



Promoting Social Considerations into Public Procurement Procedures for Social Economy Enterprises

Matrix of the social clauses of Directive 24/2014/EU



Prepared by



This matrix provides for a legal explanation of the social clauses of Directive 2014/24/EU.

It will serve to perform a comparative legal analysis between the relevant provisions of the EU Directive, the transposition laws and existing practices in different EU Member States

Authors: Patrick Tiel, Valentine de Francquen, Linli Pan-Van de Meulebroeke, Camille de Bueger, Gautier Rolland
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Contents

Article 18(2) - Principles of procurement3

Article 20 - Reserved contracts4

Article 31 - Innovation partnerships5

Article 40 - Preliminary market consultations.....7

Article 42(1) - Fourth and fifth subparagraph - Technical specifications.....8

Article 43 - Labels10

Article 46 - Division of contracts into lots12

Article 56 - Choice of participants and award of contracts - General principles.....14

Article 57 - Exclusion grounds17

Article 67 - Contract award criteria20

Article 69 - Abnormally low tenders22

Article 70 - Conditions for performance of contracts24

Article 71 - Subcontracting26

Article 74 - Award of contracts for social and other specific services29

Article 75 - Publication of notices29

Article 76 - Principles of awarding contracts32

Article 77 - Reserved contracts for certain services34

Article 18(2) - Principles of procurement			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>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.</p> <p>[Transposition is mandatory, which implies that Member States shall take appropriate measures to ensure its application]</p> <p>Cf. Recitals 37-40.</p>	<p>The obligation to comply with existing law already existed under Directive 2004/18 (through its recitals). This provision aims at making explicit and emphasizing the obligation to comply with applicable legislations in the fields of environmental, social and labour law.</p> <p>Recitals 39 and 40 confirm that the obligation of compliance with social provisions exists at all relevant stages of the procurement procedure (award, exclusion criteria, abnormally low tenders).</p>	<p>Recital 37: Article 18(2) does not prevent the application of terms and conditions of employment which are more favourable to workers.</p> <p>Article 56(1) (award of contracts): contracting authorities <u>may decide</u> not to award a contract on grounds that the tender does not comply with the obligations referred to in Article 18(2).</p> <p>In the transposition, Member States shall give contracting authorities the possibility to decide.</p> <p>Article 57(4) (exclusion grounds): contracting authorities <u>may exclude or may be required by Member States to exclude</u> an economic operator in case of violation of applicable referred to in Article 18(2).</p> <p>In the transposition, Member States shall give contracting authorities the possibility to exclude, and can even require them to do so.</p> <p>Article 69(3) (abnormally low tenders): contracting authorities <u>shall reject</u> the tender in case the tender is abnormally low because it does not comply with obligations referred to in Article 18(2).</p>	<p>Article 57(4): where they are required by Member States, contracting authorities are not allowed to select economic operators that violate obligations referred to in Article 18(2).</p> <p>Article 69(3): contracting authorities are not allowed to evaluate the tender in case the tender is abnormally low because it does not comply with obligations referred to in Article 18(2).</p>
Interactions with other EU laws	<p><u>Article 56 TFEU (freedom to provide services)</u>: Member States shall ensure that the implementation of obligations referred to in Article 18(2) of Directive 2014/24 does not constitute an unlawful restriction on freedom to provide services.</p> <p><u>Directive 96/71/EC concerning the posting of workers in the framework of the provision of services</u>: Directive 96/71 aims at protecting the social rights of posted workers and contains core employment conditions that must be applied to posted workers in the host country. Member States shall ensure that measures taken under Article 18(2) of Directive 2014/24 are applied in accordance with Directive 96/71, in a way that ensures equal treatment and does not create discrimination against economic operators from other Member States.</p>		
Open questions	<p><u>Does the obligation lie solely on Member States?</u> The obligation referred to in Article 18(2) is directed at Member States even though Recital 37 provides that the obligation concerns Member States as well as contracting authorities. Recitals are not legally binding but can be used as an interpretative tool.</p>		

Article 20 - Reserved contracts			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.</i></p> <p>2. <i>The call for competition shall make reference to this Article.</i></p> <p>[Transposition is optional]</p> <p>Cf. Recital 36 of the Directive 2014/24/UE mentioning, as examples of disadvantaged persons: “<i>unemployed, members of disadvantaged minorities or otherwise socially marginalised groups</i>”.</p>	<p>This provision aims to foster participation of procurement contracts for sheltered workshops and economic operators active in social and professional integration of disabled or disadvantaged persons. Performance of such contracts may also occur in the context of sheltered employment programmes.</p> <p>Member states retain the possibility to transpose this provision or not.</p> <p>Two main changes have occurred since the Directive entered into force:</p> <p>Threshold fell from 50% to 30%</p> <p>Disadvantaged persons have been added to the scope of the provision</p>	<p>This provision gives Member States the possibility to restrict participation in procedure and performance of contracts for such workshops, economic operators and programmes into national law.</p> <p>Call for competition shall make reference to this provision.</p>	<p>If a Member state exercises such a possibility, it must be ensured that only workshops, economic operators and programmes with at least 30% of disabled or disadvantaged workers may benefit from this provision.</p>
Interactions with other EU laws	<p><u>General principle of freedom to provide services</u>: Art. 56 <i>et seq.</i> TFEU</p> <p><u>Restrictions to aids granted by Member States</u>: Art. 107 and 108 TFEU</p> <p><u>General principles for an equal treatment of disabled persons at work</u>: Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.</p> <p>Legal definitions of <u>disabled worker</u>, <u>disadvantaged worker</u> and <u>sheltered employment</u> abide by art. 2(3), 2(4), 2(100) Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.</p> <p><u>Guidelines for the promotion of social economy in national policies</u>: Council Decision (EU) 2018/1215 of 16 July 2018 on guidelines for the employment policies of the Member States.</p>		
Open questions	<p><u>Legal scope of disability</u>: The obesity of a worker constitutes a “disability” within the meaning of the 2000/78 directive where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, regardless of the origin of the disability or the extent to which the person may or may not have contributed to the onset of his disability (C-354/13, <i>Fag og Arbejde</i>; see also C-335/11, <i>HK Danmark</i>).</p> <p>Legal scopes of <u>sheltered workshops</u>, <u>sheltered employment programmes</u> and <u>economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons</u>, close to the above-mentioned definitions in Regulation (EU) 651/2014 but not defined per se, could leave room for interpretation.</p>		

