advantageous tender criterion is mandatory, the contracting authorities are free to choose between the two available criteria.

Such freedom is the result of the so-called “Sblocca Cantieri”, which “loosened” the original provisions of the Code, generally preferring the most economically advantageous criterion: after the Law Decree no. 32/2019, above the EU threshold the former remains the prevailing criterion, below the EU threshold the public administration can choose freely, and it could be argued an implicit preference for the lowest price criterion, given

¹⁰⁰ Other cases were erased with the Law no. 32/2019.



The norm now makes use of the automatic exclusion of abnormal offers for below the threshold contracts, in line with the principles developed by the European Court of Justice¹⁰⁵: when the contracts are awarded with the lower price criterion (as long as they do not have a cross-border character), the contracting authorities mandatorily exclude from the tender offers with a percentage discount equal to or higher than the anomaly threshold identified pursuant to §§ 2, 2-bis and 2-ter; the automatic exclusion does not operate when the number of accepted offers is less than 10 (the so-called Semplificazioni Decree provided that until December 31, 2021, the automatic exclusion also applies in cases where the number of the admitted bids is equal to or lower than five).

The methods for calculating the anomaly threshold have also been reduced: in the case of a lowest price criterion, two methods are used according to whether the number of admitted offers is equal to or greater than 15 (§ 2 amended) or less than 15 (§ 2-bis amended). When, on the other hand, the criterion used is the most economically advantageous tender, it is envisaged (§ 3 amended) that the method for determining the abnormal offers (the points relating to the price and the sum of the points relating to the other evaluation elements are both equal to or greater than 4/5 of the corresponding maximum points provided for in the call for tenders) is used only if the number of offers accepted is equal to or greater than three.

As already mentioned, Labour protection is specifically taken into consideration as the contracting authorities have to verify, before awarding the contract, compliance with the provisions of Art. 97, paragraph 5, letter d), i.e. that the cost of workforce is not lower than the minimum wages indicated in the specific Ministerial tables (art. 23, paragraph 16), which function also as a benchmark to verify the compliance with the provisions on health and safety in the workplace. The **Ministerial tables**, in fact, only indicate the **average hourly labour cost**, elaborated on a statistical basis¹⁰⁶; therefore, they are not a mandatory limit for economic operators because it is quite possible that the “own” cost of the individual economic operator is different from the average cost¹⁰⁷.

Furthermore, Art. 97(6) states that no explanations can be admitted with respect to the work safety costs and mandatory minimum wages established by law or sources authorized by the law: thanks to the Constitution-oriented judicial interpretation, standard minimum wages refer to the principle of proportionality and decency provided by Art. 36 of the Italian Constitution and made “effective” through the collective agreements.

The two provisions therefore do not establish the same principle and indeed pose a series of interpretative difficulties, even more so when compared with the aforementioned Art. 30(4).

¹⁰⁵ Court of Justice of the European Union, IV section, 15 May 2008, cases C-147/06 and C-148/06.

¹⁰⁶ The cost is determined by the Ministry of Labour and Social Policies on the basis of the economic values defined by the national collective bargaining between comparatively more representative trade unions and employers' organizations, by the provisions on social security and welfare, in the various sectors for different territories (the relevant area is the *Provincia*).

¹⁰⁷ See Consiglio di Stato, sez. V, 4 May 2020, no. 2836; Consiglio di Stato, sez. V, 7 May 2018, no. 2691; Consiglio di Stato, sez. III, 18 September 2018, no. 5444; Consiglio di Stato, sez. V, 6 February 2017, no. 501; Consiglio di Stato, sez. V, 25 October 2017, no. 4912.

The first rule (Art. 97, paragraph 5, letter d) imposes an assessment of the compliance with the labour cost referred to in the ministerial tables in any case, even when there is no ground to classify the offer as *abnormal*. Any deviation from the costs indicated in the ministerial tables - and provided that the minimum wages provided for in the collective agreements are respected - do not, however, lead to the exclusion. Rather, the contracting authority will have to ask for justifications regarding this deviation (giving at least 15 days for the reply) and then assess the adequacy of the labour cost stated in the offer. Case law, in particular, remarks how an offer cannot be considered abnormal, and be excluded, only on the grounds that labour costs have been calculated according to values lower than those resulting from the ministerial tables or collective agreements: in order to doubt the adequacy, it is necessary that the discrepancies are considerable and clearly unjustified¹⁰⁸. However, the exclusion from the tender procedure of the economic operator who has submitted an offer containing labour costs lower than what estimated by the contracting authority is possible if the tender specifications have expressly denied any deviation¹⁰⁹.

Art. 97(6), confirms, instead, the duty to a labour standard as provided by collective bargaining, in its “minimal” level of protection, regardless of the selection criteria already mentioned in Art. 30(4).

Nonetheless, according to Art. 97(6), the contracting authority can in any case evaluate the adequacy of any tender which, on the basis of specific elements, appears abnormally low, even outside the mechanism set in the Code.

Moreover, the contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with the applicable obligations set forth by Article 105 of the Code on subcontracts.

4.3.7 Conditions for performance of contracts: in particular, the occupational social clauses

Art. 100 of the Italian Code provides for contracting authorities the chance to request particular conditions for the performance of the contract, “provided they are compatible with European law and with the principles of equal treatment, non-discrimination, transparency, proportionality, innovation and are specified in tender, or in the invitation in case of procedures without public tender or in the tender specifications”.

These conditions may relate especially to social needs and are surely linked to another provision of the Code, Art. 50, aimed at **protecting the employment stability** of the workers of the company already performing the contract. The provision, in particular, establishes that, when dealing with above-the-threshold procurements, «for the award of concession contracts and contracts for work and services other than those having an intellectual nature, with particular reference to those relating to labour intensive contracts [*i.e. where the cost of labor is equal to at least 50% of the total amount of the contract*], calls for competition, notices and invitations shall insert, in accordance to the principles of the European Union, specific social clauses aimed at promoting occupational stability», calling also for the new contractor’s compliance with the most representative collective agreements (as established in Art. 51 of Legislative Decree no. 81/2015).

Such social clauses – which, significantly, went from being an option in 2016 («*may insert*») to a clear obligation thanks to a 2017 amendment («*shall insert*») - impose on contractors the duty to absorb and employ the workers of the outgoing contractor in case of termination of the previous procurement contract, by virtue of the principle of safeguarding occupational stability as set out at EU level (see Dir. 2014/24/EU, but also Dir. 2014/25/EU). Such clauses already exist in collective bargaining, e.g. the Multiservice CCNL (*National Collective Agreement*) and the Logistics Freight Transport and Shipment CCNL, which determine a procedure of information and negotiation with the signatories Trade Unions, regardless whether it is a public or private procurement (Recchia 2017): which is to say that, the collective agreements have developed - where these clauses exist - an “obligation to employ”, independent from the incoming and/or of the outgoing contractor’s will, which can only be “harmonized” with the changes in the procurement organization or needs.

Due to the limited effect of collective agreements (as they are binding only for the signatories parties), the Code provision is strategic, especially for the service sector with a high intensity of workforce, in which, as it

¹⁰⁸ See Consiglio di Stato, sez. III, 9 June 2020, n. 3694; 17 January 2020, n. 414; Consiglio di Stato, sez. V, 29 July 2019, n. 5353)

¹⁰⁹ See Consiglio di Stato, 23 December 2019, n. 8698.

4.4

SUBCONTRACTING IN THE ITALIAN CODE OF PUBLIC CONTRACTS

As already noted, subcontracting in public procurement has been long regulated and limited in the Italian legal system. The original 1990 rules have “crossed” the more recent regulations, finally setting into Art. 105 of the current Code of public contracts. The provision – in its original text as well as after the various amendments, some of which “provoked” by the EU institutions – sets to combine a preventive constraint to illegal infiltrations into public organizations and the procurement system by limiting the possible subcontracting chain with (a few) social protections and rights to the workers involved. It should be noted, in this regard, that Art. 105 – placed in Part II (Procurement contracts for works, services and supplies), Title IV (Execution), of the Code – makes no distinction between contracts above and below the EU threshold; therefore, the national legislation aims to provide for a uniform regulation on subcontracting regardless of the economic value of the contract.

The law-maker’s general diffidence had determined in the original text of the 2016 Code the **provision of multiple limitations on the use of subcontracting**, and in particular

- a) the prior authorization of the contracting station and the indication in the tender offer by the competitor (aspiring contractor) of the works, services, supplies or parts of them willing to be subcontracted;
- b) the obligation to indicate a shortlist of three subcontractors in the tender and for cases of concessions, allowing checks on the subcontractor, during the awarding phase;
- c) the limit of 30% of the services to be subcontracted.

Furthermore, a firm prohibition of a subcontracting chain was established in Art. 105(19), according to which «the execution of the services entrusted to subcontracting may not be the subject of further subcontracting».

The push to alleviate legal limits, repeatedly invoked by entrepreneurs and their association, and the question of the compliance with the European framework on subcontracting (Costantini 2015) ended up strongly affecting such regulatory context. In particular, the already mentioned infringement procedure no. 2018/2273 of the European Commission objected to the subcontracting constraints, mainly on two aspects. The Commission noted that no provision in the Directives 2014/23/EU, 2014/24/EU and 2014/25/EU allow a mandatory limit on the amount or percentage to be subcontracted; on the contrary, as a greater participation of SMEs in public procurement should be encouraged, Art. 63(2) of Directive 2014/24/EU allows contracting authorities to limit the right of tenderers to use subcontracting only where such a restriction is justified by the particular nature of the services to be performed¹¹². Also, a non-compliance with Article 71(2) of Directive 2014/24/EU was found in the «disproportionate» obligation for the tenderers to always indicate three (possible) subcontractors, even if the tenderer needed fewer than three, or even none at all.

At the same time, a few cases brought to the European Court of Justice (*C-63/18 Vitali and C-402/18 Tedeschi*)¹¹³ exposed the choice of general and all-encompassing limits which would result in an unreasonable and disproportionate burden for the tenderers: furthermore, although the CJEU’s scope was expressly limited to above the threshold contracts, it was overall the combined effect of all the aforementioned constraints which were deemed to be excessive¹¹⁴.

¹¹² The infringement procedure on the percentage limitation to subcontracting had already been foreshadowed by the Italian Consiglio di Stato in the opinion rendered on the 2017 corrective decree (opinion of Comm. spec. n. 782/2017): while not downplaying the EU rules and interpretation, the Italian judges defended the choice of the national legislator, finding that a «greater rigor in the implementation of the directives must, on the one hand, be considered permitted to the extent that it does not result in an unjustified obstacle to competition; on the other hand, it is considered justified (when not imposed) by the safeguarding of constitutional interests and values, or set out in art. 36 TFEU».

¹¹³ Court of Justice of the European Union, 26 September 2018, *C-63/18 Vitali*, and 27 November 2019, *C-402/18 Tedeschi*. A more recent decision (30 January 2020, *C-395/18, Tim s.p.a.*) stated that the subcontractor’s breach of the legal obligations regarding disabled workers could not give rise to the automatic exclusion of the competitor, entitled to prove suitable («self-cleaning») measures to remove such a cause of unreliability.

¹¹⁴ In the *Vitali* decision, for example, the judges remarked how by virtue of Art. 71 of the Directive, as well as the Art. 105 of the Italian Code, in the presence of disclosure obligations and procedural obligations for which the subcontractor company could be subjected to controls similar to those that fall on the awarded company, the limit on subcontracting would not be the most effective and useful tool to ensure the integrity of the public procurement market: if the contracting authority is willing to know in advance what parts of the contract are meant to subcontract as well as the identity of the proposed subcontractors, and to verify the possession of the qualification requirements and the absence of grounds for exclusion, there should be no reason to introduce a general and abstract limit to subcontracting. The principle had already been stated in the *Wroclaw* decision (Court of Justice, 14 July 2016, *C-406/14*).

The Italian law-maker response has not necessarily been quite organic, but both aspects have been addressed (D'Alessandri 2020).

The requirement to include a shortlist of 3 possible subcontractors has been temporarily suspended with the "Sblocca Cantieri" Decree in 2019, and the suspension has been later extended until 31 December 2023 by the Semplificazioni Decree.

As for the fixed limit to subcontracting, an increase from 30% to 40% in 2019 has not stopped the Italian Courts from setting aside the national measure conflicting with the EU law and implicitly calling for a complete, and problematic, deregulation of subcontracting (Cocco and Sanna 2020)¹¹⁵. Finally, the "void" has been filled through a gradual realignment with the EU regulation: according to the two-step reform of Art. 49 of Law Decree no. 77/2021, amending the Italian Code of public contracts,

- a) the subcontracting threshold rises from 40% to 50% of the total contract amount until 31 October 2021. The complete assignment of the contract and the entrusting of the entire execution of the services to third parties, as well as the prevalent execution of labour-intensive work, are prohibited.
- b) As of 1st November 2021, quantitative limits to subcontracting are eliminated, but subcontracting will be possible only for the services identified by the contracting authorities, based on their specificity and of the evaluations carried out, also in collaboration with the *Prefetture* (territorial government offices), to protect the interests of workers. Furthermore, the main contractor and the subcontractor remain jointly and severally liable towards the contracting authority.

The latest regulatory intervention brings a certain stability to the discipline of subcontracting: however, it has to be noted that a rule that stays true to the Court of Justice interpretation and awards contracting authorities ample power over an *ex ante* evaluation of the tender's subcontracting, opens up to a likely, and in some cases, misplaced discretion for the contracting authorities (and, later, for the administrative judges) in identifying the rules and limits to subcontracting: while some contracting authorities (e.g. small municipalities) may not have the means to make such evaluation, others may intentionally forego the public interest to lawfulness.

Nonetheless, two important limits are significantly maintained.

The first, set in Art. 105(1) and sanctioned with the nullity of the public contract, strengthens the principle that economic entities entrusted with public contracts should carry out works, services or supplies by themselves by forbidding the contractor to assign to third parties the full execution of the services/works covered by the contract, as well as the prevalent execution of work relating to all the prevailing categories and labour intensive contracts (few exceptions are listed in Art. 106). Such provision does not conflict with the regulation of subcontracting, which is permitted within the limits provided for in the same Article, but must be read as a general principle that forbids "hiding" or "passing" contracts, making the main contractor a mere figurehead and risking the abuse or circumvention of both market and labour law¹¹⁶.

A second (and general) limit is in Art. 105(19) and the already mentioned prohibition of further subcontracting, what has been already subcontracted¹¹⁷, therefore limiting a possible fragmentation of the procurement through a chain of contracts.

The 2021 reform is relevant also on the front of the **labour protection of the workers involved in subcontracting**. As a matter of fact, the Code of public contracts contained already two important social clauses.

According to Art. 105(8), the contractor is jointly responsible with the subcontractor in relation to social security and salary obligations, pursuant to Art. 29 of Legislative Decree no. 276/2003, which represents the general

¹¹⁵ See Consiglio di Stato, sez. VI, 29 July 2020, no. 4832 and sez. V, 17 December 2020, no. 8101. It is worth mentioning a different view, expressed by the TAR Lazio, sez. III ter, 8 February 2021, no. 1575, which has stated that the provisions of the EU Directive 2014/24 are applied only to supra-threshold contracts and that therefore the limits imposed by the Italian legislation in the sub-threshold are lawful.

