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Promoting human rights compliance through public procurement (regulation): the new European Directive¹

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1. Introduction

In recent years, the attention for corporate social responsibility has increased both society-wide as at the level of the European Union and its Member States.² This attention is not only focused on private businesses, but also on public authorities. Public authorities in Europe buy goods and services from the market for a total value of approximately 420 billion euro per year (in 2010).³ Therefore, they have, apart from their ability to stimulate corporate social responsibility (CSR) by using conventional regulatory means, yet another powerful tool to do so. Public authorities are able to act as a ‘launching customer’ and strategically use their purchasing power in order to influence the manner in which private businesses produce and deliver their products and services from the perspective of CSR.⁴ Although this term (CSR) formerly mainly implied ‘buying green’, CSR is much broader nowadays. Apart from the pursuit of green or environmental criteria, social criteria too form an important element of the current concept of sustainability. On their part, these social criteria can also be divided into two categories. Whereas ‘internal social goals’ such as promoting re-employment and – with regard to the users of a product – *design for all* criteria have been a focus point in practice and regulation for quite a while now, the attention for the – more externally oriented – integration of human rights considerations in public procurement (regulation) is much more recent and therefore less developed. There is, however, a clear and undeniable trend of more and more Member States and purchasing authorities trying to promote the compliance with human rights – in particular labour rights – by economic operators in the performance of public contracts.

The scope Member States (national legislators) and public authorities have to stimulate CSR goals through public procurement (regulation) is determined by the European Directives (and the interpretation thereof by the European Court of Justice). With the entering into force of the new Directives, this scope has been fairly revised. Not only do the new Directives, in contrast to the current ones, explicitly focus on promoting the use of public procurement in support of *societal goals*⁵ (as the promotion of strategic use of procurement in general is one of the two main goals of the revisions⁶), they also have a greater focus than the current Directives, within the aforesaid context, specifically on the promotion of *human (labour) rights compliance* through public procurement (regulation).⁷

It can, however, be questioned to what extent the new regulation will actually clarify what Member States and contracting authorities are allowed (or maybe even obligated) to do in this respect.

This paper will illustrate that, although the scope to do so seems to have been expanded, the new Directive will also set the ground for further discussion and legal uncertainty in this field. This illustration will be based on an analysis of two of the most striking new provisions within the proposed Directive, relevant with regard to promoting human rights considerations in public procurement (regulation).

2. Article 18 (2); A new and extensive duty for Member States and contracting authorities?

One of the most notable alterations in the new Directive with respect to promoting human rights compliance through public procurement is the introduction of a new and extensive duty for Member States in article 18 (2):

Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Although the wording of the article does not leave much ambiguity about the question *whether* Member States have a *duty* (instead of a possibility) in this respect, it is much less clear about the *content* of this duty.⁸

The measures that shall be taken, must *ensure* that ‘economic operators’, when performing public contracts, *comply* – instead of: ‘are stimulated to comply’ - with the obligations referred to in art. 18(2), amongst which obligations in the field of social and labour law.⁹ This compliance is thus no longer solely the responsibility of the economic operators themselves, Member States too have an explicit duty in this respect.¹⁰

But what is the content of this duty? According to art. 288 TFEU, Directives in general impose duties upon Member States to achieve a certain results.¹¹ Hence the question is what is the result the Member States are obligated to achieve? It does not seem plausible to assume that Member States are expected to take measures that *will* actually *have* the effect that economic operators comply with the obligations referred to. For whether or not these operators will comply is (also) dependent on the individual choices of the contracting authority and of the economic operators concerned (which will be based on a broad cost/benefit analysis, only partially influenced by the existing legal context such as applicable regulation and contractual conditions). If we would interpret the duty in the aforementioned way, this would thus amount to a duty that would be neither feasible nor realistic. All the more striking is the fact that the legislator indeed did choose the rigorous formulation ‘*shall* (instead of *may*) take measures to *ensure* that economic operators *comply*’ instead of a less demanding formulation such as ‘shall take measures to *promote*’ or ‘*stimulate* that economic operators comply’.

If one would try to come to a more feasible and realistic interpretation, this wording seems to imply that in any case, the effectiveness of the possible measures should *at least* be thought about. Moreover, it does not seem compatible with this firmly formulated duty, to take measures with a voluntary character, such as measures of Member States allowing contracting authorities the liberty to decide not to take into account the compliance of economic operators with the referred norms in their procurement procedures or measures of contracting authorities allowing¹² economic operators to perform the contract without complying with the referred norms.