Article 31 - Innovation partnerships			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority.</i></p> <p><i>In the procurement documents, the contracting authority shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.</i></p> <p>(...)</p> <p><i>The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent. Only those economic operators invited by the contracting authority following the assessment of the information provided may participate in the procedure. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65. The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with Article 67.</i></p> <p>2. <i>The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.</i></p> <p>(...)</p> <p>Transposition is compulsory</p>	<p>This article settles the possibility to use the procedure of the innovation partnership.</p> <p>Such procedure will be used when the contracting authority has identified the need for an innovative product, service or works that cannot be met by anything already available on the market.</p> <p>Such innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works.</p> <p>Recital 47 stresses that this procedure can be used in order to foster research and innovation, including social innovation. Such innovative products, works and services could help to address major societal challenges while improving the efficiency and quality of public services.</p> <p>In others words, innovation partnership can be used as a tool to spur social benefits and best value for public money in the perspective of policies supporting research and social innovation and a sustainable economic growth. However, such procedure is optional and the contracting authorities are allowed to use other relevant procedures to foster social innovation.</p>	<p>Member States must set up an innovation partnership procedure.</p> <p>Recital 49 stresses that such procedure rules should be similar to rules applying to the competitive procedure with negotiation and, particularly, in view of the best price-quality ratio.</p> <p>This provision allows contracting authorities to use the way of innovation partnership in order to foster social innovation.</p> <p>The contracting authority must assess whether the need is already available on the market. If not, an innovation partnership may be established.</p> <p>From this step, a long-term innovation partnership can be established for the development and subsequent purchase of (social) innovative products, services or works delivered on agreed performance levels and costs and, when appropriate, with</p>	<p>An innovation partnership may not be established by the contracting authority if the need is already met by the market.</p> <p>An innovation partnership may not be used in order to prevent, restrict or distort fair competition.</p>

(cf. Recitals 47, 48 and 49)		several partners.	
Interactions with other EU laws	<p><u>Art. 26, par. 3 of the Directive</u> : Transposition of Art. 31 is compulsory</p> <p><u>Article 56 TFEU (freedom to provide services)</u> : Member States shall ensure that the implementation of obligations referred to in Article 18(2) of Directive 2014/24 does not constitute an unlawful restriction on freedom to provide services.</p> <p><u>Commission notice C(2018) 3051 – 15.5.2018 - Guidance on innovation procurements</u> : Legal scope of “innovation” is defined and such definition should be linked to the assessment of the need of the contracting authority. This notice also highlights the interactions between innovation and innovation partnerships.</p>		
Open questions	<p><u>How and by which means a contracting authority could assess the existence of a need on the market ?</u> Such lack of solution must be sufficiently demonstrated by the contracting authority, which requires a clear identification of the need and an in-depth screening of the market. This process can be particularly harsh for some contracting authorities due to their sizes, means, ... One can also point out the fact that some already existing solutions in view of social innovation could not be adaptable to the singular context of the contracting authority due to, e.g., cultural differences.</p>		

Article 40 - Preliminary market consultations			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p><i>Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.</i></p> <p><i>For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.</i></p> <p>[Transposition is mandatory]</p>	<p>This provision gives contracting authorities the possibility to conduct preliminary market consultations, provided that such practice does not distort competition and does not result in a violation of the principles of non-discrimination and transparency.</p> <p>The objective of preliminary market consultations is twofold:</p> <ul style="list-style-type: none"> -preparing the procurement and being updated with evolutions of products and techniques; -informing economic operators. <p>In order to safeguard fair competition, contracting authorities shall ensure that any information which an economic operator receives in the setting of a preliminary market consultation is shared with other participants.</p> <p>This provision offers the opportunity for contracting authorities to conduct preliminary consultations relating to the social aspects of the procurement.</p>	<p>Contracting authorities are allowed to seek or accept advice from independent experts or authorities or from market participants.</p>	<p>Contracting authorities are not allowed to engage in pre-negotiation nor to give information which could have the effect of distorting competition or violating the principles of non-discrimination, equal treatment and transparency. For example, defining selection criteria or award criteria, or referring in the technical specifications to an element peculiar to a participant.</p>
<p>Interactions with other EU laws</p>	<p><u>Principles of non-discrimination (Article 18 TFEU), equal treatment, proportionality and transparency:</u> Fair competition entails that all suppliers are given the same opportunities and an equal amount of information. In this regard, the market consultation process should be transparent and fair. The measures should be proportionate to the objective pursued. Accordingly, exclusion of a participant should be a measure of last resort.</p> <p><u>EU rules regarding exchange of information between competitors (Article 101 TFEU; Commission's Communication establishing the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements):</u> The facilitation of direct or indirect exchange of information between economic operators in the framework of market consultation might trigger issues from a competition law perspective. Article 101 TFEU prohibits all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition.</p>		
<p>Open questions</p>	<p>What does compliance with the principles of non-discrimination and transparency entail? The principles of equal treatment and non-discrimination imply an obligation of transparency which consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of the procedures to be reviewed (C-324/98, <i>Telaustria</i>). The principle of transparency is intended to preclude any risk of favouritism or arbitrariness of the part of the contracting authority. It implies that all conditions and detailed rules of the procedure must be drawn up in a clear, precise and unequivocal manner so that all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way (C-496/99, <i>Commission v Italy</i>).</p>		

Article 42(1) - Fourth and fifth subparagraph - Technical specifications			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>The technical specifications as defined in point 1 of Annex VII shall be set out in the procurement documents. The technical specification shall lay down the characteristics required of a works, service or supply.</i></p> <p>(...)</p> <p><i>For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, the technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.</i></p> <p><i>Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.</i></p> <p>(...)</p> <p>[Transposition is mandatory]</p> <p>Cf. Recitals 56, 74, 75 and 76 and Annex VII.</p>	<p>This provision aims to frame the technical specifications to be set out in the procurement documents. General principle establishes that technical specifications must be linked to the subject-matter of the contract and proportionate to its value and its objective. Aside from the general prescriptions, more specific subparagraphs relate to the requirement of technical specifications taking into account accessibility criteria for persons with disabilities and design for all users. When mandatory accessibility requirements have been adopted by a legal act of the European Union, such technical specification must refer to them.</p> <p>This provision contains novelty in terms of the obligation to take disability-friendly technical specifications into account by the contracting authority except in duly justified cases, when it was previously a simple goal to be reached.</p>	<p>Member States must introduce a mandatory clause linked to technical specifications taking into account accessibility criteria for persons with disabilities or design for all users.</p> <p>If any legal act of the European Union provides for mandatory accessibility requirements relevant for accessibility criteria for persons with disabilities or design for all users, technical specifications must refer to them.</p>	<p>Member States may not preclude technical specifications taking into account accessibility criteria for persons with disabilities or design for all users, except in duly justified cases.</p>
<p>Interactions with other EU laws</p>	<p>General principle of freedom to provide services: Art. 56 <i>et seq.</i> TFEU</p> <p><u>Any legal act of the European Union providing for mandatory accessibility requirements relevant for accessibility criteria for persons with disabilities or design for all users</u> (e.g. Commission Regulation (EU) N°1300/2014 of 18 November 2014 on the technical specifications for interoperability relating to accessibility of the Union's rail system for persons with disabilities and persons with reduced mobility and voluntary standards such as M/376 Standardisation mandate to CEN, CENELEC and ETSI in support of European accessibility requirements for public procurement of products and services in the ICT domain; M/473 Standardisation mandate to CEN, CENELEC and ETSI to include "Design for All" in relevant standardisation initiatives; etc.).</p>		

Open questions

Legal scope of disability: The obesity of a worker constitutes a “disability” within the meaning of the 2000/78 directive where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, regardless of the origin of the disability or the extent to which the person may or may not have contributed to the onset of his disability (C-354/13, *Fag og Arbejde*; see also C-335/11, *HK Denmark*).