¹¹⁶ Such perspective of social dumping is well known to the EU institutions, as the misuse of subcontracting is mentioned in the European Parliament resolution of 14 September 2016 on social dumping in the European Union

¹¹⁷ It has to be noted that in the letter of 24 January 2019, opening the infringement procedure against Italy, the EU Commission expressed also doubts on the compliance of Art. 105(19) with the Directives as a general prohibition for further subcontracting conflicts with the principles of proportionality and equal of treatment; although the issue has yet to be addressed, we cannot but agree with the viewpoint of the Consiglio di Stato that more rigid rules may not represent unjustified goldplating if based on reasons of public order or protection of transparency and of the labour market (*supra*, note 24).

rule on joint liability for the private sector. In particular, this provision guarantees that in the absence of the payment of wages and social contributions, the contracting entity can be taken to Court up to two years after the end of the contract, and the joint liability links all the economic subjects along the chain from the contracting agent to the last of the subcontractors (which is to say, subcontractor Z's employees can bring an action against both X, contracting entity, and Y, principal contractor). Such solidarity regime requires only the ascertainment of the non-fulfilment of the obligation on the part of the joint and several co-obligors and relieves the worker from burden of proving the extent of each contracting companies' debt. For this same reason, Art. 29 does not directly apply to Public Administrations (as a way of avoiding for the contracting authority to risk to pay "twice" the cost of public procurement)¹¹⁸ but, thanks to the Art. 105(8) referral, creates a **joint liability between the principal contractor and the subcontractors**¹¹⁹. Nonetheless, Art. 105(10) states that in the event of delay in the payment of remuneration due to employees of the subcontractor, as well as in case of non-compliance resulting from the single document of contribution regularity, the Code explicitly calls for **Public Administration's direct and surrogate intervention**, through the procedure described in Art. 30, paragraphs 5 and 6¹²⁰, and then deducting the relative amount from the sum due to the principal contractor.

It is clear, however, that subcontracting could give way to a lowering of labour protection standards, potentially involving workers in the same procurement but with different rights, as an effect of the choice of different collective agreements by the contractor and subcontractor. The Code of public procurement never took stance on the subject, even allowing for a possible reduction of the services cost provided through subcontracting (albeit with a threshold of 20%, attracting the Court of Justice's criticism)¹²¹. However, with the same 2021 reform that has gradually removed limits to subcontracting, the Italian lawmaker has introduced a new labour protection: the new Art. 105(14) provides that «the subcontractor must guarantee the same quality and performance standards provided for in the contract and grant workers an economic and regulatory treatment not lower than what the main contractor would have guaranteed, including the **application of the same national collective agreements**, if the activities subject to subcontracting coincide with those characterizing the contract or concern the work relating to the prevailing categories and are included in the corporate purpose of the principal contractor».

In other words, the Code of public contracts, as recently amended, imposes **equal treatment** between the contractor and subcontractor's employees (on the grounds of the overlapping of the contract and subcontract's object), a protection which has not been recognized in the private sector since 2003¹²²: the legislative choice is clearly suitable for countering a competitiveness between companies based exclusively on the reduction of labour costs and, therefore, on the social dumping.

Finally, the new provision is to be appreciated in the way it was introduced: after a Government's announcement of forthcoming public procurement reforms due to the implementation of the National Recovery and Resilience Plan, that could have led to the adoption of the «lowest price» as a general awarding criterion, the main Trade Union Confederations called for a general strike, putting pressure on the lawmaker and opening a discussion and consultation which moved the topic of subcontracting to the "urgent matters" folder and gained the equal treatment right.

¹¹⁸ See Cassazione, Sez. Lavoro, 22 July 2019, no. 19673.

¹¹⁹ The public contracting entity, however, is still obliged to the provision of Art. 1676 of Civil Code, according to which contractor's employees can propose direct action against the contracting entity to claim their rights, up to the extent of the latter's debt to the contractor.

¹²⁰ Another possibility of a direct payment by the contracting authority to the subcontractor (not limited to salaries or social contribution) is given by Art. 105(13), by which the contracting authority can pay directly to the subcontractor, the service provider and the supplier of goods or works, the amount due for the services performed when the subcontractor or job worker is a micro or small enterprise; in the case of default by the contractor; at the request of the subcontractor and if the nature of the contract permits it.

¹²¹ See Court of Justice 27 November 2019, C-402/18 *Tedeschi*.

¹²² The principle of equal treatment with the contracting entity's employees, originally established with Law no. 1369/1960, disappeared in 2003 in favour of the joint liability described *supra* with Art. 29 of Legislative Decree no. 276/2003. Significantly, the equal treatment is instead expressly recognized for temporary workers and (to a certain degree) transnational posted workers (Art. 4, Legislative Decree no. 136/2016).

4.5

A CONCLUDING OVERVIEW ON THE ITALIAN PUBLIC PROCUREMENT SYSTEM AND THE RELEVANCE OF SOCIAL CLAUSES

This short analysis of the Italian Code of public contracts cannot but agree that the 2016 Code has introduced significant steps forward in countering competitive and opportunistic practices, thanks also to an advancement of the EU Directives' social scope. The balance between social protection and the economic freedom may still appear as a compromise – especially when the Directive 24/2014 reference both the compliance with environmental law, social and labor law established by Union law, national law and collective agreements (Art. 18.2), and the accordance with Directive 96/71, as interpreted by the Court of Justice (Recital 98) – but the social perspective has clearly helped raising the bar in the drafting of Art. 30, 50 and 105 of the 2016 Code, all involving social clauses on the economic treatment of the awarded contractor's employees, on the occupational safeguarding and on subcontracting, as well as influencing the subsequent amendments.

Such social perspective has been central to the Trade Unions' action, although, as already remarked in the Introduction, they have been 'forgotten' in the law-making process. The main Confederations have resorted to 'external' pressure to improve the Code (such as in the 2017 amendment of Art. 50) and to avoid overturning its most advanced protection, such as the preference for the most economically advantageous tender criterion and the setting of (some) limits to subcontracting.

However, a certain normative ambiguity – stemming from the same compromise that brought the EU Directives – has determined an arm-wrestling of sorts with those who have to interpret and comply with the rules.

The main legal obstacle for the social clauses referring to wages and more generally to employment protection is represented by the lack of *erga omnes* effectiveness of the Italian collective agreements: as already demonstrated, the ambitious goal set in Art. 30(4) of the Code is diminished by a not clear sanctioning system and more importantly by the problematic relationship with freedom of association, on the internal front, and with the EU regulatory framework, **whose Directives still omit any reference to the ILO Convention no. 94**, that in the States where it is in force would ensure to the workers concerned the highest labour standards applied in the area where the contract is performed, even if such highest standards are established by a collective agreement not generally binding.

A possible (and indirect) help could come from the setting of a **minimum wage** – currently absent from the Italian legislation – which could save social clauses from a problematic condition of non-compliance with EU law, especially if such setting could derive from the implementation of the Proposal of Directive on adequate minimum wages of October 2020 (COM/2020/682 final) (Bavaro et al. 2021).

Similarly, social clauses aimed at safeguarding the occupational stability find a difficult relationship with the Constitutional principle of economic freedom of Art. 41, but also with the EU regulatory framework and the principle of proportionality to pursue the objectives set out in the procurement provisions, in the absence of a clearer statement than the one contained in Art. 70 of Directive 2014/24, by which contracting authorities are allowed to demand conditions regarding the performance of the contract, also relating to employment, especially when balanced with the general principles of European competition law and of freedom of enterprise.

As a further Code reform appears to be underway, these ambiguities need to be clarified, as all the pushes towards a more robust labour protection – as proven by the vicissitudes of the subcontracting limits – may still be kept in check by the European regulatory framework.

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The introduction of social considerations in procurement in Spain: the difficult implementation of the 2014 European directives

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5.1

THE LATE TRANSPOSITION OF EUROPEAN REGULATIONS IN THE SPANISH LEGAL SYSTEM AND THE SPECIAL EVALUATION OF THE ROLE OF UNIONS AND COLLECTIVE BARGAINING

The implementation of the fourth generation of European Directives on public procurement in Spain has been particularly long and complex, largely due to the vicissitudes that have characterised Spanish politics in the years between their approval and their actual incorporation in the Spanish legal system. These years were marked by certain political instability and the gradual overcoming of the traditional (although imperfect) two-party system that had characterised Spanish politics since the first democratic elections in 1977 and, particularly, since 1982.

In the new context of multi-partyism, the impossibility of forming a government before and the calls for early general elections later ended up repeatedly truncating the parliamentary processing of the Draft Laws of public sector contracts and on contracting procedures in the water sectors, energy, transport and postal services.

The formation of the new Government in June 2016 enabled the process to be resumed, although only the Public Procurement Draft Bill was eventually approved. This is how **Law 9/2017, of 8th November, on Public Procurement transposing Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26th February 2014** ¹²³ (LCSP, hereinafter) came to light, repealing previous regulation ¹²⁴.

To avoid a penalty for late transposition¹²⁵, the processing of a new Draft Bill on procurement procedures in the sectors of water, energy, transport and postal services (which intended to transpose Directive 2014/25/EU to the Spanish legal system) was accelerated. However, it did not come to light, yet again due to the dissolution of the Spanish Parliament in March 2019. The short duration of the XIII Legislature, which concluded on 24th September 2019, once more hindered the approval of this Law, which has only been enacted since the formation of the current Government in January 2020 through the urgent approval of **Royal Decree-Law 3/2020, of 4th February, on urgent measures for the incorporation of diverse European Union Directives in the sphere of public procurement in certain sectors; private insurance; pension plans and funds; in the tax field and tax disputes into the Spanish legal system**. With this new rule, the Spanish Government completed the transposition of European regulations in this field¹²⁶.

In spite of the drafting of national rules for transposition in relation to labour, social dialogue has not played a role. The contribution of trade unions in the drafting of the different provisions has been channelled through amendment proposals to the original text of the Draft Bills assumed by the different parliamentary groups.

¹²³ It seems opportune to point out that, although it was approved on 8th November 2017, its coming into force was deferred until 9th March 2018 (16th Final Provision LCSP), in order to grant Administrations, other public sector entities, and political parties, unions and professional organisations, as well as companies and other operators a certain period of time to adapt to the changes imposed by the new regulation. In its field of application, the Law also includes trade unions and employers' organisations, professional associations, as well as foundations and associations related to either of them. The inclusion of these organisations of a clearly private nature in the subjective scope of the application of the Law is explained and is related to the institutional role that is attributed to them by means of the Constitution (Article 7 of the Preliminary Title), as bodies that develop a clearly public service with instruments through which citizen representation and participation is channelled and structured. CABALLERO SÁNCHEZ, R., "A vueltas con el ámbito objetivo y subjetivo de aplicación de la ley de contratos del sector público", DRL, n. 8/2018, Page 832 is also referenced for the analysis of the objective and subjective scope of the application of the Law.

¹²⁴ The reference is to Royal Legislative Decree 3/2011, of 14th November, approving the consolidated text of the Public Procurement Law (TRLCSPL, hereinafter) which, through specific modifications, had already incorporated certain issues regulated in Directives 2014/25/EU and 2014/23/EU into the Spanish legal system. Despite introducing important new features with respect to the previous regulation, the new regulation maintains its structure to a large extent.

¹²⁵ On 7th December 2017, the European Commission brought two actions against the Kingdom of Spain before the Court of Justice of the European Union for it to declare that Spain had failed to fulfil its obligations by virtue of Article 106.1 of Directive 2014/25/EU and sentence it to the payment of a daily penalty of €123,928.64, effective as of the date of delivery of the judgement, in accordance with Article 206.3 of the Treaty on the Functioning of the European Union (TFUE, hereinafter) and by virtue of Article 51.1 of Directive 2014/23/EU, effective as of the date of delivery of the judgement, and sentence it to the payment of a daily penalty of €61,964.32, in accordance with Article 206.3 of the TFUE.

¹²⁶ More specifically, the 2020 Royal Decree includes the transposition of Directive 2014/25/EU related to procurement procedures in the sectors of water, energy, transport and postal services, completing the transposition of what was transposed in Law 9/2017 in relation to procurement in the aforementioned sectors by public sector entities that are not part of the Public Administration and by private companies with special or exclusive rights. The same repealed the regulations previously in force derived from Law 31/2007, of 3rd October, on procurement procedures in the sectors of water, energy, transport and postal services, which incorporated Directives 2004/17/EC, 92/13/EEC and 2007/66/EC into the Spanish legal system, as well as implementing Article 6.1 of the Council Decision dated 2nd August 2016, giving notice to Spain to take measures aimed at reducing the deficit.

This is particularly true in the case of Law 9/2017, whereby 90% of the 1,081 amendments¹²⁷ (mostly drafted by trade unions) presented during its parliamentary processing were accepted or transacted¹²⁸. The great amount of amendments proposed have certainly enriched the wording of the regulation and reinforced the democratic principles in its drafting, clearly showing the broad consensus reached in its approval¹²⁹. On the other hand, it led to increased complexity of a law that in itself was “very extensive, detailed and complex”, by no means easy to apply¹³⁰ which, at times, failed to resolve existing interpretative ambiguity and/or raised new problematic issues¹³¹.

5.2

SOCIAL CONSIDERATIONS IN LCSP

The LCSP introduces significant changes to the regulations previously in force (TRLCSPP) which go beyond its mere formal updating to adapt it to the requirements from the European sphere, as it considers the general redefinition of the regulation in the field. The field of application of the law goes beyond that of the transposition Directive to cover procurement situations that are not included therein¹³².

The main innovation refers to the acceptance of strategic procurement as an essential core of administrative procurement¹³³, particularly through the inclusion of qualitative, environmental, social and innovative aspects related to the object of the contract.

This is set out in Article 1.3 LCSP – incorporated thanks to an amendment presented in the processing phase of the law¹³⁴. This article makes now the “transversal” incorporation of social and environmental criteria “mandatory”, under the hypothesis “that its inclusion provides a better quality-price ratio in the contractual obligation, as well as greater and better efficiency in the use of public funds”. This is so if they are “related to the object of the contract”.

It is understood that the evaluation of the best quality-price ratio will be carried out bearing in mind not only merely economic considerations, but also qualitative criteria that “may include environmental or social aspects, related to the object of the contract as set out in Section 6 of this Article” (Article 145.2 LCSP). The transversality of the reorientation of public procurement is advocated in both the organisational sense, affecting all areas of activity of the Administration considered to be an organic unit, and in terms of process, implying the need to report on all of the phases of the special administrative procedure for public procurement regardless of the type of procedure adopted¹³⁵.

¹²⁷ So much so that it considered to be the Law that has received the most amendments throughout the Country’s entire democratic history. González García, J., V., “La tramitación parlamentaria de la Ley de Contratos del Sector Público”, *Monografías de la Revista Aragonesa de Administración Pública*, Zaragoza, 2018, Page 53, is referenced for an overall analysis of the processing of the Law.

¹²⁸ *Public Procurement Draft Bill, transposing Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of 26th February 2014 and 2nd December 2016 to the Spanish legal system*, available at: [121/000002 Proyecto de Ley de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo, 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014. \(congreso.es\)](https://www.congreso.es/proyecto/121/000002/Proyecto_de_Ley_de_Contratos_del_Sector_Publico_por_la_que_se_transponen_al_ordenamiento_juridico_espanol_las_Directivas_del_Parlamento_Europeo_y_del_Consejo_2014/23/UE_y_2014/24/UE_de_26_de_febrero_de_2014_(congreso.es).).

¹²⁹ Gimeno Feliu, J. M^a, *La Ley de Contratos de Sector Público. Sus principales novedades, los problemas interpretativos y las posibles soluciones*, Aranzadi Thomson Reuters, 2019, Pages 73-74.