Originating from this strict formulation of Article 18(2), that seems to impose an obligation on Member States to *garantee* (ensure) the actual compliance by economic operators and at the same time taking into account the fact that it is in reality not possible to *garantee* (ensure) actual compliance by *any* measure, in my opinion the most sound interpretation of art.18(2) is to assume that Member States have a duty to create a legal framework in which the chances on economic operators performing public contracts violating the norms art. 18(2) refers to, are as limited as possible. Although Member States will – as it was argued – not be able to *garantee* that this framework *will in fact* always lead to compliance by economic operators, they will in my opinion thus need to *garantee* that the established framework stimulates this compliance (by (all) economic operators performing public contracts) *as much as a legal framework is able to*. In other words, the result Member States are obligated to achieve is in that view not so much a ‘*factual* effectiveness *garantee*’, but more a ‘*legal* effectiveness *garantee*’. Not the actual effectiveness needs to be ensured, but the fact that the legal framework is drafted in such a manner, that the likelihood of (actual) effectiveness is safeguarded as much as possible (*i.e.* a *garantee* that the measures taken ensure the largest expectable effectiveness). This interpretation would in my opinion be the most feasible view in line with the strict wording of art. 18(2), for it formulates a more concrete duty which will make it easier for Member States to determine what is expected of them and for others to assess whether Member States do comply with this provision. However, even in the scope of this more concrete obligation, in my opinion, it will still be difficult to determine this. If, for example, a national legal framework imposes a duty on contracting authorities to include in their contract clauses an obligation for economic operators to comply with certain social standards when performing the public contract, and if this framework does not provide the contracting authority with a possibility to actually verify whether the performing economic operators do indeed comply with these standards¹³ and to take effective action if they appear not to, the probability that this legal framework is actually effective is very small – if not nil –. In such a case it can be assumed that this framework does not meet the requirements of art. 18(2), interpreted as elucidated above (for the framework does not create the largest probability of effectiveness). Even if however, the legal framework *does* provide for such possibilities, the question whether this makes the likelihood of (actual) effectiveness as large as possible, is still difficult to answer. For one could also argue that in order to comply with art. 18(2), as interpreted as above, a Member State may not suffice with creating a *possibility* for contracting authorities, but has a duty to impose an *obligation* (including a possible remedy) upon contracting authorities to effectively include human rights considerations in procurement procedures and to verify the

information provided by economic operators in such procedures. This again, would depend on the question whether one would expect that imposing a duty on contracting authorities will be more effective than ‘only’ creating a possibility for them.¹⁴ In other words, although within this less strict interpretation of art. 18(2) Member States would not have the impossible duty to ensure that their measures *will* be effective, they would still have to find a way to determine what will be the most effective measures. For on the basis of the strict wording of art. 18(2), it is in my view indisputable that Member States at least have a duty to take the measures that will in all likelihood be the most effective. This would in my view – unlike *ensuring* compliance – be a more realistic task for Member States, but not an easy one. For effectiveness (that can be expected) of measures – especially within the scope of human rights – will be hard to quantify. Moreover, it can in any case not be assessed by merely looking at the legal framework itself, because the extent to which a measure is effective depends largely on the individual choices of contracting authorities and economic operators.

Although I am of the opinion that the obvious intention of the provision – *i.e.* to establish that Member States become more aware of the effectiveness of the measures taken with regard to achieving sustainable goals – is a good one, art. 18(2) causes much uncertainty with regard to the exact content of the duty imposed on Member States. This will not only lead to legal uncertainty for Member States but, in addition, as a result of this unclarity, will presumably prevent the provision from having any remedial effect. In general, if a Directive imposes an obligation on Member States which is not performed correctly, the Commission, as well as other Member States can take action.¹⁵ But if it is unclear what exactly it is that is expected from the Member States on the basis of art. 18(2), it will obviously be very difficult, if not impossible, to establish that a Member State has failed to comply with this obligation.

Although art. 18(2) is formulated very rigorously, it therefore seems to be much more a (quite vague) signal than a duty that is likely to actually bring a change. Of course there will be Member States that will take measures to promote compliance by economic operators performing public contracts with the standards referred to, which measures could possibly even be considered to meet the result required by art. 18(2). However, it might be argued that the Member States doing so, will be those that are already willing to take such criteria into account in their role as a purchaser. They will probably not do this *because* of the newly introduced obligation of art. 18(2), but irrespectively of this. Member States that do not see the need to take environmental and social criteria into account in their procurement procedures, will in my view not be stimulated by art. 18(2) to do so.

3. Article 67; Real MEAT and MEAT on the basis of mere price?

One of the most popular manners to take into account social criteria within public procurement procedures is to include these as award criteria. The revised provision with regard to the possibilities Member States and contracting authorities have in this respect, can be found in article 67 of the new Directive.

The most striking difference between article 67 and its predecessor article 53 (Directive 2004/18) – and at first sight a good illustration of the broadened scope for strategic use of public procurement in the new Directive – relates to the fact that the award of public contracts on the basis of mere price is no longer allowed. At least that *seems* to be the clear intention of the reform. For instead of the choice that art. 53 provides between awarding on the basis of the lowest price only and awarding on the basis of the most economically advantageous tender’ (MEAT) – which options were still included in the original reform proposal¹⁶ – art. 67(1) determines: ‘*contracting authorities shall base the award of public contracts on the most economically advantageous tender*’. However, the message of paragraph 1 suddenly becomes a lot less clear when reading paragraph 2: ‘*The most economically advantageous tender*’ (...) ‘shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing (...) and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects (...)’. It follows from this that it is still possible to award the contract on the basis of mere price – in fact, contracting authorities are, unlike under the former provision, obligated to include a price or cost aspect in their award criteria¹⁷ – only this is now called awarding on the basis of MEAT.¹⁸ Taking into account that this final wording is probably the result of a political compromise, might make this mixed message less surprising, it does not make it less confusing. For until now, MEAT meant that the contract was awarded on the basis of the best price-quality ratio (assessed on the basis of several criteria, which did not necessarily have to include a price element) *instead of* on the basis of the lowest price criterion.¹⁹

