

SOCIAL ASPECTS OF THE REFORM TO THE EUROPEAN UNION PUBLIC PROCUREMENT LAW

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Abstract

Purpose: the article aims to analyse the reform of the European Union public procurement law on social aspects in different stages of the reformed public procurement procedures. Comprehensive reform of the European Union public procurement law was approved by the European Parliament in January 2014, adopted by the Council in February 2014, and legislative acts published on 28 March 2014. The current directives 2004/18/EC on procurement in public works, supply and service contracts, as well as 2004/17/EC on procurement in the water, energy, transport and postal services sectors were updated. Additionally, the new directive 2014/23/EU on the award of the concession contracts providing an orientation previously given only by the case law of the Court of Justice of the European Union was adopted. Among other things the reform is highly focused on greater scope of social issues to be addressed in the public procurement procedures. The authors' aim to analyse the way social issues are being tackled under the new directives.

Design/methodology/approach – logical systematic method will be used in order to ascertain the content of the laws within the scope of the social aspects, whereas comparative method will be applied to ascertain national and European Union legal acts. On the basis of analytical method conclusions will be drawn.

Findings – the authors will focus on legal analysis and considerations on social aspects in different stages of the reformed public procurement procedures ie in the stage when deciding on the subject-matter of the contract and the technical specifications, in the qualitative selection, in applying the award criteria and in the stage of performance of the contract.

Research limitations/implications – the new directives also set new mandatory grounds related to the infringements of social and labour laws for excluding suppliers from the competitions for contracts, though the Paper will not analyse in-depth the legal issues of the labour law.

Practical implications – the authors will be focused on some of the most important aspects of the new reform of the European Union public procurement law. The reform is new and approved at the beginning of this year thus there are no much consistent analysis of the social aspects in different stages of the reformed public procurement procedures. The Paper will be relevant to the public and private sectors, academic society and jurisprudence of Lithuania as well as European Union.

Originality/Value – the authors will present in-depth legal analysis of the social aspects of the new directives. Such logical systematic analysis will help to correctly interpret the laws.

Keywords: public procurement, directives, 2004/17/EC, 2004/18/EC, 2014/23/EU, 2014/24/EU, 2014/25/EU social aspects, social and labour laws, the European Union.

Research type: research paper.

Introduction

The use of government contracts to put social policies into effect has a long history. The attempts to link social justice issues with procurement can be found back in the 19th century in England and other industrial countries (Bercusson, 1976)¹. However, in the past, public procurement was seen much more frequently as an instrument of securing national economic and social policies (McCrudden, 2004).

Although the promotion of social cohesion is one of the European Union (EU) objectives², social sector, which has weathered the economic crisis much better than others (Monzón, 2012), only recently is gaining recognition at the European level.

Since directive 71/305/EEC³ in 1971, the *White Paper*⁴ in 1985, the *Beentjes*⁵ judgement in 1988, social aspects of EU public procurement are being tackled by the European legislator and the Court of Justice of the European Union (CJEU), but to some extend only.

After lessons of the crisis were learned greater emphasis were given to the social aspects in the Europe 2020 strategy⁶, and appropriately in the *Green Paper*⁷. It was declared that all energies and capacities should be mobilised and focused on the pursuit of the priority of economic, social and territorial cohesion.

Few years of consultations and debates resulted in the comprehensive reform of EU public procurement law. The reform was approved by the European Parliament in

¹ For example, in 1891, a resolution on fair wages was passed by the House of Commons in the United Kingdom. This committed government departments to include a stipulation in all agreements with private sector employers that workers must be paid generally accepted rates for the job

² Summaries of legislation. The founding principles of the Union: http://europa.eu/scadplus/constitution/objectives_en.htm#OBJECTIVES

³ Concerning the coordination of procedures for the award of public works contracts (OJ No L 185, 16.8.1971, p. 5)

⁴ White Paper from the Commission “Completing the Internal Market” COM(85) 310 final

⁵ Case 31/87, *Beentjes and Commission v France*

⁶ EUROPE 2020 A strategy for smart, sustainable and inclusive growth. COM/2010/2020 final

⁷ Green Paper on the modernisation of EU public procurement policy towards a more efficient European Procurement Market COM(2011) 15 final

January 2014¹. The Council on 11 February 2014 adopted the legislative package for modernisation of public procurement in the EU². And finally on 28 March 2014 in Official Journal three directives were published: i) a directive 2014/24/EU on public procurement (replacing directive 2004/18/EC on procurement in public works, supply and service contracts); ii) a directive 2014/25/EU on procurement by entities operating in the utilities sectors: water, energy, transport and postal services (replacing directive 2004/17/EC on procurement in the water, energy, transport and postal services sectors); iii) a directive 2014/23/EU on the award of concession contracts³.

