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Regulatory substitution between labour and public procurement law: the EU's shifting approach to enforcing labour standards in public contracts

Dr Albert Sanchez-Graells¹

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ABSTRACT

In this paper, I reflect about a recent regulatory trend concerning the enforcement of labour standards through contract compliance clauses and other requirements of public contracts tendered under European Union public procurement law. On the back of recent developments in the case law of the European Court of Justice regarding cross-border situations of procurement-based enforcement of labour standards, notably in the re-examination of the *Rüffert* case in both the *Bundesdruckerei* and *RegioPost* cases, I reflect on this phenomenon from the perspective of regulatory substitution. In setting out a basic framework to assess regulatory substitution, I hypothesise that most of the difficulties evidenced by the case law stem from the transfer of labour regulation goals to the public procurement sphere. I then aim to test this hypothesis by means of an analysis of labour policy-oriented mechanisms included in the 2014 revision of the EU public procurement rules. I then go on to critically assess the fitness for purpose of the procurement mechanisms from the perspective of contributing to the enforcement of labour standards. I ultimately conclude that, even though the 2014 Public Procurement Package has galvanised the trend of regulatory substitution whereby employment and social goals have now become part and parcel of public procurement strategy in the EU, a close examination of the legal mechanisms created by Directive 2014/24/EU shows that this regulatory substitution is both limited and highly dependent on the implementation (and investment of significant administrative resources) at Member State level.

KEYWORDS

Labour standards, public procurement, public contracts, regulatory substitution, EU law.

¹ Senior Lecturer in Law, University of Bristol Law School. Comments welcome a.sanchez-graells@bristol.ac.uk. This paper was presented at the Labour Law Research Network Conference (LLRN3) held at the University of Toronto, Faculty of Law, June 25-27, 2017. I am grateful to the University of Bristol Law School for financial support to attend the conference. I am also thankful to an anonymous reviewer for comments on a previous version of this paper. The standard disclaimer applies.

Introduction

In this paper, I reflect about a recent regulatory trend concerning the enforcement of labour standards through contract compliance clauses and other requirements of public contracts tendered under European Union public procurement law.² The use of public contracts for the enforcement of labour standards in situations of quasi-public sector employment, or as a tool to promote compliance with labour law more generally, has been a sticky regulatory issue in the European Union.³ Many EU countries use the leverage of public expenditure to either impose labour conditions for the benefit of those involved in the provision of services to the public sector—*ie* as an extension of their duties of *good employer*—or to leverage the enforcement of labour standards against companies interested in public sector business—in discharge of more general duties of labour market regulation.⁴ This can be seen as the EU's current approach to strategic procurement,⁵ and as an integral part of the Europe 2020 strategy for smart, sustainable and inclusive growth.⁶

This trend is creating difficulties in the context of the regulation of the EU's internal market.⁷ In particular, such instrumental use of public procurement as a tool of labour policy has raised difficulties in cross-border situations where bidders from outside the relevant labour jurisdiction have felt disadvantaged due to the obligation to meet higher labour law standards than in their home jurisdiction. This fleshes out the difficulties derived from the inability of the EU Member States to

² This is currently regulated by the 2014 Public Procurement Package, including a directive on public procurement (Dir 2014/24/EU), a directive on utilities procurement (Dir 2014/24/25) and a directive on concession contracts (Dir 2014/23/EU). For details, see the page of the European Commission: https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en.

³ For a view on the reignition of the discussion last decade, see C McCrudden, 'Using public procurement to achieve social outcomes' (2004) 28 *Natural Resources Forum* 257-267, and later more fully developed in C McCrudden, *Buying Social Justice. Equality, Government Procurement & Legal Change* (Oxford University Press, 2007). See also ACL Davies, *The Public Law of Government Contracts* (Oxford University Press, 2008) 260-296; S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (Cambridge University Press, 2009); B Bercusson and N Bruun, 'Labour Law Aspects of Public Procurement in the EU' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (DJØF, 2005) 97 and ff; and C Barnard, 'Using Procurement Law to Enforce Labour Standards', in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 256-272. For recent discussion, see C Barnard, 'To Boldly Go: Social Clauses in Public Procurement' (2017) *Industrial Law Journal* (forthc.) available at <https://doi.org/10.1093/indlaw/dww036>; and K Jaehrling, 'The state as a "socially responsible customer"? Public procurement between market-making and market-embedding' (2015) 21(2) *European Journal of Industrial Relations* 149-164.

⁴ This is not unique or peculiar to the EU. For a critical assessment of equivalent regulatory practices in Australia, see S Holley, G Maconachie and M Goodwin, 'Government procurement contracts and minimum labour standards enforcement: Rhetoric, duplication and distraction?' (2015) 26(1) *Economic and Labour Relations Review* 43-59.

⁵ See European Commission, *Buying Social – A Guide to Taking Account of Social Considerations in Public Procurement* (2011), available at <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978> (but note that this guidance was issued under the previous generation of EU public procurement rules). For a recent overview of the implementation of such policy, although on the basis of a questionable empirical methodology, see the Study on "Strategic use of public procurement in promoting green, social and innovation policies" (2015), available at <http://ec.europa.eu/DocsRoom/documents/17261>.

⁶ Communication from the Commission COM(2010) 2020 final, available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC2020>. For a critical assessment, see A Sanchez-Graells, 'Truly competitive public procurement as a Europe 2020 lever: what role for the principle of competition in moderating horizontal policies?' (2016) 22(2) *European Public Law* 377-394.

⁷ For discussion, see D Schiek et al, *EU Social and Labour Rights and EU Internal Market Law*, Study for the European Parliament (2015), IP/A/EMPL/ST/2014-02, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU%282015%29563457_EN.pdf.

adopt harmonising substantive labour standards, as well as the limitations of a system based on rules that only regulate the fringe aspects of cross-border labour mobility.⁸ More generally, the logic of prevention of social dumping implicit in the use of procurement to uphold labour standards clashes with that of market integration,⁹ particularly for the provision of services.¹⁰ This evidences a regulatory difficulty that is rather unique to the EU context—where economic law suffers important tensions and limitations due to its market-integrative approach and the competence split between the Union and its Member States—which can have detrimental implications for the internal consistency and the functionality of the regulatory system, not least due to the potential spillovers in terms of reverse discrimination that the unstable balance between these competing logics tends to create.¹¹

On the back of recent developments in the case law of the European Court of Justice (ECJ) regarding cross-border situations of procurement-based enforcement of labour standards—notably in the re-examination of *Rüffert*¹² in *Bundesdruckerei*¹³ and *RegioPost*¹⁴ cases—in the remainder of this paper, I reflect on this phenomenon from the perspective of regulatory substitution. In setting out a basic framework to assess regulatory substitution, I hypothesise that most of the difficulties evidenced by the ECJ case law in this area stem from the transfer of labour regulation goals to the public procurement sphere.¹⁵ I then aim to test this hypothesis by means of an analysis of labour

⁸ For background discussion, see H Verschueren, ‘The European Internal Market and the Competition between Workers’ (2015) 6(2) *European Labour Law Journal* 128-151; S Garben, ‘The Constitutional (Im)balance between ‘the Market’ and ‘the Social’ in the European Union’ (2017) 13 *European Constitutional Law Review* 23-61.

⁹ M De Vos, ‘Internal market and euro crisis: labour law under the gun of the European Union?’ (2013) 14(3) *ERA Forum* 335-361.

¹⁰ See European Commission, *Supporting social responsibility in the economy through public procurement*, available at http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8667. For discussion of the competing rationales for EU intervention in domestic labour law and, indirectly, for the justification of restrictions in the creation of a single EU labour market, see P Syrpis, *EU Intervention in Domestic Labour Law* (Oxford University Press, 2007) 10-75.

¹¹ The same problem arises in connection with other public procurement rules, such as exclusion requirements; see A Sanchez-Graells, L Butler and P Telles, ‘Exclusion and Qualitative Selection of Economic Operators under Public Procurement Procedures. A Comparative View on Selected Jurisdictions’, in M Burgi, M Trybus and S Treumer (eds), *Qualification, Exclusion and Selection in EU Procurements*, vol. 7 European Procurement Law Series (DJØF, 2016) 245-274. For background discussion, see A Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’ (2008) 35(1) *Legal Issues of Economic Integration* 43-67. See also D Hanf, ‘Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice’ (2011) 18(1) *Maastricht Journal of European and Comparative Law* 29-61; and P Van Elsuwege, ‘The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?’, in L S Rossi & F Casolari, *The EU after Lisbon. Amending or Coping with the Existing Treaties?* (Springer, 2014) 161-176.