¹³⁰ Sánchez Morón, M., *Derecho Administrativo. Parte general*, Tecnos, Madrid, 2018, Page 593. The Law is indeed made up of 347 Articles, 53 Additional Provisions, 5 Transitory Provisions, 1 Derogatory Provision, 16 Final Provisions and 6 Annexes. Its Articles are integrated into 4 Books which make up the regulatory body of the Law.

¹³¹ Vallecillo Gómez, M^a, R., “Aspectos sociolaborales de la nueva ley de Contratos del Sector Públicos: innovaciones y puntos críticos”, *Revista de Trabajo y Seguridad Social*, Centro de Estudios Financieros, n. 417/2017, Page 182.

¹³² For a critique of the objective and subjective application of the LCSP that is not always appropriately identified, reference is made to Caballero Sánchez, R., “A vueltas con el ámbito objetivo y subjetivo...”, op. cit., Pages 830 et seq.

¹³³ Gimeno Feliu, J. M^a, *La Ley de Contratos de Sector Público...*, op. Cit. Page 97.

¹³⁴ Amendment 1041 presented by the Basque Parliamentary Group (EAJ-PNV). The objective was specifically to clarify that “the inclusion of social and environmental criteria does not just pose an ethical or social justice question, but also a powerful and synergetic transformation tool that is highly efficient from the public interest point of view and that of the efficiency and streamlining of public budgets assigned to procurement. It also sets out to clarify and explain - for certain legal, technical and intervention areas - that social criteria makes up a guiding principle of public procurement and its inclusion provides a better offer of the contractual service, even from the economic point of view”. *Public Procurement Draft Bill...* Page 819.

¹³⁵ Palacín Sáenz, B., “A la responsabilidad social por la Contratación Pública”, PhD Thesis, La Rioja University, 2020, Page 206.

Particularly significant in this respect is the provision of Article 145 LCSP that now expressly enables the introduction of social considerations in the contract award phase ¹³⁶, in an attempt to overcome hesitation and oscillating solutions that had arisen from the European and internal sphere¹³⁷.

Note that the introduction of social considerations is merely optional in the bidding phases; indeed, Article 145.2 LCSP expressly sets out that the award criteria established by the contracting body “may” include environmental or social aspects related to the object of the contract”. Moreover, Article 202.1 LCSP establishes that “the establishment of at least one of the special execution considerations in the specific administrative clauses” which “may refer, particularly, to economic considerations related to environmental or social innovation” is mandatory (Article 202.2 LCSP)¹³⁸.

In order to strengthen legal certainty and facilitate the introduction of this type of considerations in procurement, both Article 145.2 and 202.2 LCSP (related to the award phase and contract execution phase, respectively) introduce an unrestricted range of purposes pursued¹³⁹.

In case of breach, the law also provides for the possibility of applying the penalties set out in Article 197 LCSP or, even, the resolution of the contract if the aforementioned considerations had been established as “essential contractual obligations” in the clauses ¹⁴⁰, whereby they may even be considered as grounds to prohibit contracting in the future (Articles 130.4 and 202.3 LCSP).

The radical change in perspective is evident. The mere reference to price is abandoned to include a range of criteria based on the principle of the best quality-price ratio ¹⁴¹ in an attempt to overcome the bureaucratic, formal and substantially economic outlook of public procurement and advocate a model that is not only more transparent, but also strategic, reorienting the administration’s contractual activity towards the fulfilment of instrumental and secondary objectives associated with the mere supply at the lowest cost¹⁴².

¹³⁶ The previous regulation (Law 30/2007, of 30th November, later consolidated in the aforementioned TRLCSP) contemplated social considerations only as criteria to evaluate bids and determine the most advantageous bid economically (Article 150 TRLCSP) or as special contract execution conditions (Article 118.1 TRLCSP).

¹³⁷ To delve further into this aspect, reference is made to Gallego Córcoles, I., “La introducción de cláusulas sociales como criterios de adjudicación”, in García Romero, B., Pardo López, M.ª. M. (Dirs.), *Innovación social en la contratación administrativa: las cláusulas sociales*, Thomson Reuters Aranzadi, 2017, Pages 81 et seq.

¹³⁸ In accordance with Section 1 of Article 202 LCSP - which, to a large extent, reproduces the contents of Article 70 of Directive 2014/24 -, the special execution conditions must be related to the object of the contract, must not be directly or indirectly discriminatory and must be compatible with EU law. Furthermore, it sets out that they shall be indicated in the invitation to tender and in the clauses. According to the “Three-yearly report on public procurement in Spain in 2018, 2019 and 2020”, prepared by the State Public Procurement Advisory Board, available on the website: [trienal2021.pdf\(hacienda.gob.es\)](https://trienal2021.pdf(hacienda.gob.es)) “Procurement with special social execution conditions has increased by 123.2%, from 17,878 in 2018 to 39,904 in 2020” Page 15. The report is prepared by the State Public Procurement Advisory Board (JCCPE), a consultative body of the General State Administration in terms of public procurement, which Article 338 configures as a privileged reference point for European cooperation. The institutional structure for the management of public procurement is rounded off with the establishment of another two bodies: the Cooperation Committee for public procurement in Article 329 LCSP and the Independent Office for Regulating and Supervising Procurement (OIRESCON) in Article 332 LCSP.

¹³⁹ Among the main purposes of the introduction of social-related award criteria are the following: “fostering the social integration of persons with disabilities, underprivileged persons or members of vulnerable groups among the people assigned to the execution of the contract and, in general, the social and labour insertion of people with disabilities or at risk of social exclusion; subcontracting with Special Employment Centres or Insertion Companies; gender equality plans applicable in contract execution and, in general, equality between men and women; fostering of female hiring; reconciliation of professional, personal and family life; improvement of labour and salary conditions; job stability, the hiring of more people for contract execution; training and occupational health and safety; the application of ethical criteria and social responsibility in the provision of the contract; or criteria related to the supply or use of products based on fair trade during contract execution” (Article 145.2 LCSP). The social purposes pursued through the introduction of social criteria in the award are specified in similar terms in Article 202.2 LCSP, mentioning the following: “Implement the rights recognised in the United Nations Convention on Rights of Persons with Disabilities; recruit a number of handicapped persons above that required under national legislation; promote the employment of people with special difficulties to enter the labour market, particularly people with disabilities or in situation or at risk of social exclusion through Insertion Companies; eliminate inequalities between men and women, favouring the application of measures that foster equality between men and women and to promote equality at work; promote greater participation of women in the labour market and the reconciliation of work and family life; tackle youth unemployment, particularly that affecting women and that which is long-term; foster training in the workplace; guarantee health and safety at work and the fulfilment of the applicable sectoral and territorial collective agreements; measures to prevent accidents at work; other purposes that are established with reference to the coordinated employment strategy, defined in Article 145 of the Treaty on the Functioning of the European Union; or guarantee respect for basic labour rights throughout the production chain by demanding the fulfilment of the basic International Labour Organisation (ILO) Conventions, including those considerations that seek to favour small producers from developing countries, maintaining trade relations that are favourable to them, such as the payment of a minimum price and a premium for producers or increased transparency and traceability throughout the commercial chain”.

¹⁴⁰ Article 202.3 which refers to Article 211.1.f) LCSP regulating grounds for resolution.

¹⁴¹ Only as an exceptional measure does the law allow the only determining factor to be price. It refers to supply or services contracts when the “products (or services) are perfectly defined technically and it is not possible to vary the delivery times or introduce any kind of modifications to the contract” (Article 145.2. f) and g) LCSP).

¹⁴² To this end, there has been talk of a general displacement of the prevalence traditionally assigned to public interest in the Spanish system in favour of greater consideration of the principles of free competition, non-discrimination, transparency and proportionality. Moreno Molina, J. A., *Una nueva contratación pública social, ambiental, eficiente, transparente y electrónica*, Bomarzo, Albacete, 2018, Page 21, textually citing Resolution TACRC 147/2015, of 13th February.

As already mentioned, the introduction of these qualitative elements may now affect all phases of the procurement procedure and not only the contract execution phase. Therefore, the possibility of introduction of these qualitative elements in the **contract preparation phase** (when justifying the need or suitability or defining its purpose and minimum contents¹⁴³, or when defining the base tender budget¹⁴⁴ or calculating the estimated value of the contract¹⁴⁵, but also in the design of the specific technical specifications¹⁴⁶¹⁴⁷). The same goes for **the award phase** (through the establishment of prohibitions on contracting set out in Article 71.1.b) LCSP)¹⁴⁸ or the obligation to reject abnormally low bids (Article 149.4 LCSP)¹⁴⁹, when establishing the selection criteria for bidders (Article 79.3 LCSP) and tie-breaking criteria (Article 147.2.a) LCSP), when establishing the functionality of labels (Article 127 LCSP) or defining solvency criteria¹⁵⁰ is foreseen, although, as already indicated, in this case it is a mere power - and not an obligation - to exercise discretionary appreciation of the contracting body.

Apart from the above, the obligation of complying with the social, labour and environmental obligations set out in European Union law, national law, collective agreements or provisions of international environmental, social and labour law that bind the State, whereby the Administration is responsible for taking the “appropriate measures” to ensure fulfilment in all of the phases of the public procurement procedure (Article 201 LCSP)¹⁵¹ and, where appropriate, imposing the penalties set out in Article 192 LCSP (Article 201, in fine)¹⁵², which lies primarily with the contractor participating in the public procedure, is also clarified. It is clear that with these provisions, the LCSP aims to prevent an economic advantage derived from the breach of the labour regulations

¹⁴³ When regulating the need and suitability of the contract, Article 28.2 LCSP sets out that public sector entities will evaluate the incorporation of social, environmental and innovation considerations as positive aspects in public procurement procedures. Article 35.1 LCSP sets out that when the purpose and type of contract is defined, social, environmental and innovation considerations must be taken into account. In relation to this aspect, Article 99.1 LCSP sets out that the purpose of the contract may be defined in accordance with the specific needs or functionalities that are to be satisfied, without closing the purpose to a unique solution, adding the provision that “it may particularly be defined in this way in those contracts in which technological, social or environmental innovations may be incorporated to increase the efficiency and sustainability of the assets, works or services that are contracted”.

¹⁴⁴ Article 100.2 LCSP “In contracts in which the cost of the salaries of those employed for its execution forms part of the total price of the contract, the base tender budget will indicate the estimated salary costs broken down into gender and professional category based on the reference labour agreement”.

¹⁴⁵ Article 101.2 LCSP which requires “the costs derived from the application of the prevailing labour regulations” and, in the case of contracting or concession of services in which labour is relevant, “the labour costs derived from applicable sectoral collective agreements” to be taken into account (Article 102. 2, c) LCSP). In those services in which the main economic cost are labour costs, the economic terms of sectoral, national, regional and provincial collective agreements applicable in the place where the services are provided must be taken into consideration (Article 102.3) - see also Article 116.4.d) LCSP.

¹⁴⁶ In accordance with Article 124 LCSP, “prior to the approval of the expense or at the same time, and always prior to the tender, or in its absence, prior to its award” the contracting body must approve “the specifications and documents that contain the specific technical specifications that must govern the performance of the service and define its qualities, social and environmental conditions” which “may only subsequently be modified due to material, factual or arithmetical error”.

¹⁴⁷ Note that according to the Three-yearly Report of the Independent Office for Regulating and Supervising Procurement (Article 332.8 LCSP), contained in the aforementioned “Three-yearly Report on public procurement ...”, this is the phrase in which most irregularities have been detected (page 13).

¹⁴⁸ The provision raises the prohibition of contracting in all cases of convictions by final judgement for crimes against the Social Security and against the rights of workers (Article 17.1.a) LCSP), and in the case of sanctions (also firm) “for serious breach (...) in terms of labour integration and equal opportunities and non-discrimination against people with disabilities or foreigners, (...) or for a very serious breach of labour or social issues” (Article 71.1 a) and b) LCSP). The prohibition of contracting also arises in all cases of companies that are not up to date with Social Security obligations, do not fulfil the reservation quota for persons with disabilities or who do not have an Equality Plan despite being obliged to have one (Article 71.1. d) LCSP).

¹⁴⁹ The provision forces bidders to take into account “the obligations derived from the prevailing provisions in matters of taxation, environmental protection, job protection, gender equality, work conditions, occupational risk prevention and social and labour insertion of people with disabilities, and the obligation to contract a specific number or percentage of people with disabilities, and environmental protection” in the bid preparation phase, although this will not affect the application of Article 149 whereby the Administration may reject abnormally low bids “because they violate subcontracting regulations or fail to fulfil obligations in national or international environmental, social or labour aspects, including the infringement of prevailing sectoral collective agreements”.

¹⁵⁰ Certain social and environmental considerations are included in the solvency of bidders regulation. In the field of supply contracts, Article 89.1 g) LCSP establishes, as a form of accreditation of solvency, the “indication of supply chain management systems including those that guarantee the fulfilment of the basic International Labour Organisation Conventions, and monitoring that the entrepreneur may apply on executing the contract”. According to Article 90.3 LCSP, if the contractual purpose requires specific skills in social matters, provision of proximity services and other similar ones, technical or professional solvency shall require specific experience, knowledge and resources in such matters. Finally, Article 93 LCSP, in reference to the accreditation of the fulfilment of the quality guarantee regulations, expressly refers to those related to “accessibility for people with disabilities”. Failure to respect the procurement prohibitions leads to the inevitable legal invalidity of the contract (Article 39.2.a) LCSP).

¹⁵¹ Justifiably, some have considered the introduction of this horizontal social clause as mere “wishful thinking” as it should not be necessary to recall that the prevailing regulations (not only labour regulations) must be respected in the execution of a contract. Miranda Boto, J. M^a., “*La subcontratación en la Ley 9/2017, de Contratos del Sector Público*”, DRL, n. 8/2018, Page 857.

¹⁵² Particularly significant is the express reference in Article 201 (in fine) to “persistent late payment of salaries or the application of inferior salary conditions to those derived from collective agreements” which, when “serious and wilful” trigger the sanctions set out in Article 192 LCSP. In terms of the latter, Article 197 LCSP requires them “to be proportional to the seriousness of the breach”, also establishing that the amounts of each one may be more than 10 percent of the contract price, excluding VAT, nor may the total of them exceed 50 percent of the contract price.

(from a legal or conventional source) for the bidder over complying competitors¹⁵³ and they must be interpreted as provisions that not only introduce unjustified obstacles to free competition in the market and do not violate the principle of equal treatment of bidders, but, on the other hand, serve to guarantee it.

This obligation is further reinforced through the establishment of the possibility that the breaches may integrate a legitimate clause for the exclusion of bidders (through the establishment of contracting prohibitions of Article 71 LCSP) or the rejection of bids on the presumption of recklessness (Article 149.4 LCSP). Justified grounds for contract resolution can also be considered to be any time that social considerations have been attributed to be “essential contractual obligations” (Article 202.3 LCSP).