As it was argued, the new regulation seems to create a new distinction by defining MEAT as *either* what was up to now known as the (mere) lowest price criterion *or* what was already called MEAT – *with the difference* that now, a price element has to be included²⁰ –, namely the price-quality ratio. Apart from this unclarity, this will in my opinion cause difficulties when applying the existing policy documents and case-law of the CJEU, for these are based on different definitions of the same concepts. (This is particularly surprising, because the Commission itself explicitly expressed the intention to ‘keep continuity in the use of notions and concepts that have been developed over the years through the Court’s case-law and are well known to practitioners’.)²¹ An Explanatory Note in this

respect would therefore be very welcome. For now, one can only assume on the basis of article 67 of the new Directive that the difference compared to article 53 described above is not what it seems to be: the award of a public contract on the basis of mere price is still possible, albeit that Member States now have the option to restrict or prohibit this.

But it is not only uncertainty article 67 brings us. Similar to what article 42 determines in the area of technical specifications, article 67 provides a clearer scope – certainly relevant regarding the issue of sustainable criteria – as to what (categories of content) the award criteria may comprise (par. 2) as well as to when these criteria are considered to be sufficiently linked to the subject matter of the contract (par. 3). This is mainly done by giving examples – much more than the current Directive does – of criteria that are allowed. Concerning the first question paragraph 2 – unlike the current Directive that only refers to *environmental* criteria – defines that award criteria determining the best price-quality ratio may include ‘environmental *and/or social* aspects. (...) *Such criteria may comprise, for instance: (a.) Quality, including (...) social (...) characteristics and trading and its conditions*’. Formerly, the initiative proposal for the new Directive clearly limited the scope for inclusion of social award criteria, for these might only regard ‘the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract’.²² In the Dutch coffee-case however, the CJEU broadened this scope substantially by stating – with reference to EVN Wienstrom – that ‘there is nothing, in principle, to preclude an award criterion from referring to the fact that the product concerned was of fair trade origin’.²³ The Commission seems to have followed this line in the final proposal. Of course, one could still wonder exactly what kind of social criteria are allowed (especially with regard to the principle of proportionality), but combining the fact that trading conditions (in general) are explicitly allowed and social criteria (in general) are too, fair trade criteria seem to now fall within the scope of article 67.

As regards the question when a certain criterion is considered to be sufficiently linked to the subject matter of the contract, article 67(3) also provides us with a clearer scope. Until now, the link to the subject matter of the contract-test was quite vague.²⁴ Article 67(3), however, now sheds some new light on this test (and thus on the possibilities contracting authorities have to include *i.a.* CSR criteria within the limitations of public procurement regulation) by explicating that ‘*award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:*

(a.) the specific process of production, provision or trading of those works, supplies or services; or (b.) a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.’.

(As it was argued, according to paragraph 2, these criteria can also refer to social aspects.)

This provision too, is consistent with CJEU case law. The fact that it is not required that award criteria form part of the material substance of the ‘end product’, can in my view already be deduced from the EVN Wienstrom-case²⁵ and the Concordia-case,²⁶ but has more recently also been ruled in the Dutch Coffee-case.²⁷ Also, the fact that the use of a certain production process can be included as an award criterion and can thus be linked to the subject-matter of the contract, seems to be in line with case-law like EVN Wienstrom.^{28 29} On the basis of 67(2), this applies to both environmental and social factors.

Most striking within the provision of art. 67(3) is the fact that the legislator evidently decided to remove all doubt, if any, regarding the question what stages of the life cycle of purchased goods have a sufficient link with the subject-matter of the contract, by including the words ‘*at any respect and at any stage of their life cycle*’. Whereas one could – before this new provision – have thought that the link-test limited the scope for inclusion of social and environmental criteria as award criteria, given the stage of the life cycle they referred to, it is now clear that this is not the case, provided that these criteria *relate* to the purchased goods. With this new and broad definition, this last requirement therefore seems to be the only test that needs to be passed with regard to the subject-matter of the contract-test. If it is no longer questionable whether this requirement (a sufficient link to the subject-matter of the contract) (also) refers to the stage of the life cycle of the purchased goods (the ‘distance’ of the end product one could say), one could wonder what is then still left of it. If not this, what does ‘sufficient link to the subject-matter’ (which seems to be redefined within article 67 with the words ‘refer to the goods to be provided’) then mean? In my opinion, the only way to interpret this newly formulated scope is by taking a look at the only CJEU case in which a concrete limitation was deduced from this requirement, the EVN Wienstrom case. In that case, not the question whether the criterion concerned referred to a stage of the life cycle that was too far away from the ‘end product’ was the focus, but the question whether this criterion referred to the (amount of) products purchased by the contracting authority or to the general policy of the tenderer. Reading the wide scope of article 67 in conjunction with the CJEU case-law (apart from EVN Wienstrom the Dutch Coffee-case³⁰), in my view it is exactly this aspect that is now the only limitation to be deduced from the sufficient link to the subject-matter test.^{31 32}