Level of compliance with accessibility criteria: If there is an obligation to apply accessibility criteria, what can be deemed sufficient for compliance? Since the obligation is generic, in absence of more specific EU rules, a bare minimum could already be considered sufficient. There is no definition of a bare minimum. Which aspects/features/characteristics of a work/product/service does it encompass?

Definition of a duly justified case: What does a “duly justified case” stand for?

Article 43 - Labels

Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>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 as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:</i></p> <p><i>(a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;</i></p> <p><i>(b) the label requirements are based on objectively verifiable and non-discriminatory criteria;</i></p> <p><i>(c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;</i></p> <p><i>(d) the labels are accessible to all interested parties;</i></p> <p><i>(e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.</i></p> <p><i>Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they shall indicate which label requirements are referred to.</i></p> <p><i>Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies</i></p>	<p>This provision makes it easier for contracting authorities to take social considerations into account in their buying decisions in relation to technical specifications, award criteria and contract performance clauses.</p> <p>This participates to the broader objective consisting of allowing public procurement to achieve objectives of sustainability through technical specifications drawn up by public purchasers (recital 95).</p> <p>In essence, this article means that contracting authorities may, when five conditions are fulfilled, require a specific label as means of proof that the works, services or supplies purchased correspond to the required social characteristics.</p> <p>Labels and certification schemes can help by providing third party verification. This can facilitate a decision on whether a certain product meets the requirements or not.</p> <p>It engages a two-step process:</p> <p><i>Firstly</i>, define the characteristics that contracting authorities are looking for and, <i>secondly</i>, indicate which third party verified standard it will accept as evidence that the works, services or supplies correspond to what they want.</p> <p>Three main changes have occurred</p>	<p>The provision allows contracting authorities to use labels as means of proof that the works, services or supplies correspond to the required characteristics, provided that <u>all</u> of the following five conditions are fulfilled:</p> <p>(a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;</p> <p>This condition excludes criteria and conditions relating to general corporate policy, which cannot be considered as a factor characterising the specific process of production or provision of the purchased works, supplies or services (recital 97).</p> <p>It must be noted that Contracting authorities may make use of some single criteria as spelled out in the label, if not all label criteria meet the five requirements of the provision (and in particular the link to the subject matter of the contract).</p> <p>(b) the label requirements are based on objectively verifiable and non-discriminatory criteria;</p> <p>(c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;</p> <p>(d) the labels are accessible to all interested parties;</p>	<p>First, it does not allow contracting authorities to use labels as means of proof that the works, services or supplies correspond to the required characteristics, if the five conditions mentioned in the article 43 are not fulfilled.</p> <p>Plus, references to labels requirements cannot have the effect of excluding a contract from the scope of the Directive (Art. 18 (1)), or narrowing competition, nor restricting innovation (Recital 75).</p>

<p><i>or services meet equivalent label requirements.</i></p> <p><i>Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.</i></p> <p>[Transposition is mandatory]</p> <p><i>2. Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.</i></p> <p>[Transposition is mandatory]</p> <p>Cf. Recital 75.</p>	<p>since the 2014/24 Directive entered into force :</p> <p>Labels may provide for environmental characteristics as before, but also social or other characteristics.</p> <p>Labels can be used in technical specifications, but also for award criteria and contract performance conditions.</p> <p>Labels may now be used in all types of public procurement, included public work contracts that were excluded before.</p>	<p>(e) the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.</p> <p>It is specified in Recital 75 that specific national or government bodies or organisations can be involved in setting up label requirements that may be used in connection with procurement by public authorities without those bodies or organisations losing their status as third parties.</p> <p>This article also allows tenderers to present alternative evidence. Contracting authorities will therefore be required to assess equivalence between what they have indicated as acceptable proof and the alternatives they are presented with.</p> <p>In the case an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to him, this provision indicates that the contracting authority has to accept other appropriate means of proof, which may include a technical dossier from the manufacturer. The burden of proof is on the economic operator.</p>	
<p>Interactions with other EU laws</p>	<p><u>Definitions</u>: Art. 2(1), 23° defines “label” and Art. 2(1), 24° defines “label requirements”</p> <p><u>Available information to other MS</u>: Art 44(3) and 86: information related to Labels submitted by an economic operator may be made available by a Member State to another Member State upon request. This is particular to labels and some other articles.</p>		
<p>Open questions</p>	<p><u>Use of labels</u>: one case-law concerning use of labels was held by the Court under the previous Directive (C-368/10, <i>Commission v. The Netherlands</i>). However, since then, Article 43 of the 2014/24 Directive has been written taking into account the Court’s teachings and went further (cf. upper).</p>		

Article 46 - Division of contracts into lots

Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots.</p> <p>Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the individual report referred to in Article 84.</p> <p>[Transposition is mandatory]</p> <p>2. Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots.</p> <p>Contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.</p> <p>[Transposition is mandatory]</p> <p>3. Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.</p> <p>[Transposition is optional]</p>	<p>This provision encourages contracting authorities to award contracts where feasible, in the form of separate lots, in order to facilitate the participation in public procurement of civil society organisations (CSOs), social economy enterprises (SCEs) and small and medium sized enterprises (SMEs).</p> <p>If authorities decide not to organise the contracts into lots, they must provide the reasons for its decision (Art. 46(1)).</p> <p>If authorities decide to divide the contract into lots, article 46(2) provides for two rules:</p> <ol style="list-style-type: none"> 1. Contracting authorities shall indicate the maximum number of lots tenderers may submit for. 2. Contracting authorities may limit the number of lots that may be awarded to one tenderer. <p>Article 46(3) authorises Member States to provide that contracting authorities may award contracts combining several or all lots. Contracting authorities should conduct such a comparative assessment by first determining which tenders best fulfil the award criteria laid down for each individual lot and then comparing it with the tenders submitted by a particular tenderer for a specific combination of lots, taken as a whole. In this case, States have a large margin of appreciation.</p> <p>Member States are specifically permitted to go further by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory (Recital 78 and Art. 46(4)). In such circumstances, a Member State must indicate, either in the contract notice published in the Official Journal of the European Union (OJEU) or in the invitation to</p>	<p>This article allows contracting authorities to decide whether or not to divide a contract into lots. However, where a contracting authority decides <u>not</u> to divide a contract into lots, the provision obliges them to provide reasons for their decision. Nonetheless, recital 78 indicates that content of such reasons cannot be subject to administrative or judicial supervision.</p> <p>The paragraph 2 of this article obliges contracting authorities, that have decided to divide contracts into lots, to indicate in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots. Plus, if they decide to limit the number of lots that may be awarded to one tenderer, they have to state the maximum number of lots per tenderer in the contract notice or in the invitation to confirm interest.</p> <p>Paragraph 3 allows</p>	<p>It is not allowed for a contracting authority to decide not to divide a contract into lots without providing the reasons for its decision.</p>