Here, the main problematic question continues to be the difficulty of adjudicating specific and effective mechanisms to verify the real fulfilment of these obligations by the contractors¹⁵⁴. To this effect, particularly wise is the power set out in Article 157.5 LCSP for the Administration to obtain reports for the verification of social and environmental considerations not only “from social organisations of recipients of the service, from organisations representing the field of activity to which the purpose of the contract corresponds” and “from organisations that defend gender equality” among others, as well as “from trade unions”. In this way, the union role is valued in the guarantee of the effectiveness of the change in perspective of public procurement, as well as expressly recognising the legitimate right to lodge special appeals in relation to procurement (Article 48 LCSP). More generally, it is necessary to positively value the Law’s attribution of a leading role to collective bargaining as an instrument to control contractors’ fulfilment of obligations with their workers (particularly those related to salaries), as well as the “social or labour qualitative criteria that represents a “special condition” (...) that contractors may have to fulfil in the execution of public contracts”¹⁵⁵.

The role assigned to collective bargaining in terms of conventional contractual subrogation is also decisive, as will be analysed herein.



¹⁵³ Medina Arnaiz, T., “Las cláusulas sociales en la contratación pública: su consolidación en el ordenamiento jurídico español tras el impulso europeo”, in García Romero, B., Pardo López, M.ª. M. (Dir.), *Innovación social en la contratación administrativa...*, op. cit. Page 72.

¹⁵⁴ The mandatory introduction of the need to identify “a person responsible for the contract” in Article 62 LCSP fulfils this purpose, although, in practice, it is not always easy to appoint a responsible person for each contract.

¹⁵⁵ Casas Baamonde, M.ª. E., “La negociación colectiva en la Ley 9/2017, de 8 de noviembre, de Contratos en el Sector Público”, *DRL*, 8/2018, Page 888.

5.3

THE MAIN PROBLEMATIC AND/OR CONTROVERSIAL QUESTIONS

5.3.1 Link to the purpose of the contract

Apart from questions related to the distribution of powers between the central State and Autonomous Communities in the context of administrative-territorial organisation characterised by sharp decentralisation¹⁵⁶ and sticking to the questions that have the greatest impact on social and labour rights, the main obstacle to the consolidation of the strategic reconfiguration of public procurement undoubtedly derives from the difficult specification in a legal regulation of the balance between the strategic reorientation of public procurement that enables instrumental objectives to be fulfilled, and the necessary respect for the rules on free competition in the market. Paradigmatic expression of the complexity of the search for this balance is certainly the limitation derived from the Union law of the necessary tie between the social provisions, considerations or criteria and the purpose of the contract, as well as binding requirements that inevitably favour the protection of the right to the free competition on the fulfilment of instrumental purposes by the Administration through its procurement activity.

In spite of the attempts of the 2014 Directive to codify the reorientation in the most flexible sense of the TJUE jurisprudence¹⁵⁷, the introduction of social and labour criteria and considerations in the different phases of public procurement in Spain continues to face special consolidation difficulties in practice, particularly when trying to configure them as award criteria¹⁵⁸. It is also one of the questions in which the disparity of criteria in the administrative doctrine has been most notable between, on one hand, the Central Administrative Court of Contractual Appeals (TACRC, hereinafter) and, on the other hand, regional Administrative Courts¹⁵⁹.

The contrasts revolve around the configuration of two possible interpretations: one that is stricter, inherited from the traditional vision of public procurement, in which qualitative award criteria must lead to an improvement in the level of performance or contract execution, introducing a direct relationship with the object of the contract.

The other is more lax and flexible, more in accordance with the spirit of the new regulation - although it is not yet consolidated - which conceives this tie in a more lax sense, considering it sufficient to accredit that the incorporation of qualitative criteria leads to an improvement in the performance level or execution of the contract, in any of its aspects (social, labour, environmental or innovation) and in any stage of its life cycle, even when these aspects do not form part of its material substance¹⁶⁰.

¹⁵⁶ The starting point is evidently the State's exclusive power for the approval of the bases and the legislative development of labour legislation, among others (Article 149.1. 7 CE) and basic legislation on administrative contracts and concessions and on the legal system of the Public Administrations (Article 149. 1. 7 and 18 EC). Recently, the question has been raised again due to the unconstitutionality appeal lodged by the Autonomous Community of Aragon against certain provisions of the LCSP as it considers that its powers in the field are encroached upon. The appeal was resolved with STC 68/2021, of 14th March, which has declared certain provisions of LCSP to be unconstitutional and null.

¹⁵⁷ Particularly significant in this respect is the Judgement of the European Court of Justice of 10th May 2012, Commission Versus The Netherlands (C-368/10).

¹⁵⁸ As a general rule, the introduction of social considerations in the bidding phase will only be admissible for those contracts that include this subject in its purpose, such as, for example in the case of contracting a telephone attention service in gender violence promoting the hiring of women with particular difficulties to enter the labour market. De Guerrero Manso, C., "*Guía Práctica sobre la inclusión de las cláusulas sociales en la contratación pública, con especial atención a las cláusulas que la integración y participación en los contratos de las mujeres*", 2019, Pages 25 and 26, available at: [Guía práctica sobre la inclusión de cláusulas sociales en la contratación pública, con especial atención a las cláusulas que permitan la integración y participación en los contratos de las mujeres \(aragon.es\)](#). In the same respect, Gómez Fariña, B., "*Posibilidades y límites generales de las cláusulas sociales y medioambientales como criterios de solvencia*" in Pardo López, Mª, M., Sánchez García, A., *Inclusión de cláusulas sociales y medioambientales en los pliegos de contratos públicos*. Guía práctica profesional. Aranzadi Thomson Reuters, 2019, Page 72. However, this appears to us to be an excessively restrictive interpretation that does not accommodate the purposes of European and Spanish regulations.

¹⁵⁹ For example, whilst an award criteria designed to value the existence of a social conciliation plan has been admitted by the Judgement of the Administrative Court for Public Procurement (TACP) of Madrid 16/2016, of 3rd February and by the Agreement of the TAPC of Aragon, of 30th August 2016, a similar criteria has been annulled by the Judgement TACRC 679/2017, of 27th July, which considers that "Although the reconciliation of family and working life is desirable, it is not possible to know how this reconciliation is connected to the purpose of the contract through the examination of the specifications". The same is advocated regarding the clause related to the commitment of incorporating personnel in a situation or at risk of exclusion from the labour market or people with disabilities in the workforce for the execution of the contract, as well as people who are recognised as victims of terrorism, in accordance with the prevailing regulation.

¹⁶⁰ Note that in the original draft of the Draft Bill of the LCSP, it was considered that the inclusion of a specific award criteria must be justified by the fact that this criteria "will add value to the object, use or purpose of the contract". However, it was a mistaken limitation insofar as the State Council clarified in its Verdict 1116/2015, of 10th March, that there may be "award criteria whose link to the object of the contract is clear, without being so evident that value is added to the object of the contract or its use or purpose". Bearing mind these considerations, it was finally decided to eliminate this reference from the Draft Bill that was raised to Parliament.

In accordance with the first interpretative option, such aspects as social, labour, environmental, innovation that do not enable bids to be comparatively evaluated in terms of their performance of the object of the contract as defined in the technical specifications cannot be used as award criteria. In accordance with the second option, criteria or conditions that value aspects that transcend the inherent qualities of the services that are contracted or which refer to social, labour, environmental or innovation factors in any stage of the life cycle of the work, product or service would be accepted¹⁶¹.

More generally, those clauses that refer to corporate social responsibility policies or which represent undue influence in the business policy of the contractor/bidder or those that fail to respect the principle of proportionality which is now expressly set out in Article 145.5.c) LCSP, have been considered unacceptable, although they were required by the administrative and judicial doctrine¹⁶² and must be understood to have been fulfilled when the benefits deriving from award criteria that enables an advantageous bid for public interests exceeding the prejudices for business freedom to be identified.

5.3.2 The role assigned to collective agreements and the preference applied to sectoral agreements over those of the company that devalue the work conditions.

Repeated references in Spanish regulations to the necessary respect for the labour standards set out in the sectoral collective agreements in the award phase and in contract execution (Articles 101.2, in fine¹⁶³; 102.3, in fine¹⁶⁴; 122.2¹⁶⁵; 149.4, in fine¹⁶⁶; Article 202.2¹⁶⁷) have raised the doubt concerning their compatibility with the flexibility instruments introduced in internal regulations as a result of the important and controversial labour reform in 2012¹⁶⁸. Through this, the Spanish legislator attempted to champion the company as a privileged area of definition of employment and work conditions through the easing of the opt-out clause in Article 82.3 of the Workers' Statute (ET, hereinafter) which grants power to companies, under certain circumstances, to refrain from applying the prevailing collective agreement in a series of issues of special importance for the interests of the workers, such as the organisation of the working hours, the shift system and the work and performance system, as well as the remuneration system and salary amounts) and, above all, through the absolute preference (in the sense that it is negligible for the negotiators) for the company agreement over the sector agreement in a list of issues of equal importance, such as the determination of the salary, organisation of the working hours, the professional classification system, etc. (Article 84.2 ET). In spite of the interpretative conflicts that still exist, there is no doubt that the LCSP quite rightly understands that they are flexibility instruments that intent to lower the working conditions and those set out in the sectoral agreements, establishing a preference to contract companies that have not resorted to them in order to avoid the presentation of bids that aim to abnormally or disproportionately reduce the prices or costs related to the contract in detriment to the workers' rights and competition between bidders¹⁶⁹. This has led to talk of a true counter-reform by LCSP, re-establishing

¹⁶¹ The dilemma is raised in the terms indicated in the text of the cited "Three-yearly report on public procurement ..., Op. cit., Pages 144-45, which urges the European Union to clarify the question.

¹⁶² Previously, the TACRC Judgement of 21st April 2017 for which "20 points was reserved, within the subjective value, for quality employment that was significantly better than another, the work plan for the provision of the service also represented a high percentage of the total score, which could be decisive for the contract award" (Administrative Court of Public Contracts of Aragon – ATAPC Aragon - 30th August 2016)?

¹⁶³ When it comes to calculating the estimated value of the service contracts and service concession in which labour is relevant, this provision forces "labour costs of the applicable sectoral collective agreements" to be taken into consideration.

¹⁶⁴ When it comes to calculating the contract price "in those services in which the main economic cost are labour costs", this provision forces "the economic terms of sectoral, national, regional and provincial collective agreements applicable in the place where the services are provided to be taken into consideration".

¹⁶⁵ This provision forces the specific administrative clauses to include a reference to the "obligation of the successful bidder to fulfil the salary conditions of workers in accordance with the applicable sectoral collective agreement".

¹⁶⁶ This provision forces the Administration to reject abnormally low bids because they violate the provisions set out in the prevailing sectoral collective agreements, among other regulations".

¹⁶⁷ This provision establishes that social considerations introduced as special execution conditions may be imposed in order to ensure the fulfilment of the "applicable sectoral and regional collective agreements".

¹⁶⁸ Law 3/2012, of 6th July, *on urgent measures for the labour market reform*. For a general analysis of the impact of the aforementioned labour market reform on the Spanish collective bargaining system, reference is made to Baylos Grau, A., Trillo Párraga, F. J., Castelli, N., *Negociar en crisis. Negociación colectiva en los países del sur de Europa*, Bomarzo, Albacete, 2014.

¹⁶⁹ This is easily checked by just taking note of the parliamentary debates which led to the rejection of the 3 amendments received by the Senate (Numbers 253, 254 and 255) presented by the Popular parliamentary group in the processing phase of the Law and which intended to eliminate the reference to sectoral collective agreements. For its analysis, see Rojo Torrecilla, E., *¿El inicio de la contrarreforma laboral? La prioridad de los convenios sectoriales en la Ley de contratos del sector público (frente a la de los convenios de empresa en la Ley del Estatuto de los trabajadores)*, available at: [EL BLOG DE EDUARDO ROJO: ¿El inicio de la contrarreforma laboral? La prioridad de los convenios sectoriales en la Ley de contratos del sector público \(frente a la de los convenios de empresa en la Ley del Estatuto de los trabajadores\). \(eduardorojotorrecilla.es\).](http://EL BLOG DE EDUARDO ROJO: ¿El inicio de la contrarreforma laboral? La prioridad de los convenios sectoriales en la Ley de contratos del sector público (frente a la de los convenios de empresa en la Ley del Estatuto de los trabajadores). (eduardorojotorrecilla.es).)

- although only with limited effects on the regulations of public sector contracts and not always coherently¹⁷⁰
 - of sectoral collective bargaining as the backbone of work relations in the different sectors of activity¹⁷¹. More generally, the express reference to the possibility of linking procurement to the labour standards set out in the collective agreement for the sector, it appears to settle the discrepancies that had arisen in the administrative doctrine in relation to this question during the validity of the previous regulation¹⁷².

More problematic is the admission of the possibility of requiring bidders and contractors to respect stricter labour or social standards than those set out in applicable legislation and in collective agreements (of overall effectiveness), particularly when they are established as award criteria. The contrast here lies in the relationship of interdependence between improved working conditions and the workers involved in the contract execution, on one hand, and the better service object of the contract, on the other hand. While some judgements that have admitted this tie¹⁷³, most continue ruling against it¹⁷⁴.

Raising social and labour standards with respect to those set out in the legal or conventional regulation, in all cases of public procurement likely to have a transnational dimension may be configured as an obstacle for European companies to exercise their right to the free provision of transnational services and free competition in the market in light of the interpretation by the TJUE. In this respect, whilst it is admitted that the raising of

¹⁷⁰ For a detailed analysis of the drafting that is not always coherent of the provisions that involve collective bargaining, see Casas Baamonde, M^a. E., "La negociación colectiva en la Ley 9/2017...", op. cit., Pages 882 et seq.

¹⁷¹ Rojo Torrecilla, E., *¿El inicio de la contrarreforma laboral? ...*, Op. cit.

¹⁷² In accordance with the public procurement regulation, the TACP of Madrid, in Judgement 19/2018, of 10th January 2018, considered a clause that established the application of the salary tables set out in the National Collective Agreement for Security Firms to all workers subscribed to the service provision as an essential condition. The TACP of the Canary Islands, in Judgement 050/2017, of 20th April 2017, admitted the possibility of a special execution condition through which contractors are forced to apply the working conditions set out in the most recent prevailing sectoral and regional collective agreement, provided that they fulfil the requirements of the public procurement regulation. On the other hand, the administrative body of contractual appeals in the Basque Country, in Judgement 1/2018, of 3rd January 2018, considered that an obligation imposed in the specifications, in terms of remuneration and working conditions set by the sectoral collective agreement, which did not follow any of the purposes in the execution conditions of a social nature in accordance with Article 118 of the TRLCSP was applicable.

¹⁷³ Judgement TACP of the Community of Madrid 16/2016, of 3rd February. The Court considers that the inclusion of social criteria, particularly in contracts in which there are no personal services and in which the essential component lies in the cost of labour, it is not a discriminatory treatment for any company. In the same respect, Judgement of 10th May 2017 of the same Court. See also the most recent Judgement 359/2019 of the TARC of Catalonia which establishes that contracts whose purpose is the provision of services to people and in which the main factor in the cost structure is that of personnel, there is a differentiating and contributing element in the appreciation of the tie between the criteria and the object of the contract in terms of results or performance, provided that the guarantee of quality and continuity of service is particularly related. The judgement is of special interest as it clarifies that, in such cases, the establishment of maximum percentages for salary increases to be proposed in the respective proposals must be proportional in relation to the global score and the internal allocation. In the same respect, Guideline 1/2019, of 19th June, of the General Department for Public Procurement of the Regional Government of Catalonia, with the title "Establishing criteria for the application of clauses for labour and salary improvements as an evaluation criteria in certain contracts".