¹² Judgment of 3 April 2008 in *Rüffert*, C-346/06, EU:C:2008:189.

¹³ Judgment of 18 September 2014 in *Bundesdruckerei*, C-549/13, EU:C:2014:2235. See A Brown, ‘The lawfulness of a national rule requiring a subcontractor of a bidder for a public contract to pay its workers a minimum wage, even where the services will be carried out exclusively in a lower-cost third country: case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund*’ (2015) *Public Procurement Law Review* NA17-NA21.

¹⁴ Judgment of 17 November 2015 in *RegioPost*, C-115/14, EU:C:2015:760. See F Costamagna, ‘Minimum Wage between Public Procurement and Posted Workers: Anything New after the *RegioPost* Case?’ (2017) 42(1) *European Law Review* 101-111; A Brown, ‘The lawfulness of a regional law requiring tenderers for a public contract to undertake to pay workers performing that contract the minimum wage laid down in that law: Case C-115/14 *RegioPost*’, (2016) *Public Procurement Law Review* NA49-NA55; and C Kaupa, ‘Public Procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process?’ (2016) 1(1) *European Papers* 127-138.

¹⁵ Note that this is not unique to labour policy, and that there are other aspects of regulatory substitution taking place at the same time, such as in relation with the enforcement of environmental or competition law. For a broader discussion, on the similar basis of what they term ‘external regulatory compliance’, see G S Ølykke and

policy-oriented mechanisms included in the 2014 revision of the EU public procurement rules.¹⁶ I then go on to critically assess the fitness for purpose of the procurement mechanisms from the perspective of contributing to the enforcement of labour standards. I ultimately conclude that, even though the 2014 Public Procurement Package has galvanised the trend of regulatory substitution whereby employment and social goals have now become part and parcel of public procurement strategy in the EU, a close examination of the legal mechanisms created by Directive 2014/24/EU shows that this regulatory substitution is both limited and highly dependent on the implementation (and investment of significant administrative resources) at Member State level.

A basic framework of regulatory substitution, or public procurement as a regulatory garbage can

The regulation of the EU's internal market is clearly affected by different underlying political agendas and normative models, or different conceptions of the EU's economic constitution (or its absence). It also seems clear that the choice of regulatory instruments is not simply a matter of institutional choice or dynamics, but also a function of the range of legal opportunities available to decision-makers.¹⁷ Therefore, the extent to which a set of rules and regulations is used in the pursuit of one or other set of goals is the result of the complex interaction of both substantive, procedural and rather chanceful factors. These issues can be assessed both from a holistic perspective, or in terms of the overarching model of European (economic) integration, or in relation with discrete sets of policies and their impact on their twin area of EU economic law. The former is a very general topic that exceeds the possibilities of this paper, so the bulk of this discussion will concentrate on the latter perspective in the areas of public procurement and labour law. The analysis will be carried out from the perspective of public procurement as the 'landing area' of regulatory goals traditionally assigned to labour law.

The reasons why this regulatory transfer is taking place, or the ways in which these goals could be better achieved through labour and employment policy and regulation will not be explicitly considered. Suffice it to point out here that there is a strong link between regulatory substitution (in terms of transfer of normative requirements) and the development of suitable administrative processes and systems. The discussion in this paper will show how, beyond issues of regulatory reform, the effectiveness of the intended regulatory transfer is highly dependent on the level of resources invested in the enforcement of labour standards in the procurement context.¹⁸ From that perspective, given that Member States have not succeeded in agreeing on labour standards at EU level in general, and that some of them operate under rather constrained self-standing mechanisms for the enforcement of labour standards in their jurisdiction in particular,¹⁹ it is questionable whether they

P Telles, 'A Compliance Perspective on EU Public Procurement', forthcoming in the *European Procurement & Public Private Partnership Law Review*.

¹⁶ Generally, on this process of review of the applicable EU rules, see G S Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016).

¹⁷ B G Peters, *Advanced Introduction to Public Policy* (Edward Elgar, 2015) 111.

¹⁸ For general discussion in a related area of EU policy, see S Schucht, 'What can we learn from economics and political science analysis on the efficiency and effectiveness of policy implementation?', in M Glachant (ed), *Implementing European Environmental Policy: The Impacts of Directives in the Member States* (Edward Elgar, 2001) 30-58.

¹⁹ *Eg*, in relation with occupational safety and health (OSH) legislation, see Committee of Senior Labour Inspectors, *Challenges faced by Labour Inspectorates relating to enforcement - Contribution to the ex-post evaluation of the OSH legislation carried out by the European Commission* (2015), available at <http://ec.europa.eu/social/BlobServlet?docId=14311&langId=en>.

would really be committed to develop the required suitable domestic administrative structures and get through the back door what they did not accept through the front door. The analysis in this paper could also prompt a discussion of transparency in labour policy-making, as well as issues around accountability in public expenditure. All of these perspectives are potentially fruitful for an analysis beyond that of regulatory substitution between labour and procurement law, but they also exceed the possibilities of this paper.

Here, I hypothesise that there has been progressive regulatory substitution (or at least pressure for it to take place) in recent years, whereby labour regulatory goals have been pushed towards the core of public procurement regulation. Further, I also submit that this is rather accidental and a reflection of the structural position of public procurement as a *regulatory garbage can*,²⁰ which makes it difficult to keep regulatory priorities focused on the main goals of this instrument for the functioning of the public sector. This creates difficulties for the development of case law in this area, as well as for the implementation of policies that may be structurally-flawed in their misalignment with the constraints derived from general aspects of EU internal market regulation. In that regard, I think that some of the difficulties derived from the line of case law concerning the use of public procurement for the enforcement of minimum wage requirements discussed below reflects this position of public procurement as a regulatory garbage can. This is because, after a first attempt to implement wage policies through procurement in the early 2000s and the ECJ's significant constraint of that possibility in *Rüffert*, it could have been possible to discard that policy as contrary to internal market regulation and rather concentrate regulatory efforts on the development of EU labour and employment law. However, due to the difficulties in advancing in that area, the regulatory pressure came back to the procurement arena in the form of different instruments for the implementation of social and employment policy through public contracts.

This has now led to a second wave of ECJ case law in *Bundesdruckerei* and *RegioPost*, which demonstrate both the persistence and strength of the internal market logic underpinning procurement regulation in the EU (*Bundesdruckerei*) and the limitations derived from the peculiar distribution of regulatory competence between the European Union and its Member States (*RegioPost*)—which comes to replicate in the procurement arena some of the difficulties for the development of EU-wide labour and employment rules. This is problematic because it both creates a confusing regulatory situation in the area of public procurement depending on *extraneous* regulatory instruments (such as the Posted Workers Directive, see below), and because of the multiplicity of regulatory areas that potentially impact on public procurement as a transversal regulatory tool (*ie* similar dynamics can be observed, to a different extent, concerning green and innovation procurement). Ultimately, the position of public procurement as a regulatory garbage can is nothing new but, in my opinion, this does not mean that a case should not be made against such trends of regulatory substitution or instrumentalisation of public procurement, which could reduce the difficulties around the design of effective policy instruments and a (more) coherent case law around *its own set of first principles and goals*.²¹

Indeed, even if not always made explicit, several goals of public procurement rules have largely conditioned their development and determined the functions that they have been called upon to serve. At least nine primary goals of different procurement systems have been identified: competition, integrity, transparency, efficiency of the procurement system, customer satisfaction,

²⁰ For the seminal construction of the model, see M D Cohen, J G March and J P Olsen, 'A Garbage Can Model of Organizational Choice' (1972) 17(1) *Administrative Science Quarterly* 1-25.