<p>4. Member States may implement the second subparagraph of paragraph 1 by rendering it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law. In such circumstances the first subparagraph of paragraph 2 and, where appropriate, paragraph 3 shall apply. [Transposition is optional]</p> <p>Cf. Recitals 78 and 79</p>	<p>confirm interest, whether a tender may be submitted for one, several or all lots (Art. 46(2) al.1). Member States may also provide the possibility for contracting authorities to award contracts combining several or all lots. (Art. 46(3)).</p> <p>Besides, Member States should also be free to provide mechanisms for direct payments to subcontractors.</p>	<p>Member States to provide that contracting authorities may award contracts combining several or all lots if they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.</p>	
<p>Interactions with other EU laws</p>	<p>Art. 20 (2): Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to sheltered workshops or businesses or reserve performance of contracts to the context of sheltered employment programs (recital 36). <u>European code of best practices facilitating access by SMEs to public procurement contracts.</u></p>		
<p>Open questions</p>	<p><u>Combination of paragraphs 46(2) and 46(3) and of recital 79 could lead to differences of interpretations and contradictions:</u> A legal uncertainty appears if we understand article 46 (3) and recital 79 – whose wording is not clear – in the sense that those provisions provide that Member States should organise an exception to the limitation set in the contract of being awarded a certain amount of lots. Indeed, it is provided that <i>if</i> it appears that an award to the same tenderer for multiple lots would be preferable, then that tenderer could be awarded more lots than organised by the contract. This interpretation seems to go against the principle of equal treatment between tenderers and the objective of access to public procurement to SMEs enterprises.</p> <p><u>Alternative bids:</u> It is not clear whether Article 46 allows a tenderer to make different bids for each lot separately on the one hand and a different and probably lower one if he or she is awarded all or several lots on the other hand. Reading article 46(2) and (3), it seems that contracting authorities have to indicate whether there are any limitations to bidding for several lots of the same public procurement and what is the maximum number of lots for which a single tenderer can bid. Member States may decide to provide that contracting authorities can award one or more contracts combining more than one lot (in that case, it has to be clearly indicated in the contract notice beforehand). Rebates affect the question of whether a procurement law favours SMEs to an extent that negatively affects value for money, or in other words, rebates undermine the SME-friendly purpose of Article 46.</p> <p><u>Legality of multiple tenders per tenderer (only one tender for concerned lots, multiple-lots tender with rebate per tenderer):</u> If a tenderer makes different tenders (for instance a tender for each lot, and a tender for combined lots with a rebate), the European Court of Justice case-law has ruled that the principle of competition and the principle of equal treatment according to the principle of proportionality would be violated only if it is proven that competition has been distorted <i>in concreto</i> (cf. C-538/07, <i>Assitur</i>; C-213/07, <i>Michaniki</i>; C-21/03 and 34/03, <i>Fabricom</i>).</p> <p><u>Publication of separated lots:</u> Regarding the question of publication of separated lots, Article 5(8) of the Directive states that where the contracts are awarded through different lots, the aggregate value of the lots is calculated. If the aggregated value is above the threshold, EU rules apply to each lot.</p>		

Article 56 - Choice of participants and award of contracts - General principles

Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>Contracts shall be awarded on the basis of criteria laid down in accordance with Articles 67 to 69, provided that the contracting authority has verified in accordance with Articles 59 to 61 that all of the following conditions are fulfilled:</i></p> <p>(a) <i>the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account, where applicable, Article 45;</i></p> <p>(b) <i>the tender comes from a tenderer that is not excluded in accordance with Article 57 and that meets the selection criteria set out by the contracting authority in accordance with Article 58 and, where applicable, the non-discriminatory rules and criteria referred to in Article 65.</i></p> <p><i>Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18(2).</i></p> <p>[Transposition is mandatory]</p> <p>2. <i>In open procedures, contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with Articles 57 to 64. Where they make use of that possibility, they shall ensure that the verification of absence of grounds for exclusion and of fulfilment of the selection criteria is carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that should have been excluded pursuant to Article 57 or that does not meet the selection criteria set out by the contracting authority.</i></p> <p>[Transposition is mandatory]</p> <p><i>Member States may exclude the use of the procedure in the first subparagraph for, or restrict it to, certain types of</i></p>	<p>Article 56(1) of Directive 2014/24/EU maintains that contracts are to be awarded in accordance with the award criteria set at the beginning of the procedure as per Articles 67 to 69 of the Directive.</p> <p>It does include an obligation for the contracting authority to check the tender and bidder compliance with all requirements and selection criteria once again. The compliance checks are extended with the obligations included in Article 18(2) of Directive. This Article provides for the obligation to comply with applicable legislations in the fields of social and labour law and also environmental law. Article 56(1) refers to tender compliance with the requirements set by Article 18(2), but the latter moves the compliance check to the performance of the contract, therefore having a broader scope of application than just the tender itself.</p> <p>In accordance with this Article, contracting authorities should be required, under national legislation, to act as enforcing mechanisms for the legal obligations contained in Article 18(2). In this case, this is not an obligation for contracting authorities but only a faculty to reject the tender considering the principle of proportionality.</p> <p>Article 56(2) gives the opportunity to contracting authorities, only in open procedures, to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection</p>	<p>The article 56(1) of Directive 2014/24/EU obliges contracting authorities to check the tender and bidder compliance with all requirements and selection criteria. Concerning the specific obligations enclosed in article 18(2), contracting authorities have the possibility to reject a tender where they have established that the tenderer does not comply with them.</p> <p>Article 56(2) allows contracting authorities, only in open procedures, to examine tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria in accordance with Articles 57 to 64.</p> <p>It also allows Member States to forbid examining award criteria before selection criteria, or to limit the use of this method to certain types of procurement, or specific circumstances.</p> <p>Article 56(3) allows contracting authorities to request from economic operators to complete the relevant information or documentation missing or</p>	<p>Article 56(2) does not allow contracting authorities to invert the “normal” order of verification of criteria, meaning examining award criteria before selection criteria, in other procedures than the open procedure.</p>

<p><i>procurement or specific circumstances.</i></p> <p>[Transposition is optional]</p> <p><i>3. Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.</i></p> <p>[Transposition is mandatory]</p> <p><i>4. The Commission shall be empowered to adopt delegated acts in accordance with Article 87 to amend the list in Annex X, where necessary, to add new international agreements that have been ratified by all Member States or where the existing international agreements referred to are no longer ratified by all Member States or they are otherwise changed, for instance in respect of their scope, content or denomination.</i></p> <p>[Transposition is mandatory]</p>	<p>criteria in accordance with Articles 57 to 64.</p> <p>This means that contracting authorities can choose to invert the “normal” order of verification.</p> <p>However, this Article allows Member States to forbid examining award criteria before selection criteria, or to limit the use of this method to certain types of procurement, or specific circumstances.</p> <p>The Article 56(3) provides that, unless otherwise provided by the national law implementing this Directive, contracting authorities may, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency.</p> <p>Article 56(4) empowers the Commission to adopt delegated acts to amend the list in Annex X (see below).</p>	<p>unclear.</p>	
<p>Interactions with other EU laws</p>	<p>The international social conventions identified in Annex X reflect the ILO’s eight core labour standards:</p> <p>ILO Conventions 87 (Freedom of Association and the Protection of the Right to Organise), 98 (the Right to Organise and Collective Bargaining), 29 (Forced Labour), 105 (the Abolition of Forced Labour), 138 (Minimum Age), 111 (Discrimination (Employment and Occupation)), 100 (Equal Remuneration) and 182 (Worst Forms of Child Labour).</p> <p>Recital 37 indicates that obligations stemming from international agreements that are ratified by all Member States and listed in Annex X should apply during contract performance, but this should in no way prevent the application of terms and conditions of employment which are more favourable to workers provided that they are compatible with European law, see: ECJ case-law on minimum wage of posted workers: ECJ, February 12th 2015, case C-396/13.</p>		

Open questions

Compliance Checks with obligations of Article 18(2):

The compatibility of the wording of article 56, 57, and 18(2) has been questioned as the 2 first imply that contracting authorities may decide not to award a procurement to a tenderer which has submitted the best tender because the bid is not conform to Article 18(2), though Article 18(2) provides that 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. In our understanding, we believe that there is no issue of compatibility since the scope of applications of articles are different. As a reminder, article 56(1) refers to tender compliance with the requirements set out by Article 18(2), but the latter moves the compliance check of the performance of the contract, therefore having a broader scope of application than just the tender itself.