¹⁷⁴ In the Judgement TACRC, of 21st April 2017, the court claimed that "the mere increase in remuneration or improvement in the working conditions for the workers of the successful bidder should fit easily into those contemplated in community regulations, particularly bearing in mind that the basic requirement for the execution of all public contracts is still the bid that is economically most advantageous or the Administration and, in turn, all of the criteria must be related to the object of the contract". The same is set out in the Judgement by the same Court of 26th May 2017, in which the obligation to maintain the remuneration established in the national agreement for security firms throughout the entire validity of the contract is analysed. Particularly significant is Judgement TACRC 235/2019, of 8th March which annuls the social criteria included by the Principality of Asturias for the award of a cleaning service at the premises of the regional Radio-Television station, which valued the improvement of the salary conditions of the staff subscribed to the contract with respect to those established in the sectoral agreement and the specific conciliation measures set out specifically and quantitatively in the specifications due to the lack of association with the object of the contract, claiming that: "*In this respect, a bid that proposes a better salary in excess of that set out in the collective agreement, higher than that bid by another bidder does not necessarily mean that the former bidder's workers provide a better quality service than those of the latter, nor does it significantly affect the execution of the contract...*". Similarly, the TACRC in its judgements of 8th and 29th March 2019 establishes that the high quality and the eradication of precarious jobs in the affected sector in order to provide a better service to users is not a necessary or sufficient condition to appreciate the association with social criteria in the object of the contract. Hesitations are also confirmed on analysing the judicial doctrine. See STSJ of Madrid 181/2019, of 14th March which has declared the nullity of the "improvements to working conditions" award criteria, not only for a lack of association with the object of the contract, but also due to the lack of respect for the principle of proportionality and for being discriminatory by favouring companies with a greater funding capacity. It also alludes to the discriminatory effect on company workers who are not subscribed to the execution of the contract, as well as referring to a possible violation of the system of sources of labour relations that does not contemplate the administrative contract. In the same respect, see STSJ of Madrid 136/2018, of 23rd February, which annulled Judgement 17/2017, of 18th January of the TACP of Madrid. See also the Contentious-Administrative Chamber of the TSJ of Madrid, which in view of the objection to the Judgement of the TSCP of Madrid 16/2016 states that the "controversial criteria (...) represents clear and undue interference in the sphere of salary regulation of workers, which must be excluded from the evaluation criteria for the purpose of awarding bids", whereby it is sufficient to comply with the minimum legal requirements or those of the applicable collective agreement, particularly when the ET allows the company collective agreement to prevail in terms of salary.

5.3.3.2 The problems related to the reversal of previously outsourced public service

Another interpretative problem has arisen in relation to the subrogatory effect imposed by legal or conventional obligation on the Public Administration which decides to resume public services that were previously outsourced and managed by private companies¹⁸⁸. In this case the subrogation obligation in employment contracts of personnel affected by the subrogation may defy the rules governing access to public service, which by constitutional law (Articles 23.2 and 103.3 EC) must be governed by principles of equality, merit and capacity.

The starting point in this matter is the character not always unambiguous of the subrogation obligation in labour contracts of staff affected by the re-internalisation/re-municipalisation/reversal of the previously outsourced public service whenever the elements that make up the legal succession set out in Article 44 ET occur¹⁸⁹. In all of these cases, as previously indicated, the doubt arises over the potential contrast between this obligation from the LCSP and the rules governing access to public service.

Note also that on the date of coming into force of LCSP, the 26th Additional Provision of Law 3/2017, of 27th June, on General State Budgets for 2017 (LPGE 2017, hereinafter) was also in force, which prohibited Public Administrations from considering personnel incorporated in the public sector by virtue of extinguished contracts “for fulfilment by resolution, including rescue (...) from being considered to be public employees” whereby the provisions on succession of companies in labour regulations (Article 44 ET) is applicable to such personnel. The regulation was not only declared unconstitutional, although only on competence grounds¹⁹⁰, but it was also repealed by LPGE for 2018¹⁹¹, whose 43.2nd Additional Provision now expressly admits the continuity of labour contracts, although subordinately to the call for a selection process and provided that the situation of company succession arises. Workers would then be considered to be “subrogated staff”¹⁹² (never public employees) without the need to wait for the judicial sentence.

Here, the problem lies in the relationship with the compatibility of this controversial solution, on one hand, with the provisions of Directive 2001/23/EC and its internal transposition regulation in all cases in which the personnel affected fail to pass the selection process. This in effect could represent an illegitimate restriction of the field of application of the protection provided by European regulations¹⁹³. On the other hand, this solution hardly fits with the TJUE doctrine in the matter of *Correia Moreira*, although the internal courts appear to rule out its application to the Spanish case for the time being¹⁹⁴.

Having said this, the subrogation imposed under the applicable collective agreement has also proven to be problematic, given that, as has been clarified by the Fourth Chamber of the Spanish Supreme Court, “the collective agreement may not contain obligation clauses affecting those who are not part of the negotiation, nor may establish work conditions that companies that were not included in its field of application would have to assume”¹⁹⁵. Another different thing is that the subrogatory effect is set out by an agreement held by the Administration itself in order to ensure jobs are maintained in certain situations, which is undoubtedly applicable.

¹⁸⁸ Regarding the intense process of privatisation/outsourcing of public services in Spain and its effects on the services themselves and the staff responsible for providing them, see Trillo Párraga, F. J., *Externalización de servicios públicos y su impacto en los derechos laborales*, Bomarzo, Albacete, 2017.

¹⁸⁹ However, this also occurs in the case set out in Article 130.2 LCSP. De Sande Pérez-Bedmar, M^a, “*Condiciones de subrogación en contratos de trabajo...*”, Op. cit., Page 877. For a reconstruction of the evolution of the judicial doctrine on the configurability of a company transmission in all cases of reversal of previously outsourced public service, Rodríguez Rodríguez, E., “*La subrogación empresarial en los procesos de reversión de contratos y concesiones administrativas ante una Administración Pública digitalizada*”, *Azterlanak, Revista Vasca de Gestión*, n. 17/2019, pages 54 et seq.

¹⁹⁰ STC 122/2018, of 31st October, Appeal 4710/2017

¹⁹¹ Law 6/2018, of 3rd July.

¹⁹² Variant of the controversial figure of “indefinite nor fixed” created by jurisprudence, which attempted to fill the legal loophole related to the case of irregularities in labour hiring in the Public Administrations. Monereo Pérez J. L., Moreno Vida, M^a. N., López Insua, B., “*La descentralización productiva a través de la subcontratación...*”, op. cit., Page 25. See also, STS) of Aragon, of 19th March 2018 ([rec. 214/2015](#)).

¹⁹³ Monereo Pérez J. L., Moreno Vida, M^a. N., López Insua, B., “*La descentralización productiva a través de la subcontratación...*”, op. cit., Pages 23 and 24.

¹⁹⁴ SSTSJ Navarra 1st, 3rd, 8th and 15th October 2020 ([rec. 184/2020](#); [Appeal 183/2020](#); [Appeal 189/2020](#); [Appeal 190/2020](#); and [Appeal 198/2020](#)). See Beltrán Heredia, I., “*Reversal in the Public Sector and the ‘Correia Moreira’ doctrine: no cabe declarar fijeza porque los principios constitucionales están por encima de la Directiva 2001/23 (STSJ Navarra 1/10/20)*”, available at: [Reversión en el sector público y doctrina ‘Correia Moreira’: no cabe declarar fijeza porque los principios constitucionales están por encima de la Directiva 2001/23 \(STSJ Navarra 1/10/20\) – UNA MIRADA CRÍTICA A LAS RELACIONES LABORALES \(ignasibeltran.com\)](#) and also González González, E., “*The Sentence of the Court of Justice, of 13th June 2019, ‘Correia Moreira’ ¿Un nuevo golpe al principio de mérito y capacidad?*”, available at: [La sentencia del Tribunal de Justicia de 13 de junio de 2019, «Correia Moreira» ¿Un nuevo golpe al principio de mérito y capacidad? - El Derecho - Administrativo](#)

¹⁹⁵ SSTS of 21st December 2010; of 11th November 2011, of 17th September 2012, among others.

For the same reasons analysed above regarding incompatibility with the rules on access to public service, the possibility that the subrogatory effect derives from the Administration’s voluntary decision to be responsible for the personnel who provided the service in the contract has finally been ruled out in all cases of failure to apply Article 44 ET or the non-existence of a conventional obligation. However, this may once more hinder the application of the European regulation in terms of business transfer in all cases of “dematerialised” activities in which the subrogatory effect occurs as a result of the entrepreneur’s decision to be responsible for an essential part of the workforce. It is a problem that could become even more significant in the future as a consequence of the Administration’s digitalisation processes ¹⁹⁶ which multiply the hypotheses of dematerialised activities¹⁹⁷.



¹⁹⁶ In 2020, electronic public procurement represented 83.48% in Spain, according to the aforementioned “Three-yearly report on public procurement in Spain...”, Page 21.

¹⁹⁷ Rodríguez Rodríguez, E., “La subrogación empresarial en los procesos...”, op. cit.

5.4

CONCLUSION

As can be seen from the analysis carried out, the implementation in the Spanish legal system of strategic public procurement has been long, difficult and complex. Despite the change in perspective undoubtedly pursued by the transposition regulations of European directives that have led to abandon the reference to price as the only criterion for tendering and awarding public sector contracts, its realization in practice has not been neither easy, nor peaceful, as shown by the high level of conflict in the matter and the not always coherent solutions offered by the different courts and jurisdictional orders.

The main difficulties revolve around multiple factors. Among them, undoubtedly the main one is the search for the complex balance between reorientation in a strategic sense of public procurement and guarantee of free competition in the market; equilibrium paradigmatically embodied by the need for social considerations to be linked to the object of the contract. The intrinsic ambiguity of this conditioning factor of European derivation and the prevalence of restrictive interpretative options on the part of the different jurisdictional and administrative bodies undoubtedly constitute a decisive brake on the reorientation of public contractual activity. It is hoped that the European institutions will proceed to better clarify the operation of this limit, establishing clear and uniform interpretative lines for all countries. It is fundamentally a matter of avoiding interpretative and application solutions of the requirement of connection with the object of the contract that continue to privilege the protection of the principle of free competition over any other purpose and social objective, in line with the objective set in the Treaties to act "For the sustainable development of Europe based" among other things, "on a highly competitive social market economy, aimed at full employment and social progress" (Art 3 TEU).

Added to this is the objective difficulty of establishing efficient and effective mechanisms to control compliance with the requirements in social matters imposed on contractor companies in the different phases of the contracting procedure. In this sense, the important role assigned by law to trade union organizations (expressly endowed with active standing to file special appeal in hiring matters) and to collective bargaining, through its recognition as a fundamental instrument for monitoring compliance, must be positively valued.

Apart from the above, multiple interpretative and applicative questions remain open in the approved regulation that the transposition regulations have not been able to solve. The reference is undoubtedly to the compatibility of the transposition rule with the current regulations regarding the structure of collective bargaining or succession of contracts and also to the problems related to the obligations of subrogation of the workforce in any case of succession of contracts (especially in the case of resumption by the Administration of a service previously outsourced and managed by a private company). The reference is also to the doubtful possibility of demanding higher standards for the protection of workers' rights than those established in the regulations of legal or conventional source as a way of privileging the most socially committed companies.

The complexity of the issues to be dealt with and the multiple interests involved, the not always correct formulation of the precepts and the permanent ambiguity that characterizes European policies on social and labor matters undoubtedly represent a drag on the full achievement of the objectives pursued. In this context, trade union organizations and collective bargaining are called upon to play an important role both in compensating and specifying the ambiguities of the legal regulation, arbitrating negotiation instruments that are capable of offering solutions to the main problematic issues evidenced and that go along the lines of deepening the commitment to achieve social improvements, such as when it comes to monitoring the correct compliance by contractor companies with their obligations to their workers.

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The framework for public procurement and concession by the EU institutions

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6

Public procurements and concessions by EU institutions are not regulated by the 2014 Public Procurement Directives (Directive 2014/23/EU, 2014/24/EU and 2014/25/EU). Indeed, Directives are not legally binding upon EU institutions.

The framework for procurements and concessions by the EU institutions is currently established by Title VII and Annex I of the Regulation 2018/1046 (EU Financial Regulation). In the present report, we will examine the rules of the EU Financial Regulation affecting social and labour rights. In particular, we will point out the cases in which the latter derogates from social clauses included in the 2014 Directives¹⁹⁸.

Before starting our analysis, it is worth mentioning that procurements and concessions by EU institutions are hardly covered by the literature and by the studies on public contracts¹⁹⁹. In the most recent collection of good practices, for example, only one case comes from the European Commission (2020, p. 35). Besides, the Commission's Guidance Notice on socially responsible public procurement (European Commission 2021a) refers only to the 2014 Directives, and consequently ignores tenders launched by EU institutions.

6.1

MINIMUM REQUIREMENTS

The 2018 Financial Regulation has replaced previous complex rules and procedures with a single rule book allowing for easier access to EU funding²⁰⁰. According to the 2018 regulation, «all contracts financed in whole or in part by the budget shall respect the principles of transparency, proportionality, equal treatment and non-discrimination» (Article 160.1), general principles that must be enforced in all procurement procedures throughout the European Union.

When launching a procurement procedure, the contracting authority shall indicate «which elements define the minimum requirements to be met by all tenders» (Article 166.2). The latter «shall include compliance with applicable environmental, social and labour law obligations established by Union law, national law, collective agreements or the applicable international social and environmental conventions listed in Annex X to Directive 2014/24/EU» (Article 166.2)²⁰¹.

This rule reproduces broadly the content of Articles 18.2 of the Directive 2014/24/EU and 30.3 of the Directive 2014/23/EU. However, it is not clear which social and labour law obligations are the applicable: the ones of the country where the tenderer is established? Or the ones of the country where the service should be performed? And if the service should be performed in more than one country, what happens?

In order to answer these questions, we should keep in mind that, according to the rules established by the Regulation Rome I, a contract of employment «shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work» (Article 8.2 Reg. 593/2008). Therefore, if the service outsourced by an EU institution is performed in the country where the worker habitually works (e.g. a cleaner engaged by a company active in Belgium providing cleaning services for the European Commission in Brussels), the applicable social and labour law obligations should be determined according to the principle of the *lex loci laboris*.

However, the Financial Regulation does not clarify neither which sectorial collective agreement shall be applied nor at which level collective agreements must be complied with (national level only? Or national and local level?). Another problem concerns the types of collective agreements that shall be respected: only the *erga omnes* ones? Or, as far as the principle of non-discrimination among undertakings is fulfilled, also the collective agreements which are generally applicable and the ones concluded by the most representative employers' and labour organisations?

¹⁹⁸ According to Article 161 of the 2018 Financial Regulation, «To ensure that Union institutions, when awarding contracts on their own account, apply the same standards as those imposed on contracting authorities covered by Directives 2014/23/EU and 2014/24/EU, the Commission is empowered to adopt delegated acts [...] to amend Annex I to this Regulation, in order to align that Annex to amendments to those Directives and to introduce related technical adjustments».

¹⁹⁹ See, e.g. Andhov, Caranta, Wiesbrock 2019; Lichère, Caranta, Treumer 2014; Rhode 2018; Marique, Wauters 2016; Skovgaard Ølykke, Sanchez-Graells 2016.

²⁰⁰ On the shortcomings of the previous EU Financial Regulation see European Court of Auditors 2016.

²⁰¹ The applicable social and labour law obligations shall be specified also in the draft contract (§ 16.4 Annex I).