²¹ Along the same lines, see Ølykke and Telles (n 15).

best value for money, wealth distribution, risk avoidance, and uniformity of rules.²² Some of them are closely related, some are instrumental to one another, while others are in open conflict;²³ and not all of them are equally desirable. Most noteworthy, economic objectives will have a particularly remarkable role in shaping public procurement regimes.²⁴ Moreover, no system can achieve all of those goals simultaneously, so their pursuance will require certain trade-offs.²⁵ Competition, integrity and transparency can be considered the overarching and most desirable goals of public procurement regulation,²⁶ and a proper balance with the efficiency of the procurement systems needs to be reached.²⁷

However, over time and across different systems, public procurement has been instrumentalised to achieve socio-political aims that differ from and often contradict its basic goals (competition, integrity and transparency) and function—ie, providing the public buyer with those goods and services required for his proper functioning, in the best possible conditions as to price, quality, timely delivery, etc. Goals such as market integration objectives, industrial policy and innovation policy, promotion of small businesses, social²⁸ or labour-related policies²⁹ (such as the promotion of minimum wages in procurement discussed in detail in this paper), environmental and

²² SL Schooner, 'Fear of Oversight: The Fundamental Failure of Business-like Government' (2001) 50 *American University Law Review* 627, 709-710, and *ibid*, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 *Public Procurement Law Review* 103, 104-109; and SL Schooner et al, *Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations* (George Washington University Law School, Public Law and Legal Theory Working Paper, Legal Studies Research Paper, 2008), available at <https://ssrn.com/abstract=1133234>.

²³ JN Dertouzos, 'Introduction' in AG Bower and JN Dertouzos (eds), *Essays in the Economics of Procurement* (RAND—National Defense Research Institute, 1994) 1, 4.

²⁴ PA Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004) 63. That is particularly true, at least in the EU; see C Bovis, *Public Procurement in the European Union* (Palgrave-Macmillan, 2005) 25.

²⁵ Schooner et al (n 22) 4; and PA Trepte, 'Transparency Requirements' in R Nielsen and S Treumer (eds), *New EU Public Procurement Directives* (DJØF, 2005) 49, 52.

²⁶ Schooner, *Desiderata* (n 22) 104-106 and 110. Similarly, although with some terminological differences, see Trepte (n 24) 3. See also S Arrowsmith 'The Past and Future Evolution of EC Public Procurement Law: From Framework to Common Code?' (2005-2006) 35 *Public Contract Law Journal* 337, 351-352; and S Kelman, *Procurement and Public Management. The Fear of Discretion and the Quality of Government Performance* (AEI Press, 1990) 11.

²⁷ The position that the efficiency of the system and the focus on competition as a means to achieve value for money are preferred has been strongly criticised by S Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2011-2012) 14 *Cambridge Yearbook of European Legal Studies* 1; and P Kunzlik, 'Neoliberalism and the European Public Procurement Regime' (2012-2013) 15 *Cambridge Yearbook of European Legal Studies* 283. On the contrary, it has been praised by CR Yukins and J Cora, 'Feature Comment: Considering the Effects of Public Procurement Regulations on Competitive Markets' (2013) 55(9) *Government Contractor* 64.

²⁸ See eg G Quinot, 'Promotion of social policy through public procurement in Africa', in S Arrowsmith and G Quinot (eds), *Public Procurement Regulation in Africa* (Cambridge University Press, 2013) 370.

²⁹ C McCrudden, 'Social Policy Issues in Public Procurement: A Legal Overview' in S Arrowsmith and A Davies (eds), *Public Procurement: Global Revolution* (London, Kluwer Law International, 1998) 219; *ibid*, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion on the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 *Journal of International Economic Law* 3; *ibid*, 'Buying Social Justice: Equality and Public Procurement' (2007) 60 *Current Legal Problems* 121. See also references above (n 3).

other considerations,³⁰ have been the object of so-called ‘secondary’³¹ or ‘horizontal policies’.³² Some of these secondary policies are largely consistent with the main goals of public procurement—such as market integration objectives, which can contribute to the increase of competition in certain sectors of economic activity—but others are completely unrelated to the core function and objectives of the public procurement system,³³ and could significantly jeopardise its proper implementation, not to mention the issue of their limited effectiveness. To that extent, from a normative standpoint, I consider that some secondary policies should be abandoned or, at least, re-adjusted to become more competition-oriented.³⁴ The use of public procurement as an instrument of (macroeconomic) policy should be separated from its function as a working tool of the government and, in this dimension, it should be set free from such secondary policies—precisely in order to increase the efficiency of the primary policy objectives that are to be implemented through procurement activities. Doing otherwise can be a source of market distortions that will rarely contribute to increasing social welfare.³⁵

In the context of the EU’s internal market, the regulation of public procurement has also been strongly oriented towards a market integration goal.³⁶ In their effort to reach an internal market, EU institutions placed market integration as the paramount goal of public procurement regulations and made it a key element in the 1992 strategy for the completion of the single market.³⁷ Discrimination and protectionism in public procurement was considered a non-tariff barrier to intra-EU trade,³⁸ and significant efforts were put into getting the Member States to abandon those policies. Important progress has been made in the last 25 years and the gradual liberalisation of public procurement markets in the EU has taken place. Despite the recent use of public procurement as a lever for the further development of the internal market within the context of the Europe 2020 strategy,³⁹ this has

³⁰ Other policies have included, eg, the ban on certain ideologies and/or organisations on the basis of the protection of constitutional values; see H-J Prieß and C Pitschas, ‘Secondary Policy Criteria and Their Compatibility with EC and WTO Procurement Law. The Case for the German Scientology Declaration’ (2000) 9 *Public Procurement Law Review* 171, 172-186.

³¹ On these issues, see S Arrowsmith, ‘Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation’ (1995) 111 *Law Quarterly Review* 235; PA Trepte, *Public Procurement in the EU: A Practitioner’s Guide*, 2nd edn (Oxford University Press, 2007) 63-87. For a review of these policies in EU legislation and case law, see the various contributions to S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions* (Cambridge University Press, 2009). See also E Reid, ‘Protecting Non-Economic Interests in the European Community Legal Order: A Sustainable Development?’ (2005) 24 *Yearbook of European Law* 385.

³² S Arrowsmith, ‘Horizontal Policies in Public Procurement: A Taxonomy,’ (2010) 10(2) *Journal of Public Procurement* 149.

³³ Indeed, they have been considered extraneous goals of public procurement; see SL Schooner, ‘Commercial Purchasing: The Chasm between the United States Government’s Evolving Policy and Practice’, in S Arrowsmith and M Trybus (eds), *Public Procurement: The Continuing Revolution* (The Hague, Kluwer Law International, 2003) 137, 159 fn 105; and Schooner et al (n 22) 14.

³⁴ For extended discussion and further references, see A Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart, 2015) 101-114.

³⁵ For general discussion on the conflicts between such secondary policies and the main economic goals of public procurement regulations, Trepte (n 24) 133-207.

³⁶ For scholars such as Arrowsmith (n 27), this remains the sole and limited goal of EU public procurement.

³⁷ See JA Sohrab, ‘The Single European Market and Public Procurement’ (1990) 10 *Oxford Journal of Legal Studies* 522, 524.

³⁸ P A Geroski, ‘European Industrial Policy and Industrial Policy in Europe’ (1989) 5 *Oxford Review of Economic Policy* 20, 29-30.

³⁹ Indeed, it has been stressed that in order to contribute to the objectives of the Europe2020 strategy, ‘public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide’; European Commission, *Europe2020: A strategy for smart, sustainable and inclusive growth* (COM/2010/2020 final). See also European Commission, *EU public procurement legislation: delivering results*.

not been based on integration for its own sake, but on the strategic use of public procurement optimisation as a tool to foster economic growth and economic efficiency in competitiveness.⁴⁰ Consequently, the market integration objective is being phased out or, at least, re-oriented towards substantive economic goals.