Inverting the order of verification of selection criteria and award criteria:

Inverting the order of verification of selection criteria and awarding criteria seems not to be a problem in the light of the CJUE case law as long as these two operations stay distinct and are ruled by distinct rules. This means that the selection criteria can only concern economic operators' qualitative selection and that the award criteria must only concern tender evaluation, and not tenderer evaluation (C-532/06, *Iianakis*).

Article 57 - Exclusion grounds			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:</i></p> <p>(...)</p> <p><i>(f) child labour and other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council.</i></p> <p><i>The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.</i></p> <p>[Transposition is mandatory]</p> <p>2. <i>An economic operator shall be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.</i></p> <p><i>Furthermore, contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure an economic operator where the contracting authority can demonstrate by any appropriate means that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions.</i></p> <p><i>This paragraph shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.</i></p> <p>[Transposition is mandatory]</p> <p>3. <i>Member States may provide for a derogation from the mandatory</i></p>	<p>Article 57 details the grounds on which an economic operator can or must be excluded even where they satisfy the eligibility criteria.</p> <p>The Directive organises mandatory exclusions and discretionary exclusions relating to social and labour law.</p> <p>Once a mandatory exclusion ground is discovered and that all the triggering conditions imposed by the directive is ascertained, the exclusion of the tendered from the procedure is automatic.</p> <p>With regard to discretionary grounds of exclusion, Member States have to transpose them and make them available to all contracting authorities. A contracting authority may exclude any tenderer if it considers that, firstly, there are sufficient elements to prove the circumstance. Secondly, the circumstance is serious enough to consider that credibility of the tenderer to execute the contract properly (in this case, in line with art. 57(2) concerning tax obligations or with art. 57(4) concerning social, labour and environmental obligations) is seriously undermined.</p> <p>Firstly, there is a mandatory ground of exclusion (Article 57(1)(f)) concerning the situation where the contracting authority has established that the economic operator has been</p>	<p>Article 57 obliges or allows contracting authorities to exclude an economic operator from the procurement depending if they base the procedure on mandatory and discretionary grounds of exclusions.</p> <p>Article 57(6) makes explicit a provision for a “self-cleaning” procedure for the tenderer in the case of both mandatory and discretionary exclusions.</p> <p>The tenderer/economic operator has to (a) prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct; (b) clarify the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and (c) take concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct.</p> <p>The measures taken by</p>	<p>The Article does not allow contracting authorities to choose an economic operator that enters in a mandatory ground of exclusion (as Article 57(1)(f), Article 57(2)) except in case of derogations permitted by the Directive and established by the Member States.</p>

exclusion provided for in paragraphs 1 and 2, on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment.

Member States may also provide for a derogation from the mandatory exclusion provided in paragraph 2, where an exclusion would be clearly disproportionate, in particular where only minor amounts of taxes or social security contributions are unpaid or where the economic operator was informed of the exact amount due following its breach of its obligations relating to the payment of taxes or social security contributions at such time that it did not have the possibility of taking measures as provided for in the third subparagraph of paragraph 2 before expiration of the deadline for requesting participation or, in open procedures, the deadline for submitting its tender.

[Transposition is optional]

4. Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:

(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2);

(...)

(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

(...)

(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(...)

[Transposition is mandatory]

Notwithstanding point (b) of the first subparagraph, Member States may require or may provide for the possibility that the contracting authority does not exclude an economic operator which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures

the subject of a conviction by final judgment for child labour and other forms of trafficking in human beings. About this mandatory ground of exclusion, the provision indicates that it applies even though it is not the economic operator itself that has been convicted but a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

Another mandatory exclusion (Article 57(2)) applies when contracting authorities are aware that the economic operator is in breach of its obligations relating to the payment of social security contributions and where this has been established by a judicial or administrative decision having final and binding effect. However, the Directive allows Member States to provide a derogation from this mandatory exclusion where an exclusion would be clearly disproportionate, for example where only minor amounts of taxes or social security contributions are unpaid (Article 57(3)) (cf. Recital 101).

Secondly, there are the discretionary grounds for exclusion (Article 57(4)) which generally concern the suppliers' professional honesty, solvency and reliability.

Art 57(2), second paragraph, provides for a discretionary exclusion ground where the contracting authorities can demonstrate that the

the economic operators must be evaluated taking into account the gravity and particular circumstances. Reasons must be given for any decision by the contracting authority that the evidence is not sufficient. Such evidence might include payment in compensation, changes in personnel, appropriate staff reorganization measures and the implementation of reporting and control systems.

Recital 102 indicates that Member States should determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task (cf. Recital 102).

In the absence of self-cleaning, the article 57(7) provides that the maximum period of exclusion is five years from judgment in the case

on the continuation of business in the case of the situations referred to in point (b).

[Transposition is optional]

5. Contracting authorities shall at any time during the procedure exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2.

At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4.

[Transposition is mandatory]

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

[Transposition is mandatory]

economic operator has not paid its taxes or social security contributions but where no legally binding decision has been taken (parallel to the mandatory ground of exclusion).

The mandatory and discretionary grounds of exclusion relating to payment of taxes and of social contributions cease to apply (Art. 57(2), third paragraph) when the economic operator has paid the money due, together with any interest or fines, or entered a binding arrangement to do so. This Article therefore concerns ongoing default, not past violations. Though, it can be suggested that non-payment of taxes and social security contributions may still constitute grave misconduct under Article 57(4)(c), which is also a ground for discretionary exclusion. Recital 39 makes it clear that non-compliance with collective agreements could be considered grave misconduct on the part of the economic operator concerned.

There is another discretionary ground of exclusion for suppliers who have shown significant or persistent deficiencies in the performance of a substantive requirement under a previous contract which might include non-compliance with social clauses (Art 57(4)(g)).

For all those discretionary exclusion grounds, Member States may require contracting authorities to exclude economic operators from participation, removing from the contracting authorities the discretion

of mandatory exclusions, three years from the event in the case of discretionary exclusions and the Directive is clear that 'self-cleaning' is not a way of reducing any exclusion imposed by a court (as opposed to the contracting authorities excluding a tenderer).