The EU Financial Regulation does not contain any rule on the exclusion grounds. Consequently, EU institutions do not seem to be obliged to exclude a tenderer if convicted for child labour or other forms of trafficking in human beings or is in breach of its obligations relating to the payment of taxes or social security contributions (Articles 57 Directive 2014/24/EU and 38 Directive 2014/23/EU). Neither the Financial Regulation has exploited the possibility to exclude from participation in a procurement procedure economic operators that have violated the applicable social and labour law obligations (Articles 57.4 a) Directive 2014/24/EU and 38.7 a) Directive 2014/23/EU). However, a tenderer can be excluded by a procedure launched by an EU institution when its offer appears to be abnormally low because it does not comply with the applicable social and labour law obligations (see § 3 below).

6.3

THE AWARD METHODS

Procurement procedures for awarding concession contracts or public contracts shall take one of the eight forms listed by Article 164 of the Financial Regulation. However, only for two of them (the innovation partnership²⁰² and the competitive dialogue²⁰³), the contracting authority shall base the award of contracts on the best price-quality ratio (§ 7.2 and 10.1 Annex I). In the remaining procedures (i.e. the open procedure, the restricted procedure, the design contest, the negotiated procedure, the competitive procedure with negotiation and the procedure involving a call for expression of interest), the contracting authority shall apply the most economically advantageous tender, which consists in one of three award methods: lowest price, lowest cost or best price-quality ratio (Article 167.4).

The relative weighting which the contracting authority gives to each of the criteria chosen to determine the most economically advantageous tender shall be specified in the procurement documents, except when using the lowest price method (§ 21.2 Annex I)²⁰⁴. When it opts for the best price-quality ratio, the contracting authority takes into account the price or cost, as well as other quality criteria linked to the subject matter of the contract (Article 166.4). However, in all cases «the weighting applied to price or cost in relation to the other criteria shall not result in the neutralisation of price or cost» (§ 21.2 Annex I).

The above-mentioned rules on the award methods broadly reproduce Articles 67 of Directive 2014/24/EU and 41 of the Directive 2014/23/EU. However, the Financial Regulation does not exploit the possibility to «provide that contracting authorities may not use price only or cost only as the sole award criterion» (Articles 67.2 Directive 2014/24/EU and 41.2 Directive 2014/23/EU). Neither the Financial Regulation specifies that contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that this tender does not comply with the applicable social and labour law obligations (Article 56.1 Directive 2014/24/EU). Besides, the Financial Regulation does not mention that social aspects can be included among the criteria on whose basis the best price-quality ratio is assessed (Articles 67.2 Directive 2014/24/EU and 41.2 Directive 2014/23/EU).

If the price or costs proposed in a tender launched by an EU institution appears to be abnormally low, the contracting authority shall request details of the constituent elements of the price or costs which it considers relevant and shall give the tenderer the opportunity to present its observations (§ 23.1 Annex I). In particular, the contracting authority may consider observations relating to compliance of the tenderer and subcontractors with applicable obligations in the fields of environmental, social and labour law (§ 23.1 d) and e) Annex I). And «the contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations in the fields of environmental, social and labour law» (§ 23.2 Annex I). Also, in this case the rules broadly reproduce what is established by Article 69 of Directive 2014/24/EU.

²⁰² An innovation partnership aims «at the development of an innovative product, service or innovative works and the subsequent purchase of the resulting works, supplies or services, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the partners» (§ 7.1 Annex I).

²⁰³ In the competitive dialogue, the contracting authority opens «a dialogue with the candidates satisfying the selection criteria in order to identify and define the means best suited to satisfying its needs» (§ 10.2 Annex I) and continues it «until it can identify the solution or solutions which are capable of meeting its needs» (§ 10.3 Annex I).

²⁰⁴ «If weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance» (§ 21.2 Annex I).

6.4

RELIANCE ON THE CAPACITY OF OTHER ENTITIES AND SUBCONTRACTING

Where appropriate and for a particular contract, an economic operator may rely on the capacities of other entities, «regardless of the legal nature of the links which it has with them». In this case, it shall prove to the contracting authority that «it will have at its disposal the resources necessary for the performance of the contract by producing a commitment by those entities to that effect» (§ 18.6 Annex I). Besides, the contracting authority shall verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and shall require the latter to replace the one which does not meet a relevant selection criterion (§ 18.7 Annex I). If an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial capacity, «the contracting authority may require that the economic operator and those entities be jointly liable for the performance of the contract» (§ 18.6 Annex I). The rules broadly reproduce Article 63 of Directive 2014/24/EU.

In the procurement by EU institutions, the contracting authority may also request information from the tenderer on any part of the contract that the tenderer intends to subcontract and on the identity of any subcontractors (§ 18.6 Annex I). This means that, in general, EU institutions are not bound to demand transparency on the subcontracting chain. The only case in which the contracting authority shall require the contractor to indicate the names, contacts and authorised representatives of all subcontractors involved in the performance of the contract is when works or services are provided at a facility directly under the oversight of the contracting authority (§ 18.6 Annex I).

This rule broadly reproduces Articles 71.5 of the Directive 2014/24/EU and 42.3 of the Directive 2014/23/EU. However, the latter allow Member States to enlarge the scope of the above-mentioned rules to other cases. In particular, the last paragraph of Article 71.5 authorises Member States to introduce rules that require the contractor to indicate also the names, contacts and authorised representatives of «subcontractors of the main contractor's subcontractors or further down the subcontracting chain»²⁰⁵. It has to be noted that, according to the Commission Notice "*Buying Social – a guide to taking account of social considerations in public procurement*" (C(2021) 3573, p. 91), information requirements «are highly recommended for the purposes of SRPP. Without basic information regarding the identity and location of subcontractors, it can be very difficult to enforce social clauses».

According to the EU Financial Regulation, the contracting authority shall verify whether the envisaged subcontractors fulfil the relevant selection criteria (including the applicable social and labour law obligations) only when subcontracting represents a significant part of the contract (§ 18.7 Annex I)²⁰⁶. Only in this case, the contracting authority shall require that the economic operator replaces a subcontractor which does not meet a relevant selection criterion (§ 18.7 Annex I).

Once more, the content of the Directives 2014/24/EU and 2014/23/EU is widely watered down. Indeed, Article 71.1 of the 2014 Directive always prescribes the observance of the social and labour law obligations by subcontractors and requires Member States to adopt appropriate actions to this end. Besides, according to Article 71.6, the contracting authority may always require the tenderer to replace a subcontractor that does not respect the applicable social and labour law obligations. In order to avoid any breach of these obligations, Article 71 allows also additional measures (that are missing in the EU Financial Regulation), such as:

- the possibility for the contracting authority to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors (Article 71.2; see also Article 42.2 Directive 2014/23/EU);
- a mechanism of joint liability between subcontractors and the main contractor for the applicable social and labour law obligations (Article 71.6; see also Article 42.4 Directive 2014/23/EU).

²⁰⁵ However, according to the Commission, Member States cannot impose to subcontractors a general prohibition to further subcontract (see the infringement procedure n. 2018/2273 against Italy).

²⁰⁶ Annex I does not clarify what "significant part" means.

To avoid payment delays and other fraudulent behaviours of the main contractor, Articles 71.3 and 71.5 of the Directive 2014/24/EU authorise the contracting authority to transfer due payment directly to the subcontractors. Also this rule is missing in the EU Financial Regulation.

Finally, in the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, the EU Financial Regulation allows the contracting authority to «require that certain critical tasks be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators, a participant in the group» (§ 18.8 Annex I). This rule reproduces Article 63.2 of Directive 2014/24/EU.

6.5

THE RECENT RULES ON SOCIAL CONDITIONALITY

The analysis of social clauses in procurement procedures by EU institutions is part of a much broader issue concerning the social impact of the activities financed by the European Union. In this perspective, it is worth mentioning the rules on social conditionality that have been recently introduced in the EU budget regulation with regard to European Funds. Notwithstanding the importance of the new rules, we should underline that, in many cases, they coexist with the rules on conditionality linked to the EU economic governance that have entailed severe consequences on workers' rights and labour conditions²⁰⁷. Due to the recent introduction, it is still not clear how the above mentioned social clauses will be enforced and if they will be able to prevent the effect of public budget constraints on workers' rights.

Among the social conditionality mechanisms we should mention, first of all, the regulation on a general regime of conditionality for the protection of the Union budget that has been adopted (EU Regulation 2020/2092) adopted besides the 2021-2027 multiannual financial framework (MFF), setting a maximum level of spending of €1,074 billion covering seven major areas (Council Regulation 2020/2093), and the Next Generation EU, amounting at € 750 billion (Council Regulation 2020/2094).

The Regulation 2020/2092 establishes the rules necessary for the protection of the Union budget; these rules apply only in the case of breaches of the principles of the rule of law in the Member States (Article 1). The rule of law refers to the Union value enshrined in Article 2 TUE, among which respect for human dignity and human rights, democracy, equality, and solidarity are listed. However, the Commission rule of law Reports, as well as the definition provided for by Regulation 2020/2092, focus mainly on civil and political rights, quite omitting any check on social rights (European Commission 2021).

Differently, the regulation laying down common provisions on the Union Funds (Regulation 2021/1060) imposes to the Member States and the Commission to respect fundamental rights and to comply with the Charter of Fundamental Rights (CFREU) when implementing the funds (Article 9.1). The regulation also obliges to integrate a gender perspective and to prevent any discrimination throughout the preparation, implementation, monitoring, reporting and evaluation of programmes (Article 9.2 and 9.3). Moreover, according to the regulation, UN Sustainable Development Goals shall be taken into account when pursuing the objectives of the funds (Article 9.4).

The effective application and implementation of the CFREU is then mentioned among the eligibility conditions that a Member State must fulfil when preparing a programme and must respect throughout all the programming period (Article 15 and Annex III). If the Commission concludes that the enabling conditions are not fulfilled, it shall not reimburse expenditures related to the specific programme (Article 15.6).

However, in this regulation, measures linking effectiveness of funds to sound economic governance have been also inserted (Article 19). In particular, the Commission may request a Member State to review and propose amendments of relevant programmes where this is necessary to support the implementation of a country-spe-

²⁰⁷ The literature on this point is very rich. See e.g. Lehdorff 2015; Van Gyes, Schulten 2015; Ferri, Cortese 2018.

cific recommendation adopted in accordance with Article 121.2 TFEU or with the regulation on the prevention and correction of macroeconomic imbalances (Regulation 1176/2011)²⁰⁸.

Similar measures have been inserted in the Regulation 2021/241 establishing the Recovery and Resilience Facility (i.e. the main fund belonging to the Next Generation EU). According to Article 10.1 of this regulation, where the Council decides in accordance with Article 126(8) or (11) TFEU that a Member State has not taken effective action to correct its excessive deficit, the Commission shall make a proposal to suspend all or part of the commitments or payments²⁰⁹. Therefore, although the general objective of the Facility shall be to contribute to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the Union, fostering high quality employment creation and implementing the European Pillar of Social Rights (Article 1), the pursuit of these objectives could be hindered by the budget constraints imposed within the European economic governance.

Besides, the national recovery and resilience plans «shall be consistent with the relevant country-specific challenges and priorities identified in the context of the European Semester, as well as those identified in the most recent Council recommendation on the economic policy of the euro area for Member States whose currency is the euro» (Article 17.3). Consequently, when assessing the relevance of the national plans, the Commission shall evaluate not only whether it contributes appropriately to the general objectives and to the implementation of the European Pillar of Social Rights, but also whether it effectively addresses «all or a significant subset of challenges identified in the relevant country-specific recommendations» or other relevant documents adopted by the Commission in the context of the European Semester (Article 19.3).

A clear evidence of the prominent role of the economic governance is given also by Article 27 that obliges Member States to report twice a year in the context of the European Semester on the progress made in the achievement of their recovery and resilience plan.

For the purposes of this Report, it is also worth noting that, in order to protect the financial interests of the Union, the Regulation 2021/241 obliges the Member States to collect data on the contractors and subcontractors (Article 22.2 d) ii). The rule is particularly relevant because it stresses the fact that, without a transparent subcontracting chain, it is not possible to control what happens therein.

Finally, we should mention the social elements recently inserted in the negotiation of the Common Agricultural Policy (CAP) reform (EFFAT 2021). According to the agreement reached during the trilogue, at the latest by 1 January 2025 all Member States are obliged to include in their national strategic plans a social conditionality mechanism. The scope of social conditionality includes several rules of the Transparent and Predictable working conditions Directive (Directive 2019/1152/EU), of the Directive 89/391/EEC on the measures to encourage improvements in the safety and health of workers at work, and of the Directive 2009/104/EC concerning the minimum safety and health requirements for the use of work equipment by workers at work. Furthermore, by 1 January 2025 the Commission will assess the feasibility of including Article 7.1 of the Regulation 492/2011 on the free movement of workers and will, if appropriate, propose legislation to that effect.

The social conditionality mechanism inserted in the CAP reform relies on the controls carried out by competent authorities responsible for the enforcement of applicable labour standards and labour legislation. The outcomes of those controls, as well as individual and collective complaints, have to be communicated at least once per year to the CAP Paying Agencies. On the basis of the communicated infringements, the CAP paying agencies can then impose a reduction (or a total exclusion) of subsidies to CAP beneficiaries²¹⁰.

²⁰⁸ If the Member State fails to take effective action in response to the Commission's request, the Commission may propose to the Council to suspend part or all the payments for the programmes concerned (Article 19.6). The scope and the level of the suspension shall take into account the economic and social circumstances of the Member States concerned and the impact of the suspension on programmes of critical importance to address adverse economic or social conditions (Article 19.11).

²⁰⁹ The scope and level of the suspension of commitments or payment to be imposed shall «take into account the economic and social circumstances of the Member State concerned, in particular the level of unemployment, the level of poverty or social exclusion in the Member State concerned compared to the Union average and the impact of the suspension on the economy of the Member State concerned» (Article 10.4).

²¹⁰ The level of sanctions corresponding to each workers' rights violation will be set at national level. However, the Commission is empowered to adopt a delegated act in order to harmonize the system of sanctions among Member States.

6.6

CONCLUSIONS

The legislation on public procurement by EU institutions still remains widely unexplored. In fact, this topic is analysed neither by the scholarship nor by the reports on the best practices (as abovementioned, only one of the best practices collected in the report *Making Socially Responsible Public Procurement Work*. 71 Good Practice Cases concerns the European Commission).

Besides, the 2014 Public Procurement Directives do not apply to the EU institutions. It is true that these directives are broadly recalled by the 2018 EU Financial Regulation that currently provides the framework for procurements and concessions by the EU institutions. However, many differences still exist. For the purposes of this report, it must be stressed that the EU Financial Regulation extensively waters down the rules that allow to limit subcontracting in order to defend workers' rights and to avoid other irregularities boosted by long subcontracting chains. Of particular concern is the failure to introduce both the possibility for the contracting authority to ask the tenderer to indicate the share of the contract it may intend to subcontract, and a mechanism of joint liability between subcontractors and the main contractor for the applicable social and labour law obligations.

Another regrettable issue concerns the weakness of the rules on the transparency of subcontracting chains. As stated by the European Commission (2021a, p. 91), without information regarding the subcontractors, it is very difficult to enforce social clauses. Besides, the lack of transparency deeply affects the subcontracting chain management, preventing any form of effective due diligence process.