Obviously, the fact that there is now a quite clear and broad definition of the sufficient link to the subject matter of the contract-test is helpful. It remains, however, unclear whether this definition is also applicable within the scope

of the other provisions requiring the fulfilment of this test, for example article 42(1) with regard to technical specifications. The fact that one of these articles – namely art. 70 with regard to contract performance conditions – explicitly refers to the definition of the test in art. 67(3), while others – like art. 42 (technical specifications) and 43(1)(a) (labels) – do not, increases that lack of clarity. Is the link to the subject-matter test of art. 42 and 43 different from the one in art. 67 and 70? In my view that is not probable, for the ratio of the requirement in each of these articles is the same: the principle of proportionality. Therefore, chances are that the CJEU will have to clarify whether the definition of art. 67 (3) applies to every stage in which this link is set as a precondition.³³ However until then, the fact that the definition of the concept is placed within one specific article, and the fact that some articles do and some do not refer to this definition, leaves, in any case, undesirable room for discussion.

Article 67(4) too, could on the one hand be seen as a step forward with respect to promoting compliance with human rights through public procurement and on the other as a possible ground for legal uncertainty. Apart from explicating some conditions we already know from the Preamble in the former Directive and the CJEU case law³⁴ – resulting from the general principles – (namely: the criteria may not have the effect of unrestricted freedom of choice and shall ensure the possibility of effective competition³⁵), article 67(4) determines that the award criteria ‘shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria’. This too, was already elucidated by the CJEU, which, in the EVN Wienstrom case, clarified that contracting authorities can only set criteria against which the information provided by the tenderers can *actually be verified*.³⁶ The current Directive – drafted after the Wienstrom case – however, does only contain a provision *within the Preamble* with regard to the specificity and measurability of award criteria. This determines that award criteria need to ‘allow the level of performance offered by each tender to be *assessed* in the light of the object of the contract (...) and the value for money of the tender to be measured’.³⁷ Apart from the fact that the legislator has now chosen to include this aspect within the Directive itself, the most striking difference is that the *effectiveness* of the verification made possible by the specifications is explicitly set out as a relevant factor. Although this is not completely new in terms of content – given that it is quite similar to what was determined in the EVN Wienstrom case (which contains the wording ‘*actually verified*’, see above) – it does illustrate the relevance the legislator obviously assigns to the aspect of effectiveness. And rightly so, especially from the perspective of human rights compliance, for the greatest challenge one encounters when including human rights considerations in a public procurement procedure is to find a way to effectively verify the due observance of these criteria. This is not only necessary from the perspective of legitimacy having regard to the general principles of equality and transparency, but also from the perspective of efficacy. For it seems self-evident that only given such effective verification, including these criteria will have an actual effect on the extent to which economic operators will comply with the human rights provisions concerned. (For that matter, on the basis of art. 18(2) achieving this aforesaid effect is no longer a goal contracting authorities can decide to set themselves, it is the result Member States (and – on the basis of the Preamble – possibly also contracting authorities³⁸) are now obliged to pursue. By imposing a duty on contracting authorities to set ‘*specifications that allow the information provided by the tenderers to be effectively verified*’, article 67(4) fits within the objective of article 18(2).) However, in this respect too, as it was also argued in the context of article 18(2), one could wonder what such a duty will mean in concrete, given that it will be difficult to determine whether the established specifications do in fact enable the contracting authority to *effectively* verify the provided information. It will therefore be difficult for both contracting authorities to determine what is expected of them and for others to determine whether a contracting authority complies with the duty article 67(4) comprises.

Besides the requirement of paragraph 4 that the specifications that are set must enable effective verification, it also contains – unlike the current Directive – a duty for contracting authorities to actually effectively verify the accuracy of the information and proof provided by the tenderers (art. 67(4) *in fine*). As it was argued above, both from the perspective of the promotion of human right compliance as from the perspective of the principle of equal treatment³⁹ such verification is desirable.⁴⁰ However, according to paragraph 4, this duty only exists ‘in case of doubt’. This raises the question what exactly is meant by ‘verification’, for it is clear that – *irrespective* of the existence of any doubt that can be raised – the contracting authority will always have to assess the information provided by the tenderers. Assumably, verification means – after having received proof and other information (see par. 4 *in fine*) – the carrying out of other actions to check whether the provided information is in accordance with the facts. What these actions may involve, however, and thus what the contracting authority is allowed to do and to require from the tenderer concerned, is in my opinion unclear. Although the new Directive – with a view to reducing the administrative burden – quite specifically determines limitatively what means of proof contracting authorities are allowed to require within the scope of exclusion grounds and selection criteria (art. 60) and introduces the European Single Procurement Document in this respect (art. 59), these rules only regard the verification (‘examining’) with respect to selection criteria and exclusion grounds. Does this mean that, in case art. 60 does not apply, all means are allowed? Considering the aforementioned objective of reducing the administrative burden, this does not seem assumable, but the provision of art. 67(4) does not provide for any other scope either. Therefore, the question what means may be used within the scope of the verification of art. 67(4) seems difficult to