<p>7. By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4.</p> <p>[Transposition is mandatory]</p> <p>Cf. Recitals 100 to 102</p>	<p>that the Directive gives them.</p>		
<p>Interactions with other EU laws</p>	<p><u>Child labour and other forms of trafficking in human beings</u>: they are defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council: “<i>The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation</i>”.</p> <p>+ EU’s Charter of Fundamental Rights, in particular Art 24 (the rights of the child) and Art 32 (prohibition of child labour).</p>		
<p>Open questions</p>	<p><u>Grave misconduct under Article 57(4)(c)</u>: The notion of “grave misconduct” is not clear. Recital 101 indicates that “It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.”</p> <p>The CJEU specified, relatively to this concept, that “ <i>the concept of ‘professional misconduct’ covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of res judicata</i>”, but also that “<i>Consequently, the failure of an economic operator to abide by its contractual obligations can, in principle, be considered as professional misconduct. Nevertheless, the concept of ‘grave misconduct’ must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongful intent or negligence of a certain gravity on its part. Accordingly, any incorrect, imprecise or defective performance of a contract or a part thereof could potentially demonstrate the limited professional competence of the economic operator at issue, but does not automatically amount to grave misconduct</i>” (C-465/11, Forposta SA et ABC Direct Contact sp. z o.o. c. Poczta Polska SA).</p>		

<p>Article 67 - Contract award criteria</p>			
<p>Text of the article</p>	<p>What the article means</p>	<p>What the provision allows</p>	<p>What the provision does not allow</p>
<p>1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender.</p>	<p>This Article provides for three award criteria: price or cost, cost-effectiveness approach and the Best Price-Quality Ratio - BPQR (called “most economically</p>	<p>This provision allows contracting authorities to use social award criteria.</p>	<p>This provision does not allow contracting authorities to use social award criteria that are</p>

<p>[Transposition is mandatory]</p> <p>2. <i>The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, 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. Such criteria may comprise, for instance:</i></p> <p>(a) <i>quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;</i></p> <p>(b) <i>organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or</i></p> <p>(c) <i>after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.</i></p> <p><i>The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.</i></p> <p><i>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.</i></p> <p>[Transposition is mandatory except for the last parts of this paragraph.]</p> <p>3. <i>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:</i></p> <p>(a) <i>the specific process of production, provision or trading of those works, supplies or services; or</i></p> <p>(b) <i>a specific process for another stage of their life cycle, even where such factors do not form part of their material substance.</i></p> <p>[Transposition is mandatory]</p> <p>4. <i>Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be</i></p>	<p>advantageous tender, and “MEAT” in the 2004 Directive). With the latter, a certain “weighting” is given to the different combinations of criteria chosen.</p> <p>If the “Best Price-Quality Ratio - BPQR” is used, social considerations can be included among the different award criteria to be weighed, together with the price or cost and other criteria such as social, quality and environmental considerations. Those other criteria must be linked to the subject matter of the public contract in question. Contracting authorities are free to define the subject of the contract in any way that meets their needs, as long as they do not distort the level playing field for enterprises throughout the EU, i.e. draw up a contract that unfairly favours a provider.</p> <p>The fact that contracting authorities may now take into consideration the specific production process in the context of the award criteria allows them to lay down social-related award criteria.</p> <p>The social considerations can include factors such as job creation, decent work, democratic ownership, social and professional inclusion of persons with disabilities and disadvantaged persons.</p>	<p>Article 67(4) requires award criteria (including social award criteria) to 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.</p>	<p>not linked to the subject matter of the public contract (as criteria and conditions relating to general corporate policy or requirement to have a certain corporate social responsibility policy in place).</p> <p>Contracting authority cannot provide for award criteria that have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition.</p>
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<p><i>effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.</i></p> <p>[Transposition is mandatory]</p> <p><i>5. The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.</i></p> <p><i>Those weightings may be expressed by providing for a range with an appropriate maximum spread.</i></p> <p><i>Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.</i></p> <p>[Transposition is mandatory]</p> <p>Recitals 92 – 93, 97.</p>			
<p>Interactions with other EU laws</p>	<p><u>Principles of awarding contracts:</u> Article 76 and Recital 96</p>		
<p>Open questions</p>	<p><u>The linkage with the subject-matter of the contract:</u> Article 67(3) imposes a link between the award criteria and the subject matter of the public contract. This view is supported by Recital 97 which says that the condition of a link with the subject matter of the contract excludes criteria and conditions relating to general corporate policy and that contracting authorities should not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place (case-law about this linkage under the previous Directive : C-448/01, <i>EVN & Wienstrom v Republik Osterreich</i>; C-234/03, <i>Contse v Insalud</i>; C-368/10, <i>Fair Trade</i>).</p>		

<p>Article 69 - Abnormally low tenders</p>			
<p>Text of the article</p>	<p>What the article means</p>	<p>What the provision allows</p>	<p>What the provision does not allow</p>
<p><i>1. Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.</i></p> <p>[Transposition is mandatory]</p> <p><i>2. The explanations referred to in paragraph 1 may in particular relate to:</i></p> <p><i>(a) the economics of the manufacturing process, of the services</i></p>	<p>This provision can be used as a tool to ensure compliance with labour and social laws in the procurement process.</p> <p>It confirms that control of the observance of the social and labour law provisions should be performed at the relevant stages of the procurement procedure, including when applying the provisions</p>	<p>This provision allows contracting authorities to reject abnormally low tenders where the tenderer is unable to give a sufficient explanation.</p> <p>This opportunity becomes an obligation where it has</p>	<p>Contracting authorities are not allowed to reject a tender that appears to be abnormally low without having allowed the tenderer to give explanations.</p> <p>They are neither allowed to</p>