Following that regulatory trend and going back to the issue of the instrumental use of procurement, once the internal market has reached maturity, the transitory goal of market integration is being progressively substituted by other secondary policies (notably, social and environmental policies). EU public procurement policy seems to be on a path that might significantly diverge from its basic and fundamental goal of promoting competition by 'reintroducing' secondary policies.⁴¹ This was clear in the process of revision of the 2004 generation of EU public procurement directives that the European Commission started in 2011. In its *Green Paper on the modernisation of public procurement policy*,⁴² the Commission made it clear that a fundamental objective of the reform was to support emerging trends on the strategic use of public procurement in response to new challenges and, in particular, it indicated that procuring entities "*can make an important contribution to the achievement of the Europe 2020 strategic goals, by using their purchasing power to procure goods and services with higher "societal" value in terms of ... improving employment ... and social conditions, and promoting equality while improving inclusion of disadvantaged groups*".⁴³ This approach then informed the proposal for a new directive also published in 2011, where the Commission reiterated this goal of the regulatory reform process to adopt an "*enabling approach providing contracting authorities with the instruments needed to contribute to the achievement of the Europe 2020 strategic goals by using their purchasing power to procure goods and services that foster innovation, respect the environment and combat climate change while improving employment, public health and social conditions*".⁴⁴ This orientation towards employment and social goals then permeated the legislative debates and ended up forming an important part of the final text of Directive 2014/24/EU,⁴⁵ which is the cornerstone of the 2014 EU Public Procurement Package.

In terms of current policy, the European Commission has stressed how Directive 2014/24/EU is strategically oriented towards socially responsible public procurement⁴⁶ and, more specifically, how it aims at ending social dumping by respecting social and labour laws:

Under a new 'social clause', public authorities will need to ensure the respect of obligations in all public procurement procedures. These include national or EU social and labour rules, applicable collective agreements and/or international law. Tenders may be excluded if they do not comply with social or

Summary of evaluation report (2012) and, in more detail, Commission Staff Working Paper, *Evaluation Report. Impact and Effectiveness of EU Public Procurement Legislation* (2011), available at http://www.eipa.eu/files/topics/public_procurement/executive_summary_en.pdf.

⁴⁰ See the Single Market Act, '*this simplification must be carried out in a way that does not close procurement to cross-border competition*'; Communication from the Commission, *Single Market Act: Twelve levers to boost growth and strengthen confidence "Working together to create new growth"* (COM/2011/0206 final).

⁴¹ Al Matei and L Matei, 'Modernisation of the Public Procurement Market. Towards a Strategy of Public Marketing specific on the Single Market' (2012) 1(1) *Societal Innovations for Global Growth* 497-511.

⁴² European Commission, *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, COM(2011) 15 final.

⁴³ *Green paper*, 33-34.

⁴⁴ European Commission, *Proposal for a Directive of the European Parliament and of the Council on public procurement*, COM(2011) 896 final, 9.

⁴⁵ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

⁴⁶ European Commission, *Public procurement strategy*, available at https://ec.europa.eu/growth/single-market/public-procurement/strategy_en.

labour law obligations. When the tender value is abnormally low because the offer does not comply with such obligations, then the tender must be rejected. Furthermore, any company failing to comply with their obligations will be excluded from public procurement procedures if:

- It has been convicted of failure to pay taxes or social security contributions
- no judgment has been passed but it can be proved that the company has failed to pay taxes or social contributions, or has failed to comply with the 'social clause'.⁴⁷

Directive 2014/24/EU also includes mechanisms whereby contracting authorities can specify employment-related and social requirements as part of contract compliance clauses (Art 70). This is seen as another major contribution to socially responsible public procurement, inasmuch as the awarding of a contract will no longer be dependent on price alone if a company commits to achieve social or employment-related goals. In the view of the Commission:

Contracting authorities can better take social aspects into account when awarding procurement contracts on the basis of the 'best price-quality ratio (BPQR)', i.e. they can choose the tenders that provide more social advantages. This could be, for example, a company employing the greatest number of long-term unemployed or disadvantaged persons to perform the contract or increase participation of women in the labour market.⁴⁸

Therefore, under the 2014 EU Public Procurement Package, labour and social goals have become prominent elements of the strategy to instrumentalise procurement under the so called *smart procurement* approach. In this area of interaction of labour law and public procurement law, I submit that there has been a (push for a) double regulatory substitution relationship. At a higher level of generality, there is a transfer of policy and regulatory goals from labour to public procurement law, in particular in terms of monitoring and enforcement of labour and social law. At a second level, within specific public procurement processes, there is a transfer between regulatory tools and contractual tools, and a tendency to (aim to) contractualise employment and social obligations that do not derive from existing employment and social legislation.⁴⁹ This double dynamic removes the regulation of labour standards from its 'natural' field—that of labour and employment policy—and transplants it into the very different setting of the award of public contracts in the context of procurement procedures. This is bound to create significant distortions and increased costs in the running of procurement processes. Moreover, the extent to which such regulatory substitution is possible depends on the adaptability of the internal market logic (and goal) that underpin EU public procurement law. This is particularly challenging because, differently from the pursuit of other strategic goals (such as green or innovative procurement), the inclusion of employment and social considerations has a strong geographical dimension that makes it harder to reconceptualise with the internal market logic.

The remainder of the paper offers a critical assessment of the main mechanisms introduced in Directive 2014/24/EU in support of socially responsible public procurement, with a particular focus on the enforcement of labour standards (and, in particular, pay or wage requirements). It also

⁴⁷ European Commission, Supporting social responsibility in the economy through public procurement, *available at* http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8667&lang=en&title=Supporting-social-responsibility-in-the-economy-through-public-procurement.

⁴⁸ European Commission, EU Public Procurement reform: Less bureaucracy, higher efficiency, *available at* <http://ec.europa.eu/DocsRoom/documents/16349/attachments/1/translations/en/renditions/native>.

⁴⁹ This is certainly not a new phenomenon in the area of public procurement. See C Turpin, *Government Procurement and Contracts* (Longman, 1989) 67.

considers the extent to which the internal market logic (and goal) that underpin EU public procurement law are actually likely to adapt to this strategic goal, or allow for its effective delivery.

Critical assessment of the of pro-labour standards mechanisms of the 2014 EU public procurement rules

The regulatory trend of inclusion of pro-labour standard mechanisms into EU public procurement rules has taken place at different levels and in relation to different stages of the procurement process. For the purposes of their detailed assessment, it will be useful to distinguish between negative mechanisms aimed at leveraging compliance with existing mandatory rules, and positive mechanisms aimed at imposing labour standards beyond those mandated by applicable rules. The specific issue of the enforcement of pay-related labour standards, as discussed in the ECJ case law in *Bundesdruckerei* and *RegioPost*, falls somewhat between both categories because one of the legal issues in these cases concerned the extent to which pay-related labour standards were or not applicable to some (cross-border) tenderers. However, at least conceptually, it seems appropriate to discuss this as part of the positive mechanisms aimed at imposing specific labour standards for the execution of the contract.⁵⁰

Negative pro-labour standards mechanisms: using procurement to enforce existing rules

Public procurement, as a significant and rather visible part of the activity of the public sector, can serve to support legal compliance.⁵¹ In that regard, it is common for public procurement systems to foresee the exclusion of undertakings that breach tax, social security or other laws with a close link to the financial interests of the State. Recently, and as part of the broader regulatory trend discussed in this paper, EU procurement law has been reformed to facilitate its use as a mechanism to leverage compliance with other regulatory requirements. Importantly, a general duty for the EU's Member States to ensure compliance with relevant labour standards has been enacted in Article 18(2) of Directive 2014/24/EU, according to which '*Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of ... social and labour law established by Union law, national law, collective agreements or*

⁵⁰ This is clearly the case in *Bundesdruckerei*, as the relevant regional legislation was not directly applicable to a cross-border tenderer. In the case of *RegioPost*, this approach is more debatable, given that the relevant regional law did apply to the challenging tenderer. However, given that the regional law (and the contract compliance clause to which it could implicitly give rise) aimed to go beyond what would otherwise result from generally applicable legislation, I submit that this analytical approach is useful.