answer.⁴¹ This leaves contracting authorities a seemingly wide scope of discretion. In addition to this, they will have to face the problem of a lack of clarity. Not only with regard to the means of verification that could be used, but also with regard to the way in which this verification should be performed effectively within the boundaries of the general principles. One might, for example, imagine that the decision of the contracting authority to verify the information of one of the tenderers, and not verify the information provided by another, could influence the outcome of the procedure. The implication of this is that the said decision needs to be objectively justified in order to prevent that the principle of equality will be violated.⁴² According to the wording of art. 67 (4), however, the only criterium that will be relevant when determining whether the contracting authority will have to verify, is whether the contracting authority is in doubt. Obviously, this is a subjective criterion. That raises the question whether a contracting authority can choose to verify the information of one of the tenderers on the basis of mere doubt regarding the tender of the latter (as the wording of art. 67 seems to imply) or whether this should be justified on the basis of objective grounds. Vice versa, in search for the precise ambit of the contracting authority's duty to verify, one could wonder what the exact scope is for contracting authorities to decide *not* to verify. On the basis of article 67(4) the answer is 'in case of doubt', but does this mean the duty does not exist if the contracting authority – subjectively – assumes the information is correct while there are objective grounds for doubt? Or is it possible for a competitor to demand verification regarding another tender by providing the contracting authority with information that should – objectively – be regarded as ground for causing doubt? In my opinion, the answer lies in the application of the principle of equality to the facts and circumstances of the case at hand. However, while one of the main goals of the Directive is to provide contracting authorities with a clearer view on the boundaries set by the general principles in concrete parts of the procurement procedure, neither article 67, nor the Preamble creates any scope with regard to this question.

Moreover, if the answer indeed lies in the application of the equality principle, and if one would assume that this principle could in any stage of the procurement procedure be ground for a duty to verify, it could be questioned whether the inclusion of a specific duty within the scope of award criteria, will not – instead of what is intended by including this specific provision (in the regulation) – give rise to more legal uncertainty. For the fact that – with regard to the award criteria the – the directive does include the said duty whereas it does not do so regarding other aspects of the procurement procedure, such as the assessing of technical specifications, raises the question whether such a duty is perhaps non-existent or different in the other stages of the procedure.

4. Conclusion

With the introduction of art. 18(2) it has become undeniable that Member States will need to contemplate about what measures have to be taken to effectively stimulate compliance of economic operators with applicable obligations in the field of environmental, social and labour law. With regard to the extent to which Member States are and can be expected to actually achieve compliance by economic operators – e.g. whether this includes a duty to perform control, as the Preamble seems to imply⁴³ – however, art. 18(2) leaves us with legal uncertainty. Moreover, determining what measures will (or can be expected to) be most effective, will be a complicated task for Member States. For the (expected) effectivity – especially with regard to compliance with human rights and labour law obligations – is difficult to quantify.

In line with art. 18(2), the scope to include human rights considerations as award criteria seems to have been expanded. At the same time, the new provision with regard thereto creates new ground for discussion. For on the one hand, the link to the subject-matter of the contract is substantially clarified in art. 67(3). It is now clear that this requirement does not limit the possibilities to include social award criteria with regard to the production process, the trading of the purchased goods or other stages of the life cycle thereof. Moreover, art. 67(3) clearly states (in coherence with the Dutch Coffee-case) that it is irrelevant whether these factors form part of the material substance of the subject-matter of the contract. This, in my opinion, means that the only limitation which the “link to the subject-matter of the contract” requirement brings, is that the award criteria may only regard the amount of goods purchased, and not the general policy of the tenderer. On the other hand, it is unclear whether this definition of the link to the subject-matter of the contract also applies outside the scope of art. 67, for example with regard to technical specifications. Furthermore, art. 67 introduces a new view on the meaning of MEAT, inconsistent with the current directive, policy documents and case-law, which will assumably cause difficulties when applying these within the scope of the new provision. Finally, art. 67(4) imposes a duty on contracting authorities to *effectively* verify the information provided by tenderers within the scope of the award criteria. However, neither art. 67 nor the Preamble provides a scope regarding the means that may be deployed in this respect. Also, with regard to the boundaries of the discretionary power of the contracting authority when deciding (*not*) to verify the information provided by one or more tenderers, the new regulation provides no clarity.

Although these are only two of the new provisions that the proposed directive contains, they are exemplary for many of the other revised or newly introduced provisions relevant with regard to promoting human rights

considerations in public procurement (regulation).⁴⁴ For they clearly intend to expand the possibilities in this respect, but at the same time will create new ground for discussion.

References

¹ Unless stated otherwise, within the context of this paper, ‘new’ or ‘proposed Directives’ will refer to the most recent version of the new procurement Directive: EP, European Parliament legislative resolution of 15 January 2014 on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011)/896).