<p><i>provided or of the construction method;</i></p> <p><i>(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;</i></p> <p><i>(c) the originality of the work, supplies or services proposed by the tenderer;</i></p> <p><i>(d) compliance with obligations referred to in Article 18(2);</i></p> <p><i>(e) compliance with obligations referred to in Article 71;</i></p> <p><i>(f) the possibility of the tenderer obtaining State aid.</i></p> <p>[Transposition is mandatory]</p> <p><i>3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2.</i></p> <p><i>Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).</i></p> <p>[Transposition is mandatory]</p> <p><i>4. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.</i></p> <p>[Transposition is mandatory]</p> <p><i>5. Upon request, Member States shall make available to other Member States by means of administrative cooperation any information at its disposal, such as laws, regulations, universally applicable collective agreements or national technical standards, relating to the evidence and documents produced in relation to details listed in paragraph 2.</i></p> <p>[Transposition is mandatory]</p>	<p>concerning abnormally low tenders.</p> <p>Cf. Recital 40.</p> <p>An abnormally low tender may imply that binding social and labour law are not correctly applied. Where tenders appear to be abnormally low, contracting authorities shall require economic operators to give explanations. These explanations may notably refer to compliance with obligations referred to in Article 18(2), which imply ensuring compliance with social and labour law provisions.</p> <p>While contracting authorities should generally be entitled to reject abnormally low tenders where the tenderer cannot provide a sufficient explanation, Article 69(3) goes further by obliging contracting authorities to do so where it has been established that the abnormally low price or costs proposed result from non-compliance with (international or national) social or labour law provisions.</p> <p>Cf. Recital 103.</p>	<p>been established that the abnormally low price or costs proposed result from non-compliance with (international or national) social or labour law provisions.</p>	<p>award a contract to a tenderer without having verified the relevant explanations as to the low level of the price or costs.</p> <p>In any case, contracting authorities are not allowed to accept a tender where it has been established that the abnormally low price or costs proposed result from non-compliance with (international or national) social or labour law provisions.</p>
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Cf. Recitals 40 and 103.			
Interactions with other EU laws	<p><u>EU rules on aids granted by States</u>: State aids, which in some cases may concern social aspects, might be deemed incompatible with the internal market. Regulation 652/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty contains specific provisions on aids with a social character.</p> <p><u>EU Charter of fundamental rights</u> (in particular provisions relating to social and labour rights : Articles 27 to 34)</p> <p><u>EU rules laying down social rights and principles</u> such as Directive 96/71 concerning the posting of workers in the framework of the provision of services, Directive 2003/88 concerning certain aspects of the organisation of working time.</p>		
Open questions	<p><u>How can contracting authorities concretely detect non-compliance with social or labour law at the tender stage?</u> Where a tender appears to be abnormally low, the economic operator must explain as to why the price or costs are low, notably by proving compliance with social and labour law. However, it seems very difficult, not to say impossible, for the contracting authority to concretely verify such compliance at the earliest stage. It may at most verify compliance with the minimum wage rules, which is already as such a very difficult task.</p> <p><u>Where does the margin of appreciation of the contracting authority lie?</u></p> <p>Where a tender appears to be abnormally low, the contracting authority does not have a margin of discretion as to whether to require explanations from the economic operator. It is obliged to do so. The explanations may relate to several elements, listed in Article 69(2), among which compliance with social and labour provisions. Where the explanations turn out to be unsatisfactory, do contracting authority have any margin of appreciation? From the wording of Article 69(3), there is no doubt that the contracting authority does not have any discretion as to whether to reject an abnormally low tender where it has been established that it does not comply with social or labour provisions. Conversely, it appears that, in the other cases, the contracting authority can choose whether to reject the tender or not.</p>		

Article 70 - Conditions for performance of contracts			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p><i>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 within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.</i></p> <p>[Transposition is mandatory] Cf. Recitals 98-99.</p>	<p>This article is important for the enforcement of social and labour rights in the performance of contracts. It allows contracting authorities to set additional conditions for performance of contracts linked to their subject matter.</p> <p>Contract performance clauses can contribute to achieving social policy objectives, as they allow contracting authorities to go beyond the standards set by binding legislation.</p> <p>Compliance with such clauses is verified at the execution stage, not during the tender's assessment.</p>	<p>Contracting authorities are allowed to set additional conditions for performance of contracts linked to their subject matter.</p>	<p>Contracting authorities are not allowed to set performance conditions that are not linked to the subject-matter of the contract.</p> <p>Recital 97 specifies that the condition of a link with the subject matter of the contract excludes criteria and conditions relating to general corporate policy.</p>

Interactions with other EU laws	<p>Principles of equal treatment and non-discrimination, as well as free movement of people, goods, services (Titles II and IV TFEU) .</p> <p><u>Directive 96/71/EC concerning the posting of workers in the framework of the provision of services</u>: Recital 98 of Directive 2014/24 indicates that contract performance conditions concerning social aspects should be applied in accordance with Directive 96/71 as interpreted by the CJEU.</p>
Open questions	<p>The condition of a “link to the subject matter” is unclear. The condition already existed under Article 53 of Directive 2004/18 (see e.g. C-368/10, <i>Commission v The Netherlands</i> and other case-law cited under the analysis of Article 67 of Directive 2014/24).</p> <p>Article 67(3) of Directive 2014/24 provides 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:</p> <ul style="list-style-type: none"> (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. <p>However, it remains unclear to what extent a contract performance clause may be considered as connected to the subject matter of the contract. Is it sufficient that the clause is relevant for the main contract?</p>

Article 71 - Subcontracting			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>Observance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.</i></p> <p>[Transposition is mandatory]</p> <p>2. <i>In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.</i></p> <p>[Transposition is mandatory]</p> <p>3. <i>Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded (the main contractor). Such measures may include appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.</i></p> <p>[Transposition is optional]</p> <p>4. <i>Paragraphs 1 to 3 shall be without prejudice to the question of the main contractor's liability.</i></p> <p>5. <i>In the case of works contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, after the award of the contract and at the latest when the performance of the contract commences, the contracting authority shall require the main contractor to indicate to the contracting authority the name, contact details and legal representatives of its subcontractors, involved in such works or services, in so far as known at this point in time. The contracting authority shall require the main contractor to notify the contracting authority of any changes to this information during the course of the contract as well as of the required information for any new subcontractors which it subsequently involves in such works or services.</i></p> <p>[Transposition is mandatory]</p> <p><i>Notwithstanding the first subparagraph, Member States may impose the obligation</i></p>	<p>Article 18(2) obliges Member States to ensure that in the performance of public contracts, economic operators comply with applicable social and labour law.</p> <p>Article 71 imposes on competent national authorities the obligation to ensure that subcontractors comply with the obligations referred to in Article 18(2).</p> <p>The possibility to subcontract is meant to facilitate involvement of SMEs, including social economy enterprises, in the public procurement market.</p> <p>The practice of subcontracting may however lead to abuses, particularly since it could result in using subcontractors which do not comply with social and labour legislations. In order to ensure some transparency in the subcontracting chain (Recital 105), Article 71 provides that contracting authorities may ask or may be required by a Member State to ask the tendered to deliver information.</p>	<p>Contracting authorities are allowed to ask or may be required by a Member State to ask the tenderer information relating to subcontracting.</p> <p>Member States are free to provide mechanisms for direct payments to subcontractors.</p> <p>According to Article 71(6)(a), where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, Member States shall ensure compliance with obligations referred to in Article 18(2).</p> <p>According to Article 71(6)(b), contracting authorities are allowed to verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57.</p> <p>Where the verification has shown that there are compulsory grounds for exclusion, the contracting</p>	

to deliver the required information directly on the main contractor.

[Transposition is mandatory]

Where necessary for the purposes of point (b) of paragraph 6 of this Article, the required information shall be accompanied by the subcontractors' self-declarations as provided for in Article 59. The implementing measures pursuant to paragraph 8 of this Article may provide that subcontractors which are presented after the award of the contract shall provide the certificates and other supporting documents instead of the self-declaration.

The first subparagraph shall not apply to suppliers.

Contracting authorities may extend or may be required by Member States to extend the obligations provided for in the first subparagraph to for instance:

(a) supply contracts, to services contracts other than those concerning services to be provided at the facilities under the direct oversight of the contracting authority or to suppliers involved in works or services contracts;

(b) subcontractors of the main contractor's subcontractors or further down the subcontracting chain.