⁵¹ More generally, in jurisdictions with a develop set of public law constraints on procuring entities, it is common to require them to act in compliance with the law, or to act legally, and not to support or facilitate any type of legal infringements. For discussion, see P Craig, 'Article 41 – Right to Good Administration', in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014) 1069-1098; and A Sanchez-Graells, 'Assessing the Public Administration's Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?', in KA Armstrong (ed), *Cambridge Yearbook of European Legal Studies 2016*, vol 18 (Cambridge University Press, 2016) 93-121.

by the international ... social and labour law provisions listed in Annex X'—which, in relation to employment and labour law, lists ILO Conventions 29,⁵² 87,⁵³ 98,⁵⁴ 100,⁵⁵ 105,⁵⁶ 111,⁵⁷ 138⁵⁸ and 182.⁵⁹

This general principle can hardly be seen as creating any obligation of its own.⁶⁰ However, it is coupled with more specific rules concerning (1) a duty to engage in an in-depth analysis of tenders that seem abnormally low due to the reduced costs derived from non-compliance with applicable social and labour obligations, with a view to their mandatory rejection if non-compliance is ascertained (Art 69(3) *in fine*),⁶¹ as well as (2) the creation of discretion for contracting authorities to (i) exclude tenderers that are shown to be in violation of Art 18(2) obligations (Art 57(4)(a)),⁶² including their subcontractors (Art 71),⁶³ or (ii) decide not to award a contract to the tenderer submitting the most economically advantageous tender where it does not comply with applicable Art 18(2) obligations (Art 56(1) *in fine*).⁶⁴ Therefore, from a negative perspective, Directive 2014/24/EU includes mechanisms for contracting authorities not to support infringements of Art 18(2) obligations by withholding the award of contracts which execution would entail an infringement of those obligations, as well as by excluding tenderers that have infringed those obligations even outside of the scope of the tendered contract.

These new grounds for exclusion of tenderers and/or rejection of their tenders raise difficulties around the need to establish the standard of diligence that the contracting authority must discharge in order not to be negligently unaware of the existence of such violations—particularly where it is under a duty to investigate and exclude (*ie* in the case of abnormally low tenders). Given that there are different standards for different exclusion grounds (some of them being mandatory, such as in relation with abnormally low tenders, while the rest remain discretionary), these are issues that are prone to litigation and that will likely require interpretation by the ECJ. In that regard, it is submitted that any means of proof should suffice to proceed to such exclusion,⁶⁵ but the violation should be of a sufficient intensity as to justify the exclusion under a proportionality test (similarly to

⁵² ILO Convention 29 on Forced Labour.

⁵³ ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise.

⁵⁴ ILO Convention 98 on the Right to Organise and Collective Bargaining.

⁵⁵ ILO Convention 100 on Equal Remuneration.

⁵⁶ ILO Convention 105 on the Abolition of Forced Labour.

⁵⁷ ILO Convention 111 on Discrimination (Employment and Occupation).

⁵⁸ ILO Convention 138 on Minimum Age.

⁵⁹ ILO Convention 182 on Worst Forms of Child Labour.

⁶⁰ In fact, some Member States (such as the UK) have decided not to transpose it into their domestic laws. See A Sanchez-Graells, 'The Implementation of Directive 2014/24/EU in the UK', in S Treumer & M Comba (eds), *Implementation of Directive 2014/24* (Edward Elgar, forthc.), available at <https://ssrn.com/abstract=2947939>.

⁶¹ For in-depth analysis, see G S Ølykke, 'The Provision on Abnormally Low Tenders: A Safeguard for Fair Competition', in G S Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016) 146-169.

⁶² S de Mars, 'Exclusion and Self-Cleaning in Article 57: Discretion at the Expense of Clarity and Trade?', in G S Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016) 253-273.

⁶³ R Craven, 'Subcontracting Matters: Articles 43 and 71 of the 2014 Directive', in G S Ølykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016) 295-317.

⁶⁴ Sanchez-Graells (n 34) 288.

⁶⁵ Provided other procedural guarantees are upheld. For discussion, see A Sanchez-Graells, "'If it Ain't Broke, Don't Fix It'? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts", in S Torricelli & F Folliot Lalliot (eds), *Administrative Oversight and Judicial Protection for Public Contracts* (Larcier, forthc.), available at <https://ssrn.com/abstract=2821828>.

what the new Directive proposes in terms of lack of payment of taxes or social security contributions,⁶⁶ or ‘grave’ professional misconduct), since exclusion for any minor infringement of social, labour or environmental requirements may be disproportionate and, ultimately, not in the public interest if it affects the level and intensity of competition for the contracts.

On a more technical note, it is also worth emphasising that both Art 56(1) *in fine* and 57(4)(a) of Directive 2014/24/EU serve exactly the same function—*ie* the strengthening of the social, labour and environmental aspects of the public procurement function, although in a manner that can seriously diminish its economic effectiveness and that can impose a burden difficult to discharge on contracting authorities (which could now be in a difficult position where they will need to assess tenderers’ and tenders’ compliance with an increased set of diverse rules of a social, labour and environmental nature). Indeed, both provisions aim at the same outcome, with the only apparent difference that Art 56(1) *in fine* is concerned with the tender specifically, whereas Art 57(4)(a) is concerned with the tenderer more generally. Consequently, Art 57(4)(a) may be seen as a rule that looks at the past and present (general) compliance of the economic operator with social, labour and environmental law, whereas Art 56(1) *in fine* allows the contracting authority to make a prognosis of compliance and reject a tender if its (future) implementation would imply non-compliance with social, labour and environmental law requirements—which is, in any case, mandatory under Art 69(3) if there has been an investigation on the tenders’ apparent abnormality. The effectiveness of these provisions will largely depend on the transposition decisions of the Member States and, ultimately, on the actual capacity of contracting authorities to engage in such (possibly complex) assessments of compliance with EU, domestic and international social, labour and environmental rules (as discussed below).

Positive pro-labour standards mechanisms: using procurement to go beyond existing rules?

Beyond those negative measures, Directive 2014/24/EU also includes positive mechanisms that can be seen to facilitate the use of procurement requirements to go beyond existing labour rules and to mandate compliance with higher standards. In particular, Art 70 foresees that contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract⁶⁷ and indicated in the call for competition or in the procurement documents, and that those conditions may include social or employment-related considerations. This provision has introduced some drafting modifications to its predecessor in Art 26 of Directive 2004/18/EC,⁶⁸ in particular to stress that the conditions for the performance of the contract can include ‘employment-related considerations’, which has been seen as an indication that the 2014 rules are more open to their use for the enforcement of labour and employment-related standards than the previous generation of 2004 directives.⁶⁹ However, in my view, the substantive content of the provision remains unchanged.

⁶⁶ Art 57(3) *in fine*. For discussion, see A Sanchez-Graells, ‘Exclusion, Qualitative Selection and Short-listing’, in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement. The New Directive* (DJØF, 2014) 97-129.

⁶⁷ See A Semple, ‘The Link to the Subject Matter: A Glass Ceiling for Sustainable Public Contracts?’, in B Sjøfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law. New Perspectives on the State as Stakeholder* (Cambridge University Press, 2015) 50-74.

⁶⁸ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114.

⁶⁹ Along those lines, S Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, 3rd edn, vol. 1 (Sweet & Maxwell, 2014) 746-747; see also OECD-SIGMA, *Incorporating Social Considerations into*

In general terms, and at first reading, Art 70 of Directive 2014/24/EU could be seen as a rather flexible framework for contracting authorities to build any specific labour or employment standards they desired into their public contracts—for instance, establishing their own tailor-made health and safety requirements, imposing higher pay standards than would otherwise be applicable (such as public sector minimum wages, living wages, or similar, as discussed below), or demanding any other measures to be implemented by their suppliers and service providers. Nonetheless, this interpretation is open to challenge on the basis of the requirement for contract compliance clauses to be linked to the subject matter of the contract, and for them to comply with the requirements of EU law more generally.

At the outset, it is important to stress that, where contracting authorities decided to make extensive use of contract compliance clauses, competition for the public contract could be rather easily distorted by strategic tenderers offering to comply with those additional requirements *ex ante*—thereby formally complying with the award criterion—and breaching the contractual covenant *ex post*—being then subject to penalties or other contractual remedies, which are largely irrelevant for analytical purposes.⁷⁰ Ensuring that the award of contracts according to this type of award criteria—particularly if they are given significant weight by the contracting authority—does not result in discrimination or a distortion of competition through the strategic behaviour of tenderers (and, eventually, of contracting authorities themselves) would require a significant amount of monitoring and surveillance after the award of the contract—which is costly and difficult to conduct by any agent other than the parties to the contract. In such circumstances, the room for discrimination and distortions of competition is widened and, consequently, the possibilities for the exercise of unlimited discretion and for the generation of discriminatory and anti-competitive outcomes might be unduly increased. In this regard, I consider that, unless very relevant (exceptional) circumstances make the adoption or weighting of such criteria essential or difficult to avoid in relation to the specific subject-matter of a given contract, contracting authorities are bound not to adopt, or to give marginal weight to, award criteria of a forward-looking nature that are not possible to verify or validate at tender evaluation stage (or, more generally, before contract implementation).⁷¹

More specifically, one issue that has triggered litigation in recent times concerns the *possibility of mandating compliance with minimum rates of pay to favour the employees of the undertakings involved in the execution of public contracts*. Such use of public procurement for the enforcement of social policies and, in particular, for the imposition of labour standards and minimum wage requirements has been both widespread and controversial in the EU.⁷² The case law of the ECJ has been considered restrictive of the possibilities of using public procurement to enforce minimum wage standards in a flexible way. This rigidity has been particularly linked to the *Rüffert* case,⁷³ and the way in which the ECJ linked the possibility of using procurement to enforce labour standards to

Public Procurement, Public Procurement Brief 14 (2016), available at <http://sigmaweb.org/publications/Public-Procurement-Policy-Brief-14-200117.pdf>.