Among other things, the reform is highly focused on greater scope of social issues to be addressed in the public procurement procedures. Significant changes made in respect of social matters in all stages of the procurement. Therefore, in this paper the most important (to the opinion of the authors) social aspects of the reform are being examined via technical specifications, award criteria and contract performance clauses.

Aim of the reform as regards social aspects

The reformed directives provide wide reasoning of the new regulations related to social issues.

In all the new directives it is emphasised that: compliance with obligations in the fields of environmental, social and labour law should be ensured (Article 37, Article 52 and Article 55 of the preambles⁴); control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procedures (Article 40, Article 55 and Article 58); contracts should not be awarded to economic operators in cases of non-payment of taxes or social security contributions (Article 100, Article 105 and Article 69 of the preambles); economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, can be excluded (Article 101, Article 106 and Article 70 of the preambles) etc.

From the above it is clear that one of the most important aims of the reform as regards all these directives is promotion of socially and environmentally responsible public procurement.

In both the repealing directive 2004/18/EC and the repealing directive 2004/17/EC it is emphasised that: innovation, including social innovation, are among the main drivers

¹ New rules adopted by the European Parliament – 15.01.2014: http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm

² Council adopts directives for the reform of public procurement: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/140975.pdf

³ OJ L 094, 28.03.2014

⁴ References to the articles in this paragraph are given in following order: article of the preamble the repealing directive 2004/18/EC, article of the preamble of the repealing directive 2004/17/EC, and article of the preamble of the concession directive

of future growth (Article 47 and Article 57 of the preambles¹); contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels (Article 75 and Article 85 of the preambles); contracting authorities should be allowed to use award criteria or contract performance conditions relating to the works, supplies or services to be provided under the public contract in any respect and at any stage of their life cycles (Article 97 and Article 102 of the preambles); rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with social, labour or environmental law (Article 103 and Article 108 of the preambles) etc.

These two reformed public procurement directives are clearly focused on social and environmental issues (ie repealing directives 2004/18/EC and 2004/17/EC), it can be seen that almost majority of the changes are related to social aspects in one or another way.

However, indicated aims of the reform correspond not to all opinions of the most important players in the social economy arena, which participated in the public consultations². For example, Social Enterprise Coalition (UK) insisted on focusing EU public procurement towards the aim to ensure that the public sector gets the greatest value from its economic transactions. This could be requiring contractors to create local employment opportunities for disadvantaged groups, put something back into the local community, or create a positive environmental impact by reducing waste or carbon emissions³. To the opinion of the authors of this Paper, although the aim was not fixed on indicated proposals of the parties involved in the consultations, similar results could be achieved in using the tools present reform provides.

It is important to mention that from the point of view of successful international trade usage of public procurement as a tool for promoting social and environmental objectives may be treated as a barrier (Arrowsmith, 2010). Therefore, aforementioned strong social focus of the new directives may have not only positive effect for the future growth, but on the other hand may negatively affect the economy of EU in the sense of competitive worldwide trade.

Social labels

Despite of potential usefulness and practical benefits, till the reform there has been confusion about how third party verifications (labels, certifications) can be used in public procurement processes in a way that is compatible with EU law⁴.

¹ References to the articles in this paragraph are given in following order: article of the preamble of the repealing directive 2004/18/EC, and article of the preamble the repealing directive 2004/17/EC

² Consultations regarding the reform took place in 2011: http://ec.europa.eu/news/business/110128_en.htm

³ Social Enterprise Coalition (UK) opinion can be found at: http://www.ekonomiaspoleczna.pl/files/ekonomiaspoleczna.pl/public/_MRR_Better_Future/EU_reform_of_public_procurement.pdf

⁴ Comment of the Environmental Law Organisation “ClientEarth”: <http://www.clientearth.org/reports/article-41-overview-of-issues-in-play-in-trilogue.pdf>

On one hand, it was recognised that contracting authority can take considerations related to sustainable development (social labels and the implications for ethical trade)¹. On the other hand, CJEU, based on the principles of transparency and equal treatment, gave preference to detailed characteristics rather than referring to specific labels².