² For a few examples, see: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm; COM (2010) 2020 final. Communication from the Commission. *Europe 2020. A strategy for smart, sustainable and inclusive growth.*; EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010; EC, *Buying Green: Handbook on green public procurement 2nd edition*, European Commission 2011; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, Human Rights Council Document A/HRC/17/31, United National General Assembly (March 21st 2011); T.E. Lambooy, *Corporate Social Responsibility. Legal and semi-legal frameworks supporting CSR*, Deventer: Kluwer 2010; L.J. Ankersmit & J.C. Lawrence, ‘The future of environmental labeling: US – Tuna II and the Scope of the TBT’, *Legal Issues of Integration* 39, no. 1 (2012); 127 – 147.

³ European Commission - Press Release “External public procurement initiative - Frequently Asked Questions” *Europa* 21 March 2012, www.europa.eu (search for *MEMO/12/201*).

⁴ This latter phenomenon is known as ‘socially responsible purchasing’ (SRP).

⁵ See for example COM (2011) 896 (final). EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, recital 2.

⁶ Within the proposed Directive this strategic use covers the use of procurement with a view to various sustainability goals and with a view to the objective of innovation. See EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final, p. 2 and 9.

⁷ See for example EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 (final), p. 10; And EP, European Parliament legislative resolution of 15 January 2014 on the proposal for a directive of the European Parliament and of the Council on public procurement (COM(2011)/896), recital 37, art. 18(2), art. 57(1)(f) and (4)(a), art. 67(2) and art. 69(2)(d).

⁸ The Directive only contains a duty for Member States. The Preamble (recital 37) however, also addresses contracting authorities. Given that provisions within Directives are binding upon the Member States to which they are addressed, according to art. 288 TFEU, one could wonder how this should be interpreted.

⁹ See art. 18(2) and Annex X of the new Directive.

¹⁰ Although one could perhaps assume a positive obligation for Member States and contracting authorities on the basis of the Treaties concerned (this is one of the objects of the author’s phd-research), until now, such an obligation was never defined in the field of promoting human rights compliance through public procurement. There is in any case not such an integration requirement with respect to human rights as there is regarding ‘green goals’ in Article 11 TFEU. Also see the new Directive, recital 91.

¹¹ See art. 288 TFEU: ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’

¹² With ‘allowing’ is *not* meant the fact that it will, self-evidently, always remain possible that an economic operator – despite of the measures taken – will indeed violate the obligations concerned. Much more it refers to the question whether the framework is established in such a way, that it is probable that such violations will be discovered (e.g. by verification during the performance phase) and that the contracting authority will take action to remedy this situation.

¹³ Although the new Directive does not contain an explicit duty to verify, the Preamble does explicitly pay attention to this aspect with regard to art. 18(2). For recital 40 determines: ‘Control of the observance of these environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure. That is when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders.’ Whether this means that contracting authorities have an obligation to perform control in the relevant stages of the procurement procedure or that – if contracting authorities would like to carry out control – they will have to do this in the relevant stages of the procedure, is not clear. Also unclear is why the legislator has chosen to explicitly pay attention to this very relevant aspect of promoting compliance with the mentioned standards, but at the same time failed to include any provisions in the Directive itself. In my opinion, this will not make the message of the legislator any clearer for Member States and contracting authorities.

With regard to the subsequent question what should or could be done on the basis of possible negative results of such control, neither the Directive nor the Preamble provides any scope. Apart from the obligation to exclude economic operators when it is established that there is a mandatory ground for exclusion, a general duty to act upon negative results is not stipulated. One could, however, wonder whether such an obligation could be drawn from the general principles such as the principle of equality (but that question falls outside the scope of this paper).

Finally, a striking aspect within the Preamble regarding this duty to perform control, is that the contract performance stage is not one of the stages mentioned as relevant stages within which the *control* should be performed (see recital 40). If this has been a conscious choice of the legislator, this would mean a substantial change compared to the current Directive and policy documents. For these indeed assign the contract performance clauses as a good, if not the best way to include social and environmental criteria (see for example: Directive 2004/18, art. 26 and EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010, p.43). This would, in my vision – from the perspective of human rights compliance – be a good development, for inclusion within the other stages enhances the possibilities to effectively and timely discover possible violations by economic operators and to timely take action. On the other hand, one could argue

these possibilities will be reduced by the strict regulation with regard to the means of proof that may be required, amongst which art. 59 with regard to the European Single Procurement Document.

¹⁴ Whether this is the case, is in my opinion not a legal question, but one that can only be answered from a social-psychological perspective. It is not my opinion that this in all cases should be the decisive factor, but I am of the opinion that art. 18(2) *does*. On the other hand, the Preamble, recital 37, states, that ‘the measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment’ and ‘in a way that does not discriminate directly or indirectly’. Surprisingly, this is not determined with regard to the measures themselves, but solely in respect of the *application* thereof. The reason for this could be that the measures themselves are intended to promote compliance with i.a. International Treaties, which rank higher in the legal hierarchy than the principles of Union law do.