⁷⁰ See also G Racca, R Cavallo Perin and GL Albano, 'Competition in the Execution Phase of Public Procurement' (2011) 41(1) *Public Contract Law Journal* 89.

⁷¹ On the ban against using award criteria that are not possible to verify, see Judgment of 4 December 2003 in *EVN and Wienstrom*, C-448/01, EU:C:2003:651, para [52].

⁷² For an interesting discussion, see A Wiesbrock, 'Socially Responsible Public Procurement. European Value or National Choice?' in B Sjøfjell and A Wiesbrock (eds), *Sustainable Public Procurement Under EU Law: New Perspectives on the State as Stakeholder* (Cambridge University Press, 2016) 75-98.

⁷³ *Rüffert*, C-346/06, EU:C:2008:189. For discussion, see R Caranta, 'Sustainable Public Procurement in the EU', in R Caranta and M Trybus (eds), *The Law of Green and Social Procurement in Europe* (DJØF, 2010) 15, 35-38.

compatibility with EU law and, in particular, with the Posted Workers Directive (PWD).⁷⁴ In that regard, it is worth stressing that the PWD allows Member States to impose compliance with terms and conditions on minimum rates of pay, including overtime rates, in relation to workers posted to their territory and whatever the law applicable to the employment relationship, where those are laid down by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable.⁷⁵

In *Rüffert*, the contracting authority had required tenderers to pay employees employed on the building site at least the minimum wage in force at the place where those services were performed, which was determined by a collective agreement. Once the contracting authority became aware of the fact that one of the subcontractors of the main contractor had infringed this obligation, it terminated the contract. This decision was challenged on the basis of EU free movement law and, after detailed analysis, the ECJ determined that the collective agreement at issue covered only a part of the construction sector falling within the geographical area of that agreement because it *applied only to public contracts and not to private contracts*, and the collective agreement had not been declared universally applicable. These two elements of the *Rüffert* Judgment are important because they led the ECJ to conclude that the requirement to pay that minimum wage in accordance with the collective agreement did not fix a rate of pay according to one of the procedures laid down in Art 3(1) and in Art 3(8) of the PWD. Consequently, the ECJ declared the requirement incompatible with EU law. Even if the *Rüffert* Judgment gave rise to significant criticism and left some legal uncertainties unsolved—notably, around the possibilities of establishing procurement-specific pay rules that did not apply to private contracts—it seemed clear that the ECJ aimed to align EU procurement and EU labour law, to the effect of enshrining the PWD as the single benchmark of legality for pay-related requirements.

Subsequent guidance by the European Commission⁷⁶ stressed this link by indicating that the relevant EU public procurement rules make it clear that the laws, regulations and collective agreements, at both national and EU level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, *providing such rules, and the way they are applied, comply with EU law*.⁷⁷ And, more specifically, the Commission stressed that one example of such compliance with EU law is the need to meet the requirements of the PWD in public procurement involving cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract.⁷⁸ This approach is currently reflected in recital (98) of Directive 2014/24/EU, according to which

It is essential that ... contract performance conditions concerning social aspects ... should be applied in accordance with [the PWD], as interpreted by the [ECJ] and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the [World Trade Organisation Government Procurement Agreement] or to

⁷⁴ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L 18/1. For criticism of this approach, see C McCrudden, 'The Rüffert Case and Public Procurement' in M Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press, 2011) 117-148.

⁷⁵ See Art 3(1) PWD, with Art 3(8) defining universal applicability as that of collective agreements that "*must be observed by all undertakings in the geographical area and in the profession or industry concerned*".

⁷⁶ "Buying Social" (n 5).

⁷⁷ This guidance was issued in relation to the now repealed Directive 2004/18/EC. However, this is equally relevant in relation to the new generation of EU public procurement directives, including Directive 2014/24/EU. See recital 37 of Directive 2014/24/EU.

⁷⁸ "Buying Social" (n 5) 46, fn 86.

Free Trade Agreements to which the Union is party. Thus, requirements concerning the basic working conditions regulated in [the PWD], such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive.

Remarkably, though, the extent to which ‘autonomous’ public procurement requirements also applied to the imposition of (minimum) wage conditions through contract compliance clauses—such as the need for them to be linked to the subject matter of the tendered contract⁷⁹—and the contours of the limitations derived from the PWD remained somewhat unclear. This led to subsequent litigation that challenged some interpretations of *Rüffert* and, in particular, to the recent Judgment in *RegioPost*.⁸⁰ In *RegioPost*, the contracting authority included the same material requirement that had been assessed in *Rüffert*—ie the obligation to pay the workers employed to execute the public contract the minimum wage applicable to the place of provision of the services. However, there was an important legal difference in this case because the relevant minimum wage had been determined by a regional law applicable only to the execution of public contracts. Thus, the case raised some difficulties around its compatibility with *Rüffert* in that, on the one hand, the imposition of the minimum wage by the regional law did fit the formal requirements of the PWD (as Art 3(1) explicitly covers measures adopted by law) but, on the other hand, the requirement was potentially in conflict with *Rüffert* because the regional law applied to public but not to private contracts. The latter issue seemed to have particular relevance because it had been recently reiterated in *Bundesdruckerei*, in relation with another German regional law mandating minimum wage for the execution of public contracts only, where the ECJ stressed that “*in so far as it applies solely to public contracts, such a national measure is not appropriate for achieving that objective if there is no information to suggest that employees working in the private sector are not in need of the same wage protection as those working in the context of public contracts*”.⁸¹

Ultimately, however, the ECJ allowed for the imposition of minimum wage⁸² requirements as special performance conditions in contracts covered by the EU public procurement rules where that minimum wage derives from regional legislation—even if that only applies to public contracts—because the condition as to universal application defined in the first subparagraph of Art 3(8) of the PWD applies only to the collective agreements or arbitration awards, but not to the other measures listed in Art 3(1) of that directive.⁸³ Thus, it seems clear that the analysis remains focused on compliance with the PWD, and that issues of discrimination between workers employed to execute private and public contracts did not enter the analysis of the ECJ as it would if the requirement for

⁷⁹ This was a debatable question under Art 26 Dir 2004/18/EC, given its silence, but there were good reasons to consider the need for contract compliance requirements to be linked to the subject matter of the contract; see A Sanchez-Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart, 2011) 317. This is now clearly a requirement under Art 70 Dir 2014/24/EU, which explicitly establishes that ‘*Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract ...*’; see Sanchez-Graells (n 64) 390. See also Semple (n 67).

⁸⁰ *RegioPost*, C-115/14, EU:C:2015:760.

⁸¹ Judgment in *Bundesdruckerei* EU:C:2014:2235, para [32].

⁸² It remains unclear whether the imposition of wage requirements (such as a living wage) above a lower generally applicable minimum wage would be allowed; see Judgment in *RegioPost* EU:C:2015:760, para [76], where the ECJ refers to the fact that, at the time when the minimum wage was imposed by the regional law, it conferred “*a minimum social protection since ... the [applicable legislation] did not impose, nor did other national legislation impose, a lower minimum wage for the [relevant economic] sector*”.