Social labels were addressed in Article 43 of the repealing directive 2004/18/EC and in Article 61 of the repealing directive 2004/17/EC, which states that “where contracting authorities *intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label...*”. *This clause stipulates that a specific label can be required. However, the next Parts of Article 43 and appropriately Article 61 specifies conditions that label requirements should be based on objectively verifiable and non-discriminatory criteria etc., and contracting authority should accept all equivalent labels (alternative evidence of the fulfilment of the requirements of the specific label, such as manufacturer’s dossier).*

Provided wording of the above articles obviously restricts the ability of contracting authority to request particular social label³ and above indicated confusion remains. It can be difficult to put into practice the use of specific labels.

It even can be consider that the requirement to accept a manufacturer’s own dossier completely removes the ability of a contracting authority to insist upon third party certification regarding the environmental or social characteristics of the product they are buying (Semple, 2012). Progression from the uncertainty in usage of specific labels is rather small.

Exclusion for violations of social obligations

In addition to previously existed exclusion grounds the reform provides new exclusion grounds related to violation of 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 of International Labour Organization (ILO) and other precisely indicated conventions (listed in the annexes of the reformed directives).

Violation of the above obligations is stipulated as an exclusion ground from participation in a procurement procedure if such violation can be demonstrated (Articles 18(2) and 57(4) of the repealing directive 2004/18/EC, Articles 36(2) and 76(6) of the repealing directive 2004/17/EC) and in case of abnormally low price due to noncompliance with the aforementioned obligations (Articles 18(2) and 69 (3) of the repealing directive 2004/18/EC, Articles 36(2) and 84(3) of the repealing directive 2004/17/EC). Measures for

¹ A guide on taking account of social considerations in public procurement “Buying Social”: <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978&furtherNews=yes>

² Case C-368/10, *Commission v The Kingdom of the Netherlands*

³ For example, labels such as: Fair Trade, Max Havelaar, Utz, Rainforest Alliance etc.

compliance with the same obligation should be taken in accordance with the concession directive also (Article 30 of this directive).

It seems that a great while argued stronger connection with international social and labour principles (ensuring such rights as safe work environment (Ahlberg, 2012)) was made in EU public procurement, but with few limitations.

First of all, distinction is made as regards application of the violations in different cases of exclusion. Exclusion right is optional for contracting authority in the event of application of Article 57(4) of the repealing directive 2004/18/EC “Exclusion grounds“ and appropriately Article 76(6) of the repealing directive 2004/17/EC “General principles“¹, but is obligatory in the event of application of Article 69 (3) of the repealing directive 2004/18/EC and appropriately Article 84(3) of the repealing directive 2004/17/EC “Abnormally low tenders“². The distinction seems to have no clear justification. Based on such regulation, despite of all the emphasis given in the new directives, it will be possible for contracting authority to award the contract even when international social and labour principles are breached.

Secondly, some relevant international conventions are not mentioned in the list of international social and environmental conventions, provided in the annexes of the new directives³. For example, ILO Conventions 94 “Public Contracts, Labour Clauses”, 95 “Protection of Wages”, 138 “Minimum Age” and many others are not included into the list. Issue of the ratification could be the answer to the question regarding narrowness of the list, but nevertheless limitations of the social protection given are obvious.

Thirdly, practical application of the obligations under EU law and international conventions to the third countries and subjects from such countries raises doubts. Countries non-members of EU and the conventions will not be legally bounded. Some authors keeps to the position that said provisions will be difficult to implement and they are more of a political message to third countries than mechanism intended to be put into actual practice, in the same way as Articles 58 and 59 of directive 2004/17/EC⁴, which have never been applied (Van den Abeele, 2012).

Social criteria of contract award

For years the award of public contract were based on two criteria: i) the lowest price or ii) the most economically advantageous offer. Although contracting authorities have absolute discretion in adopting the award criterion (Bovis, 2012), the assortment, as it is interpreted in the case law of CJEU⁵, not always correspond to the contemporary needs.