¹⁵ See art. 258 and 259 TFEU.

¹⁶ See COM 2011/896 final. EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, art. 66, which contained the option to award on the basis of ‘the lowest cost’. This already was slightly different from the ‘lowest price’ criterion of art. 53 Directive 2004/18. In the final version of the new Directive, this ‘lowest cost’ criterion is deleted as such and included within the MEAT criterion. See C 191/84, Opinion of the European Economic and Social Committee, on the ‘Proposal for a Directive of the European Parliament and of the Council (...) COM 2011/895, COM 2011/896, COM 2011/897, paragraph 1.14, in which it is advised to use the lowest price criterion as an exception, rather than the rule. Also: C 391/49, Opinion of the Committee of the Regions on ‘Public procurement package’, paragraph 22, in which the Committee advocates sustaining the ‘lowest *price* criterion’, because in the opinion of the Committee the ‘lowest *cost* criterion’ is ‘more connected with the most economically advantageous tender’ and would therefore be confusing.

¹⁷ Under the current Directive, contracting authorities may – when awarding on the basis of MEAT – decide to award on the mere basis of qualitative criteria, for article 53 does not require to include a price element (see art. 53(1)(a) Directive 2004/18).

¹⁸ Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts (par. 2, *in fine*). Moreover, contracting authorities may also include a fixed price or cost, which will focus the competition on quality criteria only (par. 2, third alinea). In this case however, it will in my opinion only be possible to achieve the best price-quality tender, if the contracting authority has sufficient knowledge of the market to determine a realistic price, especially if compliance with human rights and labour clauses is required.

¹⁹ See for example, *Commission v. Netherlands*, Case C-368/10, recital 86 referring to art. 53(1)(a) of Directive 2004/18: ‘The most economically advantageous tender being (that) which (...) [etc.] offers the best value for money’ and recital 84: ‘If the contracting authority decides to award (...) to the tenderer who submits the economically most advantageous tender (...) the contracting authority must base its decision on various criteria’; Also see Directive 2004/18, recital 46, third alinea: ‘In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority.’ And EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010, p.37: ‘Since the most economically advantageous tender or best-value tender always combines two or more sub-criteria’.

²⁰ As explained above, under the new provision, contracting authorities are obligated when awarding on the basis of MEAT to include a price element in their award criteria. Therefore, in fact the ‘new’ MEAT-criterion and the current one are not the same either, also see reference 17.

²¹ See EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 (final), Explanatory memorandum, p. 8.

²² COM 2011/896 final. EC, Proposal for a Directive of the European Parliament and of the Council on public procurement, Preamble recital 41.

²³ See *Commission v. Netherlands*, Case C-368/10, par. 91.

²⁴ Introduced in the *Concordia*-case (CJEU 17 September 2002, C-513/99), the exact meaning of this link was never clarified, neither by the Commission, nor by the CJEU. Only in the *EVN Wienstrom*-case the CJEU has clarified that including an award criterion that exceeds the volume of consumption to be expected in the context of the procurement, is not sufficiently linked to the subject matter of the contract (*Wienstrom EVN v. Austria*, CJEU 4 December 2003, C-448/01, par. 68 – 71).

²⁵ For this case regarded the production method of electricity, which was not seen as a problem by the CJEU (recital 34).

²⁶ *Concordia v. Finland*, CJEU 17 September 2002, C-513/99 (*Concordia*).

²⁷ *Commission v. Netherlands*, Case C-368/10, par. 91: ‘There is no requirement that an award criterion relates to an intrinsic characteristic of a product, that is to say something which forms part of the material substance thereof’.

²⁸ Although the CJEU in the *EVN Wienstrom*-case does not explicitly state that award criteria relating to the production process can have a link to the subject-matter of the contract while art. 67(3) *seems* to state that this is *always* the case, in my view they both establish that these criteria *can* have a link to the subject-matter of the contract. For firstly the *Wienstrom*-case does clearly imply this, by determining that award criteria relating to the production process can be included as award criteria. And secondly, with regard to art. 67(3): after stating that these criteria ‘*shall* be considered’ to have this link, art 67(3) states that this is not *always* the case, but only if the criteria ‘relate to the works, supplies or services to be provided under the contract’. Both the *Wienstrom*-case as art. 67(3) therefore mean the same: that award criteria relating to the production process *can* have a sufficient link to the subject matter of the contract. Also see reference 31.

²⁹ The current Directive only determines this with regard to technical specifications, see Annex VI 1(a) and Preamble, recital 29 of Directive 2004/18.

³⁰ *Commission v. Netherlands*, Case C-368/10, par. 90.

³¹ In *Wienstrom EVN v. Austria*, CJEU 4 December 2003, C-448/01, par. 34, the CJEU states that ‘Community law (...) does not preclude a contracting authority from applying a criterion requiring that the electricity supplied be produced from renewable energy sources, provided that the criterion is linked to the subject matter of the contract, etc (...)’. It thus follows that the fact that the criterion refers to a specific process of production, does *not* imply that this criterion can *not* be sufficiently linked to the subject-matter of the contract. In the *EVN Wienstrom*-case, this link is subsequently considered to be absent on the basis of the

fact that the award criterion concerned exceeded the amount of electricity purchased by the contracting authority. The CJEU thus sees this as the limitation deriving from the link to the subject-matter requirement.