⁸³ Judgment in *RegioPost* EU:C:2015:760, para [63].

universal application had not been assessed in the strict terms of Art 3(8) PWD.⁸⁴ The substantive contradiction between *Bundesdruckerei* and *RegioPost* thus seems to be formally saved by the explicit terms of the PWD where applicable (*ie* in *RegioPost* but not in *Bundesdruckerei*), which is not a satisfactory position in terms of meaningful systemic integrity of the rules applicable to public procurement and the enforcement of labour standards in the internal market—it does save the underlying difficulties in terms of competence allocation, but it creates significant uncertainty in situations where the applicability of the PWD is not straightforward.⁸⁵

Compatible with the approach of concentrating the analysis of the imposition of labour standards through contract compliance clauses on the requirements of the PWD, the ECJ Judgment in *Bundesdruckerei* also established that, if a service can be provided from a different Member State—*ie* where there is no posting of workers—it is against EU law to impose minimum wage requirements that apply across the board, *ie* regardless of the Member State where performance of the service takes place. As clearly put by the ECJ

*a fixed minimum wage corresponding to that required in order to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents [economic operators] established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay ... [and] goes beyond what is necessary to ensure that the objective of employee protection is attained.*⁸⁶

This is important because the *Bundesdruckerei* Judgment suggests that, other than in compliance with the PWD—which allows for procurement-specific minimum wage requirements when they are laid down by law, regulation or administrative provision, but not when they are laid down by collective agreement, unless declared universally applicable⁸⁷—the rules in the EU public procurement directives are insufficient to provide legal cover to minimum wage requirements due to the restrictions they create on free movement.⁸⁸

However, despite the guidance in this line of case law, the interaction between the PWD and the rules on contract compliance clauses in the public procurement directives remains somewhat unclear. In one reading, given that the wage requirements included in the *Rüffert*, *Bundesdruckerei* and *RegioPost* cases were assessed against the standard of the PWD, it can be concluded that Art 26 of Directive 2004/18/EC, and now Art 70 of Directive 2014/24/EU do not provide sufficient legal basis for contracting authorities to create minimum wage requirements that actually go beyond those *already* derived from existing rules adopted in conformity with the PWD. I consider this the better

⁸⁴ Similarly, see Costamagna (n 14) 107-108; and, for further discussion, C Kilpatrick, *Internal Market Architecture and the Accommodation of Labour Rights: As Good as it Gets?*, EUI LAW Working Paper 2011/04, available at <http://hdl.handle.net/1814/16824>.

⁸⁵ For a well-argued criticism of this approach, see Costamagna (n 14) 109-110. This is also discussed in more detail in A Sanchez-Graells, 'Competition and State aid implications of 'public' minimum wage clauses in EU public procurement after the *RegioPost* Judgment', in A Sanchez-Graells (ed), *Smart Public Procurement and Labour Standards—Pushing the Discussion after RegioPost* (Bloomsbury-Hart, forthc.), available at <https://ssrn.com/abstract=2958296>.

⁸⁶ Judgment in *Bundesdruckerei* EU:C:2014:2235, para [34], emphasis added.

⁸⁷ Which now seems impossible on the basis of *Rüffert*'s and *RegioPost*'s interpretation that compliance with Art 3(8) PWD is excluded where the collective agreement applies to public but not private contracts.

⁸⁸ A controversial issue pending adjudication concerns the establishment of minimum wage or other labour law requirements by administrative provision not universally applicable, which can be very problematic if the inclusion of the requirement in the tender documentation is in itself constructed as a valid administrative provision for the purposes of Art 3(1) PWD.

position, in particular due to the need to ensure systematic consistency in the field of EU economic law. Nonetheless, it must be acknowledged that there is an alternative reading based on *RegioPost* that can create scope for divergence from this position.

In that regard, it is worth noting that the ECJ indicated that *“since the national measure [imposing minimum wage] falls within the scope of Article 26 of Directive 2004/18, which permits, subject to certain conditions, the imposition of a minimum wage in public contracts, that measure cannot be required to extend beyond that specific field by applying generally to all contracts, including private contracts. The limitation of the scope of the national measure to public contracts is the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down in Directive 2004/18”*.⁸⁹ This could be seen as effectively pointing out to the rules in the procurement Directives as allowing something that goes beyond the PWD. However, in my view, this is not the case because the ECJ had already concluded that, under the PWD itself, there is no requirement for universal applicability of national measures other than for collective agreements or arbitration awards. Moreover, this is clear from the way the ECJ completed the reasoning on the interaction of the PWD and the procurement rules, by indicating that *“Article 26 of Directive 2004/18, read in conjunction with [the PWD], permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive ... which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers”*.⁹⁰ In my opinion, this conclusion is in line with the general criterion that the analysis of pay-related requirements in the area of public procurement remains focused on compliance with the PWD.⁹¹

Therefore, I submit that a proper interpretation of Art 70 of Directive 2014/24/EU in relation to the PWD demonstrates that the public procurement rules do not contain a substantive standard that allows Member States and their contracting authorities to use contract compliance clauses to go beyond existing employment and labour rules. Ultimately, then, the procurement-specific measures oriented towards imposing labour standards will have to be enacted in compliance with the PWD, where applicable, and otherwise be compatible with an analysis of proportionality under the general free movement rules. Moreover, contract compliance clauses will have to be linked to the subject matter of the contract, which creates a further restriction to the use of this mechanism to go beyond existing rules.

Potential contribution of procurement mechanisms to the enforcement of labour standards in the EU

The previous analysis lends itself to the core conclusion that the success of the inclusion of pro-labour standards mechanisms in Directive 2014/24/EU as a result of the trend of regulatory substitution that has pushed for a reorientation of EU public procurement towards the facilitation of employment and labour goals is both limited and highly dependent on the implementation (and investment of significant administrative resources) at Member State level.

⁸⁹ Judgment in *RegioPost* EU:C:2015:760, paras [64] and [65].

⁹⁰ Judgment in *RegioPost* EU:C:2015:760, para [66].

⁹¹ This can be criticised for different reasons and from different perspectives. I find the likely distortions of competition that this can create particularly troubling, as discussed in detail in Sanchez-Graells (n 84).

First, the inclusion of *positive mechanisms in the form of contract compliance clauses* (Art 70 Dir 2014/24) is severely restricted by the double requirement of compliance with general EU law and with the procurement-specific requirement of their link to the subject matter of the contract. In the specific case of the use of contract compliance clauses to impose minimum wage requirements, the coordination of the public procurement rules with general EU labour law (specifically, the PWD) has shown that regulatory substitution has not actually taken place, and that the internal market logic of both sets of rules prevent the advancement of labour law regulation by means of public procurement, despite repeated efforts in that regard. I submit that, ultimately, only one substantive standard applies to the use of contract compliance clauses for wage-related requirements—that of free movement, as concretised by the PWD where applicable—which may fall short from insulating public procurement from the pressure for it to assimilate extraneous regulatory goals, but does significantly constrain what can *legally* be done in this area. As mentioned above, the PWD only allows for procurement-specific minimum wage requirements when they are laid down by law, regulation or administrative provision, but not when they are laid down by collective agreement, unless declared universally applicable.

There are two open issues. One, whether non-minimum wage requirements are allowed, in the sense of whether requirements can be imposed that go beyond (statutory) minimum wages. This can have an important impact by restricting living wage and other ‘public-sector’ minimum wage requirements that go beyond generally applicable minimum wage legislation—which would take place on the basis that Member States are only allowed to regulate an absolute wage floor, and that procurement mechanisms can only impose that minimum requirement but not one that exceeds it. And two, how to draw the boundaries of ‘administrative provisions’ for the purposes of Art 3(1) PWD in order to avoid situations that could take the exemption from the requirement of universal applicability too far (such as if the tender documentation was considered an acceptable administrative provision for the purposes of the PWD, which I submit would be excessively permissive). In my view, both elements should (and are likely) to be interpreted in a restrictive manner, which can further contribute to narrow down the scope for wage-related contract compliance requirements. Beyond this, the requirement for the link to the subject matter of the contract will remain an important constraint (particularly where a single employer cannot discriminate between employees in its work force depending on whether they engage in the execution of public contracts or not, or where staff are employed for the execution of contracts from time to time but not permanently, which raises issues around the ways in which their wages should fluctuate). The general requirement to comply with EU internal market law will also be a constraint for non-wage labour and employment-related contract compliance requirements, as they are likely to constitute barriers to trade that fail a strict proportionality assessment in terms of the *Bundesdruckerei* test.