¹ Construction with „may“ is used

² Construction with „shall“ is used

³ Annex X of the repealing directive 2004/18/EC, Annex XIV of the repealing directive 2004/17/EC, Annex X of the concession directive

⁴ Articles: “Tenders comprising products originating in third countries“ and “Relations with third countries as regards works, supplies and service contracts“

⁵ In cases as Case C-513/99, *Concordia Bus Finland v Helsingin Kaupunki*, where it was articulated that award criteria for public procurement contracts must be linked to the subject-matter of the contract

By the reform the most economically advantageous tender is promoted. What is more, this criterion is adjusted in the way that it 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, linked to the subject-matter of the public contract in question. The criteria may comprise for instance social, environmental and innovative characteristics (Article 67 of the repealing directive 2004/18/EC and Article 82 of the repealing directive 2004/17/EC).

Although greater attention is actually given to social aspects, the request for connection with the subject-matter of the contract remained. This provides some uncertainty about future case law of CJEU under reformed criteria.

Life-cycle costing (Article 68 of the repealing directive 2004/18/EC and Article 83 of the repealing directive 2004/17/EC) is considered to be the most promising change as regards the award criteria. Broad demand for new cost-benefit rationale that translates into life-cycle costing under the criteria of the most economically advantageous tender to replace the lowest initial cost rationale exists (Edler, 2007). Procurement processes and decisions have to move beyond considering the purchase price of a good or service, for the purchase price does not reflect the financial and non-financial gains that are offered by environmentally and socially preferable assets as they accrue during the operations and use phases of the asset life-cycle. It is expected that the best value for money across the asset life cycle can only be assured by purchasing green and socially preferable alternatives¹.

Regardless of high expectations, *life-cycle costing*, as it is regulated in the reformed directives, seems potentially complicated and cumbersome for contracting authorities.

Contract performance clauses related to social considerations

The reformed directives provides that contracting authorities may lay down special conditions, which would *include* environmental, *social or employment-related* considerations, provided that they are *linked to the subject-matter of the contract and indicated in the call for competition or in the procurement documents (Article 70 of the repealing directive 2004/18/EC and Article 87 of the repealing directive 2004/17/EC).*

The above regulation provides opportunity to include different kind of environmental, *social or employment-related clauses*. *For example*, requiring that goods has to be delivered outside peak traffic times to minimise the contribution of deliveries to traffic congestion, requiring application of specific management measures and many other².

¹ Comment of the International Institute for Sustainable Development: http://www.iisd.org/pdf/2009/life_cycle_costing.pdf

² A handbook on green public procurement „Buying Green!“: http://ec.europa.eu/internal_market/publicprocurement/docs/gpp/buying_green_handbook_en.pdf

However, large degree is thus required to develop contract clauses which are appropriate to achieve specific social or environmental objectives – without being either over or under-ambitious. As contract conditions do not form part of the assessment of tenders¹ (other than by a simple declaration of acceptance), tenderers may not in fact take adequate account of these requirements in their tender price and delivery terms. The delivery of the contract can be compromised if the cost of compliance outweighs the margin of profit achieved by successful tenderers (Van den Abeele, 2012).

Effective verification of the link to the subject-matter and other requirements of social and environmental aspects when the contract (full text of it) is not being attached to the procurement documents can also be problematic. Question of appropriateness of some requirements potentially can be raised only in performance of the contract.

In our view, inclusion of social as well as environmental and employment-related considerations in contract performance clauses should match conservative approach.

Conclusions

In this Paper, we have outlined social aspects of the reform to EU public procurement. The reform obviously involves social and closely related issues. Even the aim of the reform considered to be directed socially. EU public procurement gradually developed to the point where social matters are being tackled more than ever. In none of each stage of the procurement social aspects are left behind.

New and important regulations related to social labels, exclusion for violations of social obligations, social criteria of contract award, social considerations in contract performance clauses and other are provided by the reform. Much more emphasis on social issues is expected in further development of public procurement.

Already today it is clear that there will be many questions regarding practical application of analysed clauses. Certain clarity and completion is missing, but some of that should be provided by expected CJEU cases law. Not all opinions of interested parties were, and of course could be, taken into account in finding final texts of the new directives. Nevertheless big step ahead is made towards promotion of social cohesion.

Strong aim of focusing public procurement on the social aspects is expected to ensure sustainable growth of the EU economy, but the competition in worldwide commerce may negatively influence approach of EU as well as individual member states when it comes to actual application of appropriate tools promoting social and environmental objectives.

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