The legislator of the new Directive *seems* to go further than the CJEU, by stating that award criteria relating to the production process *have* a sufficient link to the subject-matter of the contract. But in my view the legislator actually follows the same line of reasoning established in the EVN Wienstrom-case, only using different terms. Because, by clarifying that award criteria referring to the production process etc. can (namely: 'shall (...) *provided that*', see reference 28) be considered to be linked to the subject matter of the contract (art. 67(3)), the legislator establishes the same as the CJEU did in the Wienstrom-case by stating that 'Community law does not preclude a contracting authority from applying a criterion requiring that the electricity supplied be produced from renewable energy sources'. Secondly, by stating that this is only true if the award criterion 'relate to the works, supplies or services to be provided under that contract' (art. 67(3)), the legislator in my view means to establish the same as the CJEU did by the phrase 'provided that the criterion is linked to the subject matter of the contract', by the CJEU explained as described above. For in my opinion, this last 'criterion' of art. 67(3) (that the award criteria need to *relate* to the works, supplies or services purchased), can only be interpreted as referring to the limitation established in the Wienstrom-case: that award criteria may not exceed the amount of products purchased by the contracting authority. For every other possible explanation of this 'refer'-limitation is explicitly allowed by art. 67(3). Therefore, the most sound interpretation of art. 67(3) is in my view that the legislator has narrowed down the link to the subject matter – by explicating that it does not interfere with criteria referred to in art. 67(3) – to the limitation that was already established in the EVN Wienstrom-case.

³² Although art. 67 refers to 'the production, provision or trading of *those* works, supplies or services' (par. 3(a)), on the basis of which one could reason that this does not include the production, provision or trading of *parts of* those goods, this does not seem to be the intention of the legislator ('where they relate to the works etc *in any respect*'). Moreover, this interpretation would conflict with the Dutch Coffee case, in which the CJEU determined that Max Havelaar criteria were suitable to be included as award criteria (provided that the underlying criteria would be included, equal labels would also be accepted and the general preconditions would be fulfilled). For the award criteria concerned (the Max Havelaar criteria) see to the fair trade origin of *parts of the subject-matter of the contract*' (see recital 90). Apparently, the fact that an award criterion only regards *parts* of the subject-matter of the contract is for the CJEU not problematic.

This could in my opinion however lead to a practical problem, for it could be difficult to determine how far in the supply chain one could still speak of 'parts of the purchased goods'. In that respect, this case does in my view leave room for discussion.

³³ The CJEU decided something similar in the Dutch Coffee-case, applying the rules regarding labels to award criteria, whereas the legislator had placed these rules within the specific context of technical specifications (art. 23(6)). See *Commission v. Netherlands*, Case C-368/10, par. 94-97.

³⁴ See Directive 2004/18 Preamble, recital 46, first and third alinea; *Commission v. Netherlands*, Case C-368/10, par. 87 and CJEU 17 September 2002, C-513/99 (*Concordia*), par. 61.

³⁵ Regarding this last criterium one could wonder – especially in the scope of high level sustainable criteria – what it means in concrete. Would including an award criterion and assigning a substantial weight to this, interfere with this provision if, expectedly, only one possible tender will be able to meet this criterion? Assumably, this will depend on the extent to which the reasons for including this criterium can be objectively justified and are proportionate with respect to the subject-matter of the contract. However, this topic falls outside the scope of this paper.

³⁶ *Wienstrom EVN v. Austria*, CJEU 4 December 2003, C-448/01, par. 44 t/m 52: i.a. 'an award criterion that is not accompanied by requirements which permit the information provided the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement'. Also see EC, *Buying social: A guide to taking account of social considerations in public procurement*, European Commission 2010, p. 39.

³⁷ See the new Directive, Preamble, recital 46.

³⁸ See paragraph 2 of this paper and the new Directive, Preamble, recital 37.

³⁹ For the principle of equality requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless objectively justified (*Fabricom*, joined cases C-21/03 and C-34/03, par. 27). If the extent to which tenders meet the award criteria would not be verified, obviously, chances are that this principle would be violated.

⁴⁰ One could also argue that contracting authorities – in general – have a duty to verify all information provided by tenderers on the basis of the principle of equal treatment. This topic however falls outside the scope of this paper (but is one of the objectives of the author's phd-research).

⁴¹ Regarding the scope article 60 refers to, it is maybe even more striking that whereas this provision states to apply to article 57, it does not provide a provision for article 57(4)(a), referring to compliance with 18(2).

⁴² See reference 39.

⁴³ New Directive, Preamble, recital 40.

⁴⁴ Also with regard to the broadened scope for sustainable technical specifications, selection criteria, exclusion grounds and the greatly expanded provision regarding subcontractors, there is a lot to be said. These issues are the object of the author's phd-research.