This is not to say that labour standards cannot (much less that they shall not) be enforced in the area of public procurement, but rather that they are (and can only be) enforced to the same extent as in any other sector of the economy, and only in compliance with rules of general application compatible with EU law. In my view, this seems appropriate because it tends to constrain the issues of policy conflation and loss of policy effectiveness in the area of procurement that could otherwise arise—which are roughly of the same type as those created by negative mechanisms (discussed below). Ultimately, this leads to the conclusion that the use of positive procurement mechanisms in the form of contract compliance clauses for the enforcement of labour standards creates a layer of regulatory burden likely to only achieve limited practical results, if any, and that the expectations placed on this strategy may be overblown. Thus, there are good reasons to abandon the rhetoric underlying the efforts or push for regulatory substitution in this area, so that public bodies do not operate under the illusion that this will boost labour protections and, in turn, undertakings need not waste their time wriggling around, trying to find gaps in the over-regulation from which to try to derive

a competitive advantage. Departing from the current instrumental approach to contract compliance clauses for the enforcement of labour standards will also reduce the legal uncertainty in this area, which would bring immediate benefits in itself.

Second, and in a somewhat contrasting fashion, the reforms concerning *negative pro-labour standards mechanisms* for the exclusion of tenderers or tenders that do not comply with applicable labour and employment obligations (Arts 18(2), 56, 57 & 69 Dr 2014/24) have been more successful in terms of regulatory substitution, and have now become part and parcel of public procurement regulated by the 2014 EU Package. Some aspects of this regulatory substitution implicitly rely on previous findings of breach of relevant social and employment legislation, and these aspects are unlikely to generate significant distortions of the procurement process—*eg* the exclusion of a tenderer that has been previously convicted by final judgment for the infringement of health and safety rules. However, other aspects create an independent duty to investigate (or the discretion to investigate, which can then prompt a duty, either under general principles of administrative law or on the back of a challenge by tenderers⁹²) and are likely to create disruptions in the conduct of procurement procedures.

This regulatory reform has effectively transferred (or multiplied) inspection and audit burdens in public procurement (without necessarily having reduced those same burdens in the employment and labour arena), and more than probably placed procuring entities under significant strain by creating the expectation that they will (effectively) monitor compliance with social and labour law established by Union law, national law, collective agreements or by a number of relevant ILO Conventions. In countries where there is a separate enforcement architecture in charge of monitoring (and sanctioning) breaches of social and employment rules (*ie* labour inspectorates, such as those existing in Denmark, Germany, Italy or Spain, to name only a few EU jurisdictions),⁹³ rather than regulatory substitution, this will create regulatory duplication. This will not necessarily only create issues of coordination and resource allocation, but can also raise issues of complacency or priority distraction, provide excuses not to take other types of enforcement measures, and ultimately encroach regulatory discrimination between workers in public sector facing industries and elsewhere.⁹⁴ Differently, in countries where such enforcement architecture does not exist (*ie* where there has been an effective regulatory substitution as an attempt to create *some* sort of labour and employment enforcement structure), this will result in an additional strain of the resources dedicated to the administration of public procurement, as well as a false sense of sufficiency of these mechanisms to oversee compliance with employment and social law more generally. Put in simple terms, procurement compliance and oversight can be no substitute for other enforcement mechanisms.

In both cases, this regulatory substitution (or duplication) raises questions around its effectiveness⁹⁵ because it is not clear that procuring entities are in a position to monitor compliance

⁹² In that regard, concerning the justiciability of exclusion grounds, see Judgment of 5 April 2017 in *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268. See also Sanchez-Graells (n 65) for extended discussion.

⁹³ For more details of the existence of labour inspectorates in European jurisdictions, see SYNDEX-EPSU, *A mapping report on Labour Inspection Services in 15 European countries* (2012), available at http://www.epsu.org/sites/default/files/article/files/EPSU_Final_report_on_Labour_Inspection_Services.pdf. More generally, see ILO, *Figures and Statistics on Labour Inspection Systems* (2010), available at http://ilo.org/labadmin/info/WCMS_141079/lang--en/index.htm.

⁹⁴ For a compelling account of these issues in the Australian context: Holley, Maconachie and Goodwin (n 4).

⁹⁵ Generally, on the unlikely effectiveness of the use of procurement to enforce similar policies, such as SME participation, see S Evenett and B Hoekman, 'International Disciplines on Government Procurement', in A Lukauskas, R Stern and G Zanini (eds), *Handbook of Trade Policy for Development* (Oxford University Press, 2013)

with Art 18(2) obligations in a satisfactory manner. Some aspects of this additional burden linked to the tenderers can be hedged or mitigated by the creation of centralised registration systems entrusted with monitoring compliance—although this will require the investment of significant resources in countries where such systems do not exist, or where they need to be significantly reformed. However, other aspects directly linked to the each of the tenders will raise tender evaluation costs and possibly litigation, without necessarily resulting in higher levels of compliance with labour or employment standards more generally. This can have a disproportionate effect for some smaller scale procuring entities, as well as for all procuring entities when carrying out relatively low-value procurement.

Overall, it seems that despite the rhetoric surrounding the legislative process leading to the adoption of Directive 2014/24/EU and current formulation of EU policy, procurement mechanisms have limited potential to contribute to the enforcement of labour standards in the EU. I am aware that such rhetoric and strategic couching in smart procurement terms may trigger *de facto* non-compliance with the restrictions on the use of positive mechanisms—which may go unchecked due to commercial reasons—and that Member States may actually decide to invest significant amounts of resource in making the negative mechanisms discussed above work out (not least because they are common to the pursuit of other exclusion grounds that are core to procurement regulation). However, I do not think that those are good enough reasons to reject the legal analysis carried out here.

Conclusion

In this paper, I have shown how the review of the EU public procurement rules through the 2014 Package has galvanised a trend of regulatory substitution whereby employment and social goals have now become part and parcel of public procurement strategy in the EU. However, a close examination of the legal mechanisms created by Directive 2014/24/EU has also shown that this regulatory substitution is both limited and highly dependent on the implementation (and investment of significant administrative resources) at Member State level.

Negative mechanisms oriented towards the exclusion of tenderers and tenders that are shown to breach relevant social and employment obligations are legally defined in a way that fits the conduct of procurement procedures, but also in a way that raises the administrative burden without necessarily providing proportionate benefits—which remains an empirical question. They are also created in ways that generate legal uncertainty and that are likely to result in fresh litigation in view of recent ECJ case law on the justiciability of exclusion grounds. Moreover, even if implemented in an effective manner, these mechanisms are no substitute for more general systems of enforcement of social and employment law, and this creates structural issues of coordination and allocation of resources.

Positive mechanisms aimed at the creation of contract compliance clauses imposing social or employment-related conditions (and in particular, minimum wage requirements) are more limited than they would seem at first reading. They are constrained by the cumulative applicability of EU public procurement *and* EU labour law, which results in the double requirement of compliance with the PWD and of keeping a close link with the subject matter of the contract, and are in any case subject

851-876; and B Hoekman, 'International Cooperation on Public Procurement Regulation', in A Georgopoulos, B Hoekman & P C Mavroidis (eds), *The Internationalization of Government Procurement Regulation* (Oxford University Press, 2017) 568-602.

to a strict proportionality analysis under general EU free movement law where the PWD (or other sectoral regulation) does not apply.

In my view, these conclusions can be useful not only in EU jurisdictions—where implementation decisions will have to aim to support the use of negative mechanisms through adequate resourcing, and provide guidance on the *legally compliant* limited ways in which contract compliance requirements can be contractualised—but also elsewhere. Issues surrounding negative mechanisms and their impact on the regulatory burden of carrying out procurement will be a common restriction of this instrumental use of public procurement. Issues surrounding positive mechanisms, or labour regulation through public contract, may be different in the absence of a market integration norm. However, there will be common issues concerning discrimination of workers engaged in the execution of public and private contracts, as well as other issues concerning limited competition for public contracts and the shadow cost this creates for the public purse.

Therefore, on the whole, the analysis in this paper supports a change of tack and a move away from the instrumentalisation of public procurement for the enforcement of labour standards, and back to its core function. However, the extent to which this is likely to happen might as well be limited, for public procurement is and will likely remain a regulatory garbage can.