Also the award methods established in the EU Financial Regulation present some shortcomings. First, the best price-quality ratio is not set as a general criterion. Then, the rule allowing the contracting authority not to award a contract to the tenderer that does not comply with the applicable social and labour law obligations is missing. Finally, the Financial Regulation does not oblige to include social aspects among the criteria on whose basis the best price-quality ration is assessed.

Another aspect that still remains unclear is the obligation to respect collective agreements. In fact, the 2018 EU Financial Regulation does not specify which national collective agreement must be fulfilled, which sectorial collective agreement shall be applied, or at which level collective agreements must be complied with. Another problem concerns the types of collective agreements that shall be respected: only the *erga omnes* ones? Or also the collective agreements which are generally applicable and the ones concluded by the most representative employers' and labour organisations? Unfortunately, we could not see any specific tender by EU institutions, so we could not verify how, in practice, these problems are solved²¹¹.

The Report shortly presents also the rules on social conditionality that have been recently introduced in the EU budget regulation with regard to European Funds. Due to their recent approval, we could not analyse how these rules operate in practice. A main concern relates to the coexistence of the rules on social conditionality with the rules on conditionality linked to the EU economic governance. In fact, on one side, Member States are demanded to respect certain social standards but, on the other side, they have to fulfil rigid prescriptions on public budget; and a wide literature has already shown what public budget constraints imply on workers' rights and collective bargaining.

²¹¹ Upon suggestion of the European trade unions, the Author contacted Anna Lupi (DG Grow) that kindly replied, mentioning the best practice collected in European Commission 2020, p. 35.

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Conclusion

The four country-reports on the implementation of the 2014 Public Procurement Directives provide for a controversial picture concerning the use and the legitimacy of social clauses in the national legislation. Without any doubt, the 2014 Directives have played a fundamental role to promote more socially and environmentally sustainable public procurements. All the Member States examined have widely exploited the social clauses therein present (see the Table below for the detailed measures adopted by each State). Consequently, in France, Germany, Italy and Spain, tenderers have to comply with applicable obligations in the field of environmental, social and labour law established by Union law, national law, collective agreements or International provisions listed in Annex X of the Directive 2014/24. All the countries analysed have thus fully implemented the general principles of procurement set out by Article 18 of the Directive 2014/24 that, as stated by the European Court of Justice (30 January, C-395/18, *Tim s.p.a.*, § 38), constitute cardinal requirements with which the Member States must always ensure full compliance.

Besides, the “most economically advantageous tender” has become the main award criterion, even if some exceptions, whose scope varies from country to country, are still possible. In order to evaluate the best quality-price ratio, German and Spanish national legislations expressly prescribe to consider qualitative aspects, such as social and environmental issues.

Rules on the exclusion ground have also been introduced. On this point, the French legislation is very interesting because it allows contracting authorities to exclude tenderers who have not respected the obligation to negotiate with trade unions provided for in the Labour Code. The Italian legislation instead lists among the exclusion grounds serious infringement to health and safety law and applies these exclusions also to subcontractors²¹².

All the four country-reports testify as well the importance of the rule on abnormally low tenderers. In fact, in all the four Member States, the contracting authorities shall reject low offers that result from non-compliance with environmental, social and labour obligations. In Spain, abnormally low bids can be rejected also when they depend on the violation of the relevant sectoral collective agreement. In Italy, the rejection clause applies also when non-compliance with environmental, social and labour obligations concerns subcontractors.

Other important rules promoted by the 2014 Directives concern transparency on the subcontracting chain. In France, the contract holder is allowed to subcontract only if it has obtained the contracting authority’s acceptance of the list of subcontractors. Similarly, in Germany, the contracting authorities have the right to know from the contractors which subcontractors they want to use for which activities.

Besides, Member States can limit, in different way, the possibility to subcontract. Subcontracting of the entire public procurement’s execution is usually forbidden (e.g. in France, in Italy). The contracting authority can as well require the contract holder to perform certain essential tasks (this happens e.g. in France, Germany and in Italy). In Italy, subcontracting is possible only for the services identified by the contracting authorities, a rule introduced as a result of a European Court of justice’s decision (26 September 2019, C-63/18, *Vitali*) and a Commission’s infringement procedure (see below).

Finally, all the four countries examined have introduced rules on joint and several liability. In Germany these rules are present in the Regional legislation. Instead, according to Italian legislation, in the event of delay in the payment of remuneration or social security contributions, the public administration has to directly pay the workers and the social security institute. Similarly, in France, the contracting authority directly pays the subcontractors for the part of the contract they perform; this rule applies also in favour of second-tier subcontractors, if the first-tier subcontractor provides for a delegation of payment. In Spain, the main contractor is jointly and severally liable for the three years following the completion of the contract in respect of the payment of contributions that the subcontractors should have paid during the performance of the contract. Besides, the contractor remains jointly and severally liable for the wages due to subcontractors’ workers during the year following the performance of the contract.

²¹² The latter rule has been recently challenged by the European Court of justice according to which «Article 57(4)(a) of Directive 2014/24 does not preclude national legislation under which the contracting authority has the option, or even the obligation, to exclude the economic operator who submitted the tender from participation in the contract award procedure where the ground for exclusion referred to in that provision is found in respect of one of the subcontractors mentioned in that operator’s tender». However, «contracting authorities must pay particular attention to the principle of proportionality», taking into account in particular the minor nature of the irregularities committed and evidence that demonstrates tenderer’s reliability despite the existence of that ground for exclusion (European Court of Justice 30 January, C-395/18, *Tim s.p.a.*, § 48 and 49).

As already mentioned, the 2014 Directives, as well as other changes in European legislation, have helped in solving problems raised under the previous regulation by several European Court of Justice's decisions²¹³. However, notwithstanding the important role played by the 2014 Directives to support the strategic use of public procurement to promote a more socially and environmentally sustainable development, it is still not clear to what extent the Member States can promote workers' rights and collective bargaining by limiting the market freedoms of tenderers.

As stated by the European Court of Justice, the general principles of procurement set out by Article 18 of Directive 2014/24, that include the obligations, for any economic operator, to respect, in the performance of the contract, environmental, social and labour law, constitute cardinal requirements with which Member States must always ensure full compliance (European Court of Justice, 30 January 2020, C-395/18, *Tim s.p.a.*, § 38). However, the rules laid down by the Member States or contracting authorities in implementing the provisions of the 2014 Directives must respect the principle of proportionality, i.e. must not go beyond what is necessary to achieve the objectives of these directives (§ 45). Consequently, in all the countries examined, several disputes still remain both on the precise meaning of the social clauses introduced when implementing the 2014 Directives and on their consistency with EU law.

In France, for example, the abnormally low offers are rejected but the definition of "abnormally low" is still debated by the jurisprudence. Besides, it is not clear if a social criterion (such as the professional integration of disadvantaged people) can be inserted among the award criteria in public contracts whose purpose is not solely social. In fact, French legislation allows a social clause to be included as a condition for the execution of the public contract (and not as an award criterion). Social clauses of execution can be voluntarily used by public authorities and this has probably prevented the fulfilment of the social objectives set by the French Government (at least 25% of public contracts including at least one social provision).

Another problematic issue in France is the so-called "Molière" clause which requires the exclusive use of the French language on construction sites or, failing that, that an interpreter is present therein. This clause has been presented as contributing to compliance with health and safety rules in the workplace. However, it presents two problems: on one side, it creates an obstacle for companies employing foreign workers and could be therefore considered as inconsistent with EU law; on the other side, it could be ineffective (e.g. in case workers present on the site speak different languages). In order to take seriously the problems that can be caused by linguistic barriers, more effective measures should be adopted, e.g. introducing, for the employers, an obligation to provide workers present on the site with language training.

According to the report on German public procurement legislation, the 2014 Directives boosted the renaissance of social clauses after the "Rüffert-Shock" (Schulten 2012). However, social criteria can be set only for the performance of the contract, and not with regard to the company's general employment policy or its working conditions. Moreover, all tenderers are demanded to comply with collective agreements, but only when they are universally applicable. For this reason, some regional public procurement acts contain minimum wage requirements for workers under public contracts above national statutory minimum wage. Such specific procurement-related minimum wages are often set at the lowest wage grade of the public sector collective agreement. The reason provided for this choice is quite relevant: indeed, the Federal States want to ensure a fair competition between services provided by public entities or by private companies and to avoid the contracting out of public services just for the reason to save labour costs.

In Italy, the cumbersome relationship between the national law-maker and the European institution has made the public procurement legislation a 'work in progress', subject to continuous amendments in order to comply with the EU regulations and policies. The rules on the exclusion grounds, for example, have been amended twice in order to respond to an infringement procedure initiated by the European Commission²¹⁴. However, scholars still doubt the consistency of Italian legislation with EU law. The abovementioned infringement procedure concerns also the prohibition for the auxiliary (i.e. the entity on whose capacity the tender relies on) to use more than one economic operator, as well as the prohibition, for a subcontractor, to further subcontract. Both rules still remain unchanged and this generates a certain degree of legal uncertainty. In fact, the national courts have to decide, case by case, if national legislation is or not consistent with EU law, and consequently they have to decide if the former has to be disapplied or not.

²¹³ On the previous EU legislation on public procurement and on the problems generated by the Court of Justice's case law see Schulten et al. 2012, and more in general, Neergaard, Jacqueson, Skovgaard Ølykke 2014.

²¹⁴ Infringement procedure n. 2018/2273.

Other problematic aspects of the Italian public procurement legislation are the multiple limitations on the use of subcontracting. In particular, the European Commission²¹⁵, as well as the European Court of Justice²¹⁶, have contested the mandatory limit on the percentage to be subcontracted which would allegedly result in an unreasonable and disproportionate burden for the tenderers. Consequently, from the 1st of November 2021, quantitative limits to subcontracting have been eliminated and subcontracting is possible only for the services identified by the contracting authorities, based on their specificity and of the evaluations carried out to protect the interests of workers. As clearly stated by Giuseppe Antonio Recchia, this rule «opens up to a likely, and in some cases, misplaced discretion for the contracting authorities (and, later, for the administrative judges) in identifying the rules and limits to subcontracting: while some contracting authorities (e.g. small municipalities) may not have the means to make such evaluation, others may intentionally forego the public interest to lawfulness».

Besides, it is quite surprising that, when deciding on the consistency with EU law, the European Court of Justice underestimates the fact that certain limits to free competition and freedom of economic initiative have been introduced to assure effective controls on the respect of general principles of the public procurement by all the contracting authorities. If public procurement legislation must promote lawfulness and transparency, combating corruption and criminal organisations, as well as the fulfilment of environmental, social and labour law obligations (Article 18 Directives 2014/24), it is of paramount importance to concretely enhance monitoring by contracting authorities. Consequently, it should not be ignored that, in certain circumstances (as in subcontracting chains), ex post controls are very cumbersome and only ex ante limits can effectively guarantee the respect of the general principles of public procurement.

Other social clauses that have been widely debated in Italy, as well as in Spain, are the one aimed at promoting occupation stability. Also in this case, the obligation to re-employ the outgoing contractor's workforce in the same workplace and in the context of the same contract must be made compatible with the freedom of economic initiative. Consequently, social clauses protecting the employment stability cannot be applied automatically, in any circumstances. In order to implement these social clauses, in Italy, the bidders are currently obliged to attach to the offer a "re-employment plan". In Spain, an obligation to re-employ workers in case of a new contractor takes over the public work or service exists only if expressly established by law or by a mandatory collective agreement. In these cases, the new contractor is liable for unpaid salaries due to the workers affected and for the unpaid social security contributions.

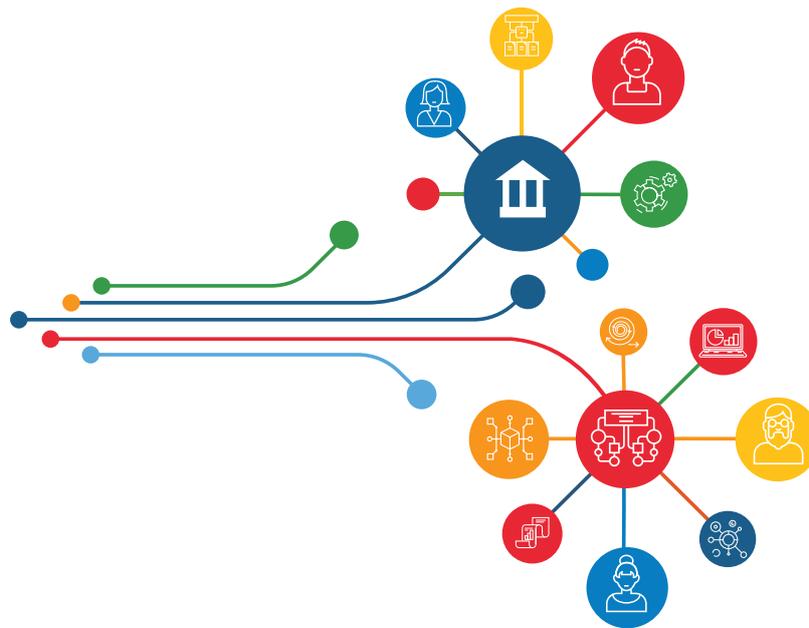
Moreover, in Spain, the introduction of social criteria in the different phases of public procurement continues to face several difficulties, particularly when trying to configure them as award criteria. This problem is further emphasised when contracting authorities decide to raise social and labour standard set by law or erga omnes collective agreements.

The Reports on Germany and Italy also demonstrate how, especially in countries without *erga omnes* collective agreements, the legislation on public procurement plays a fundamental role to increase collective bargaining coverage. In Germany, a Post-Rüffert procurement regime in which the requirement to pay workers performing public contracts at least the rates determined by the most representative collective agreements is currently developing. Similarly, in Italy, the Code of Public Contracts sets a "subjective" selective criterion on the representativeness of the signatories of the relevant collective agreements, and an "objective" selective criterion that forecloses the possibility of applying a sectoral collective agreement unrelated to the activity covered by the public contract and chosen only based on greater economic convenience. However, the effectiveness of the obligation to apply national and local collective agreements stipulated by the most representative trade unions in force for the relevant sector and area, is hindered by the lack of explicit references in those rules setting the consequences of the violation of collective source obligations (e.g. the infringement of this obligation is not enlisted among the criteria to evaluate if an offer is abnormally low).

Notwithstanding the improvement brought by the 2018 Posting of Workers Directives on clauses that require the application of non *erga omnes* collective agreements, in the legal debate it is still contested whether or not the use of such clauses in procurement comply with EU law. For this reason, it is of paramount importance that Article 9 of the proposal for a Directive on adequate minimum wages (European Commission 2020) specifies that Member States shall «ensure that in the performance of public procurement or concession

²¹⁵ Infringement procedure n. 2018/2273.

²¹⁶ European Court of Justice, 26 September 2019, C-63/18, *Vitali* and 27 November 2019, C-402/2018, *Tedeschi e Consorzio Stabile Istant Service*.



The report on Spanish legislation points out also the problems caused by the 2012 reform aimed at decentralising collective bargaining and boosting company collective agreements on public procurement procedures. As stated by Nunzia Castelli, the national legislation on public procurement has played a fundamental role to confirm national sectoral collective bargaining as the backbone of industrial relations. Indeed, the standards established by national sectoral agreements have been considered binding for all the tenderers; consequently, they cannot be ruled out by company agreements.

Another problem affecting social clauses in public procurement concerns their effective implementation. Thorsten Schulten reports that in Germany, due to severe budgetary restrictions, the lowest price still remains the most important criterion to award public contracts. The prevailing use of the lowest price has been detected by the European Commission (2017), according to which, in 2017, 55% of procurement procedures in Europe still used this criterion as the only award criterion for public contracts.

In the report on German public procurement legislation is also underlined that social clauses referring to the purchasing of goods are widely ineffective due to the difficulty (or impossibility) to verify if a good has been produced in compliance with the ILO Core Labour Standard.

Similarly, in Spain, the main problematic question continues to be the absence of effective mechanisms to verify the real fulfilment of social and labour law obligations by the contractors. To solve this problem, public administrations can demand reports for the verification of social and environmental issues, also from trade unions.

The Spanish case demonstrates the fundamental role of trade unions when monitoring on public contracts. To this purpose, trade union rights should be strengthened, guaranteeing more transparency over bidding processes and contents of public contracts, as well as access to information about suppliers and subcontractors. Moreover, as claimed by ETUC (2021), it should be possible for social partners and workers to report irregularities, by correctly implementing the Whistleblower Directive (2019/1937) and by giving trade unions the right to challenge abusive practices through the Public Procurement Remedies Directives.

The four country-reports testify also that the rules on e-procurement are still underexploited, and consequently underexplored. From the French report, we learn that the dematerialisation of the public procurement procedure has not led to a lowering of social standards compared to traditional public tenders. However, it is still not clear if and to what extent the European Single Procurement Document (ESPD) Service can prevent the contracting authorities from performing the necessary controls on tenderers and their subcontractors.

Finally, the report on public procurements and concessions by EU institutions proves how the latter remain “the dark side of the moon”. In fact, the 2014 Directives do not apply to these procedures that are instead governed by the 2018 EU Financial Regulation. This regulation is widely unexplored by scholarship and public procurements by EU institutions are practically ignored in the best practices’ collections (except for one case mentioned in European Commission 2021b).

From the research performed, several loopholes in the 2018 Financial Regulation have emerged. The latter extensively waters down the rules that allow to limit subcontracting in order to defend workers' rights and to avoid other irregularities boosted by complex and long subcontracting chains. Of particular concern is the failure to introduce a mechanism of joint liability between subcontractors and the main contractor for the applicable social and labour law obligations. As shown by the country-reports, this mechanism has been established in all the examined Member States, and it is one of the main tools to protect workers' rights in case of subcontracting.

Another regrettable issue in the EU Financial Regulation concerns the weakness of the rules on the transparency of subcontracting chains. The lack of transparency deeply affects the subcontracting chain management, preventing any form of effective due diligence process. In the national legislations implementing the 2014 Directives, transparency obligations are better outlined. In fact, in all the four Member States examined, contracting authorities have the possibility to demand relevant information on subcontracting (see above). However, also at national level, there is no obligation, for the contractor, to identify, prevent, mitigate and account for risks in its subcontracting chain. Consequently, rules on transparency should be strengthened and binding due diligence obligations should be established, both in the national and in the European public procurement legislation²¹⁸.

Finally, the EU Financial Regulation does not clearly define the obligation to respect collective agreements, leaving several important aspects (as the level, the sector or the type of collective agreement to apply) still uncertain. And this confirms once more the need to pay more attention to this discipline in the next future.

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²¹⁸ On this point, see European Commission 2018, p. 106 and European Commission 2021a, p. 89.

	FRANCE	GERMANY	ITALY	SPAIN	EU INSTITUTIONS
<p>Principle of procurement (Article 18 Directive 2014/24)</p>	<p>Respect of social and labour requirements.</p> <p>Rejection of offers that fail to comply with applicable social legislation.</p>		<p>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 provisions listed in Annex X.</p> <p>Workers employed in public tenders and concessions of works, services, and supplies are guaranteed the compliance with national and local collective agreements signed by the comparatively most representative trade unions and employers' associations at national level and in force for the relevant sector and area.</p>	<p>The Administration is responsible for taking the appropriate measures to ensure fulfilment in all of the phases of the public procurement procedure of social, labour and environmental obligations set out in European Union law, national law, collective agreements or provisions of international environmental, social and labour law</p>	<p>Minimum requirements shall include compliance with applicable environmental, social and labour law obligations established by Union law, national law, collective agreements or the applicable international social and environmental conventions listed in Annex X to Directive 2014/24/EU.</p>
<p>General principles on the choice of participants and award of contracts (Article 56 Directive 2014/24)</p>	<p>Most economically advantageous tender.</p>	<p>In making the award, aspects of quality and innovation as well as social and environmental aspects shall be considered. However, these must be related to the subject matter of the contract.</p>	<p>The contracting authority has verified that a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents and b) the tender comes from a tenderer which is not excluded and that meets the selection criteria.</p>	<p>Best quality-price ratio. Only as an exceptional measure does the law allow the only determining factor to be price.</p> <p>The evaluation of the best quality-price ratio will be carried out bearing in mind also qualitative criteria that may include environmental or social aspects, related to the object of the contract.</p>	

	FRANCE	GERMANY	ITALY	SPAIN	EU INSTITUTIONS
Exclusion grounds (Article 57 Directive 2014/24)	<p>The contracting authorities shall exclude:</p> <ul style="list-style-type: none"> • Economic operators who have not paid social security contributions. • Tenderers who have sanctioned for breaches of certain labour regulations (such as undeclared work, employment of foreigners without work permit, discrimination). • Tenderers who have not respected the obligation to negotiate with trade unions provided for in Article L. 2242-1 of the French Labour Code. 		<p>Contracting authorities may decide not to award a contract when the tenderer does not comply with the 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.</p> <p>An economic operator is to be excluded in the event of serious violations of taxes or social security contributions obligations, and when the authority is aware of and can adequately demonstrate a non-compliance with such obligations, constituting a serious breach.</p> <p>The exclusion is also possible in case of serious infringements, duly ascertained, to health and safety in the workplace.</p> <p>The same grounds for exclusion operate also when referred to one of the subcontractors.</p>	<p>Prohibition of contracting in all cases of convictions by final judgement for crimes against the Social Security and against the rights of workers.</p> <p>Prohibition of contracting in all cases of companies that have not respected Social Security obligations, do not fulfil the reservation quota for persons with disabilities or who do not have an Equality Plan.</p>	<p>The EU Financial Regulation does not contain any rule on the exclusion grounds.</p>

	FRANCE	GERMANY	ITALY	SPAIN	EU INSTITUTIONS
<p>Reliance on the capacity of other entities (Article 63 Directive 2014/24)</p>	<p>The contracting authority may require the economic operators involved to be jointly and severally liable in so far as this is necessary for the proper performance of the contract.</p>		<p>The contracting authority shall verify whether the entities, on whose capacity the economic operator intends to rely, fulfil the relevant selection criteria and whether there are grounds for exclusion.</p> <p>Entities which do not meet a relevant selection criterion, or for which there are compulsory grounds for exclusion can be demanded to be replaced.</p> <p>The tenderer and the auxiliary undertaking are jointly responsible towards the contracting station with regard to the provisions object of the contract.</p> <p>While the use of several auxiliary companies is permitted, the auxiliary cannot be available to more than one economic operator.</p>		<p>The contracting authority shall verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and shall require the latter to replace the one which does not meet a relevant selection criterion.</p> <p>If an economic operator relies on the capacities of other entities with regard to criteria relating to economic and financial capacity, the contracting authority may require that the economic operator and those entities are jointly liable for the performance of the contract.</p>

	FRANCE	GERMANY	ITALY	SPAIN	EU INSTITUTIONS
<p>Contract award criteria (Article 67 Directive 2014/24)</p>	<p>Most economically advantageous offer. However, in some cases, award criteria based on price only are possible.</p> <p>Contracting authorities can include a social criterion (e.g. on the professional integration of disadvantaged people) among the award criteria for the public contract.</p>	<p>Contracting authorities shall accept the “most economically advantageous tender” which is determined “according to the best price-quality ratio”.</p>	<p>Public contracts can be awarded on the basis of the most economically advantageous tender criterion, based on the best quality/price ratio, or the lowest price criterion. The most economically advantageous tender criterion is mandatory in several cases (e.g. service contracts relating to social services).</p> <p>As a general rule, the most economically advantageous criterion remains the prevailing one above the EU threshold, while below the EU threshold the public administration can choose freely between the former and the lowest price criterion.</p> <p>In the economic part of the tender, the operator must indicate the labour costs and the health and safety costs.</p>	<p>The contracting authorities shall include a reference to the obligation of the successful bidder to fulfil the salary conditions of workers in accordance with the applicable sectoral collective agreement.</p>	<p>Only in case of innovation partnership and competitive dialogue, the contracting authority shall base the award of contracts on the best price-quality ratio. In the remaining procedures (i.e. the open procedure, the restricted procedure, the design contest, the negotiated procedure, the competitive procedure with negotiation and the procedure involving a call for expression of interest), the contracting authority shall apply the most economically advantageous tender, which consists in one of three award methods: lowest price, lowest cost or best price-quality ratio.</p>

	FRANCE	GERMANY	ITALY	SPAIN	EU INSTITUTIONS
<p>Abnormally low tenders (Article 69 Directive 2014/24)</p>	<p>An abnormally low offer is an offer whose price is clearly undervalued and likely to compromise the correct performance of the contract.</p> <p>Public buyers shall reject any tenderer which did not provide for sufficient evidence to explain the low basis of its submitted pricing or costing, as well as when the contracting authority has established that the abnormally low offer results from non-compliance with environmental, social and labour applicable obligations.</p>	<p>According to the German Ordinance on the Award of Public Contracts (§ 60), "where the price or costs of a tender appears to be abnormally low in relation to the performance to be provided, the contracting entity shall seek clarification from the tenderer", including its compliance with existing social and labour regulation. Some regional procurements acts have even a more specified regulation on "abnormally low tenders".</p>	<p>The contracting authorities have to verify, before awarding the contract, compliance with the obligation not to lower the cost of workforce below the average hourly labour cost indicated in the specific Ministerial tables and elaborated on a statistical basis. While an explanation of a possible difference can be submitted (e.g. tax reliefs), no explanations can be admitted with respect to the work safety costs and mandatory minimum wages established by law or sources authorized by the law.</p> <p>The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with the applicable obligations in case of subcontracting.</p>	<p>The Administration may reject abnormally low bids because they violate subcontracting regulations or fail to fulfil obligations in national or international environmental, social or labour aspects, including the infringement of prevailing sectoral collective agreements.</p> <p>The public administrations can reject abnormally low bids because they violate the provisions set out in the prevailing sectoral collective agreements.</p>	<p>In case of abnormally low tender, the contracting authority may consider observations relating to compliance of the tenderer and subcontractors with applicable obligations in the fields of environmental, social and labour law. The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with applicable obligations in the fields of environmental, social and labour law.</p>
<p>Conditions for performance of contracts (Article 70 Directive 2014/24)</p>	<p>Non-economic awarding criteria can be taken into account.</p>	<p>All companies under public contracts have to comply with all legal obligations including all legal social and labour law provisions.</p> <p>Moreover, they must comply with universally applicable collective agreements.</p> <p>The contracting authorities have the possibility to determine additional contract performance conditions which may in particular include social or employment-related considerations.</p>	<p>The contracting authorities may request particular conditions for the performance of the contract. The conditions may relate to social needs (e.g. protecting the employment stability).</p>		

	FRANCE	GERMANY	ITALY	SPAIN	EU INSTITUTIONS
Subcontracting (Article 71 Directive 2014/24)	<p>The contracting authority may ask tenderers to indicate in their tender the part of the public contract that they intend to subcontract to third parties.</p> <p>The holder remains personally liable towards the buyer for the proper performance of the contract, both for his work and for that which he has subcontracted.</p> <p>The holder cannot subcontract the entire execution of a public contract for which it has been selected.</p> <p>The contracting authority can require the contract holder to perform certain essential tasks of the contract. Tasks considered as essentials and limitations must be justified by objective means.</p> <p>The holder is allowed to subcontract only if it has obtained the public buyer's acceptance of the list of subcontractors and the approval of their payment terms. Moreover, the acceptance and the approval of the payments terms by all the subcontractors are required.</p>	<p>The contracting authorities have the right to know from the contractors which subcontractors they want to use for which activities.</p> <p>Below EU Thresholds, the contracting authorities have the right to require that all or certain tasks in the provision of performances be carried out directly by the contractor itself. In the case of public awards above EU thresholds this right is limited to certain critical tasks for service contracts or critical siting or installation work.</p> <p>Further provisions about the right of public contracting authorities to get transparency over the use of subcontracting can be found in the regional procurement acts.</p> <p>Most regional procurement acts make it clear that social requirements also apply to subcontractors.</p>	<p>Subcontracting is possible only for the services identified by the contracting authorities, based on their specificity and of the evaluations carried out, also in collaboration with the Prefettura (territorial government offices), to protect the interests of workers.</p> <p>The main contractor and the subcontractor are jointly and severally liable towards the contracting authority.</p> <p>In the event of delay in the payment of remuneration due to employees of the subcontractor, as well as in case of non-compliance resulting from the single document of contribution regularity, the Public Administration has to direct pay the Social Security Institute and the workers, and then has to deduct the relative amount from the sum due to the principal contractor.</p> <p>The main contractor cannot assign to third parties the full execution of the services/works covered by the contract, as well as the prevalent execution of work relating to all the prevailing categories and labour intensive contracts.</p>	<p>The subcontractor shall fulfil the social clauses set out in the procurement specifications and inform the representatives of the subcontracted workers.</p> <p>The main contractor is exempted from joint and several liability with the subcontractors for the payment of social security contributions only if s/ he obtains a certificate from the Social Security Institute declaring that the latter have been paid.</p> <p>In any case, the contractor is jointly and severally liable for the three years following the completion of the contract in respect of the payment of contributions due during the performance of the contract.</p>	<p>The contracting authority may request information from the tenderer on any part of the contract that the tenderer intends to subcontract and on the identity of any subcontractors.</p> <p>The contracting authority shall verify whether the envisaged subcontractors fulfil the relevant selection criteria (including the applicable social and labour law obligations) only when subcontracting represents a significant part of the contract.</p>

	FRANCE	GERMANY	ITALY	SPAIN	EU INSTITUTIONS
<p>Subcontracting (Article 71 Directive 2014/24)</p>	<p>If a subcontractor is found to be subject by an exclusion ground, the contracting authority shall require the tenderer to replace it.</p> <p>The contracting authority directly pays the subcontractors for the part of the contract they perform if this exceeds € 600. This rule does not apply to second-tier subcontractors; in this case, the first-tier subcontractor shall be required to provide second-tier subcontractors with a personal and joint and several guarantee or a delegation of payment, allowing the latter to be directly paid by the administration.</p>	<p>Most regional procurement acts also state that, if the subcontractor does not comply with the social obligations laid down in the public contract, it is the main contractor who bears the responsibility and may also have to pay a fine.</p>	<p>A subcontractor cannot further subcontract.</p> <p>The subcontractor must guarantee the same quality and performance standards provided for in the contract and grant workers an economic and regulatory treatment not lower than what the main contractor would have guaranteed, including the application of the same national collective agreements, if the activities subject to subcontracting coincide with those characterizing the contract or concern the work relating to the prevailing categories and are included in the corporate purpose of the principal contractor.</p>	<p>Besides, the contractor remains jointly and severally liable for the wages due to subcontractors' workers during the year following the performance of the contract.</p>	<p>In the case of works contracts, service contracts and siting or installation operations in the context of a supply contract, the contracting authority can require that certain critical tasks be performed directly by the tenderer itself.</p>