[Transposition is mandatory]

6. With the aim of avoiding breaches of the obligations referred to in Article 18(2), appropriate measures may be taken, such as :

(a) Where the national law of a Member State provides for a mechanism of joint liability between subcontractors and the main contractor, the Member State concerned shall ensure that the relevant rules are applied in compliance with the conditions set out in Article 18(2).

(b) Contracting authorities may, in accordance with Articles 59, 60 and 61, verify or may be required by Member States to verify whether there are grounds for exclusion of subcontractors pursuant to Article 57. In such cases, the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion. The contracting authority may require or may be required by a Member State to require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are non-compulsory grounds for exclusion.

[Transposition is mandatory]

7. Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for

Article 71(3) allows Member States to provide mechanisms for direct payments to subcontractors.

authority shall require that the economic operator replaces the subcontractor.

The contracting authority may also require or be required by a Member State to require that the economic operator replaces the subcontractor where the verification has shown that there are non-compulsory grounds for exclusion.

<p><i>them to request such direct payment.</i></p> <p>[Transposition is optional]</p> <p><i>8. Member States having chosen to provide for measures pursuant to paragraphs 3, 5 or 6 shall, by law, regulation or administrative provisions and having regard for Union law, specify the implementing conditions for those measures. In so doing, Member States may limit their applicability, for instance in respect of certain types of contracts, certain categories of contracting authorities or economic operators or as of certain amounts.</i></p> <p>[Transposition is mandatory]</p> <p>Cf. Recitals 78 and 105</p>			
<p>Interactions with other EU laws</p>	<p><u>Directive 96/71/EC concerning the posting of workers in the framework of the provision of services</u>: compliance with the protection of workers' rights under Directive 96/71 should be ensured in subcontracting chains.</p>		
<p>Open questions</p>	<p><u>The concept of « subcontractor » is not legally defined</u>: it seems that any convention through which the main contractor entrusts to a third operator the execution of part of its own contract, should be considered as a subcontract within the meaning of Directive 2014/24.</p> <p>What does the terms "<i>competent national authorities acting within the scope of their responsibility and remit</i>" entail? It seems that not only contracting authorities but any competent national authority not acting within the framework of a public procurement contract have the obligation to ensure compliance.</p> <p><u>Is the contracting authority allowed to require that a certain portion of the contract is executed by the main contractor?</u> The CJEU has ruled in <i>Wroclaw</i> (C-406/14) that such a clause is incompatible with the terms of Article 71, which does not provide for particular limitation in the use of subcontracting.</p>		

Article 74 - Award of contracts for social and other specific services

Text of the article	What the article means	What the provision allows	What the provision does not allow
<p><i>Public contracts for social and other specific services listed in Annex XIV shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in point (d) of Article 4.</i></p> <p>[Transposition is mandatory]</p> <p>Cf. Recital 114</p>	<p>This provision recognizes that services to the person, such as social services, health services, educational services, are endowed with particular characteristics such as limited cross-border interest, distinctive goals, can address users in a vulnerable situation and openly contribute to social cohesion and inclusion, as well as to the enjoyment of fundamental rights.</p> <p>This provision introduces a particular procurement regime dedicated to public contracts for social and other specific services when they are equal to or greater than € 750.000.</p> <p>Recital 114, last paragraph, stresses that this particular procurement regime does not prevent Member States or public authorities to provide or to organize such services without referring to public procurements. In this case, Recital 114 gives examples of those possibilities, such as the mere financing of services or the unlimited granting of licenses and authorisations to all economic operators. This latter case must however ensure sufficient advertising and compliance with the principles of transparency and non-discrimination.</p>	<p>All public contracts for social and other specific services listed in Annex XIV must be awarded in compliance with articles 75-77 when the value is equal to or greater than € 750.000.</p> <p>Member States remain competent to determine award rules for public contracts when the value is lower than € 750.000.</p>	
Interactions with other EU laws	<p><u>Any Regulation amending Directive 2014/24/EU in respect of the application thresholds for the procedures for the award of contracts</u> such as Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 amending Directive 2014/24/EU.</p>		
Open questions	<p><u>Cross-border interest?</u> What if the public contract whose amount is under threshold mentioned in Art. 4, (d) of the Directive actually turns out to have a certain cross-border interest? This assumption must be concretely verified. CJEU assumes that objective criteria to assess whether the contract is endowed with a certain cross-border interest are:</p> <ul style="list-style-type: none"> The value of the contract, in conjunction with the place where the work is to be carried out; The technical nature of the contract and the specific characteristics of the goods concerned; Real complaints made by operators in Member States other than that of the contracting authority; The fact that, at the time of the award of the contract at issue in the main proceedings, similar services may previously have been provided by entities established in other Member States; EU funding for cross-border projects ; <p>(See Recital 114 and cases such as C-65/17, <i>Oftalma Hospital</i>; C-119/06, <i>Commission v Italian Republic</i>).</p> <p>In such cases, the Treaty principles will apply (transparency, non-discrimination and equal treatment).</p>		

Article 75 - Publication of notices

Text of the article	What the article means	What the provision allows	What the provision does not allow
1. <i>Contracting authorities intending to award a public contract</i>	This provision provides for rules	When they intend to award a public contract	

<p><i>for the services referred to in Article 74 shall make known their intention by any of the following means:</i></p> <p><i>(a) by means of a contract notice, which shall contain the information referred to in Annex V Part H, in accordance with the standard forms referred to in Article 51; or</i></p> <p><i>(b) by means of a prior information notice, which shall be published continuously and contain the information set out in Annex V Part I. The prior information notice shall refer specifically to the types of services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.</i></p> <p><i>The first subparagraph shall, however, not apply where a negotiated procedure without prior publication could have been used in conformity with Article 32 for the award of a public service contract.</i></p> <p>[Transposition is mandatory]</p> <p><i>2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in Annex V Part J, in accordance with the standard forms referred to in Article 51. They may, however, group such notices on a quarterly basis. In that case, they shall send the grouped notices within 30 days of the end of each quarter.</i></p> <p>[Transposition is mandatory]</p> <p><i>3. The Commission shall establish the standard forms referred to in paragraphs 1 and 2 of this Article by means of implementing acts. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).</i></p> <p><i>4. The notices referred to in this Article shall be published in accordance with Article 51.</i></p> <p>[Transposition is mandatory]</p>	<p>applicable to publication of notices for public contracts under art. 74.</p> <p>This provision softens the obligation of advertising for the public procurements covered by article 74.</p> <p>However public authorities still have to comply with advertising of those public procurements.</p>	<p>under Art. 74, contracting authorities must make known their intention by :</p> <p>Either a contract notice with information referred to in Annex V, Part H, and forms referred to in Art. 51</p> <p>Either a prior information notice with information referred to in Annex V, Part I.</p> <p>Such notice must refer to the types of services, to the fact that there will not be any further publication and must invite economic operators to express their interest in writing.</p> <p>When they have awarded a public contract under art. 74, contracting authorities must make known the results of the procurement procedure with a contract award notice with information referred to in Annex V, Part J, and forms referred to in Art. 51.</p> <p>This award notification can take place either after every award, either on a quarterly notice within 30 days of the end of the quarter.</p> <p>When they intend to award a public contract under Art. 74 and negotiated procedure without prior publication according to Art. 32, contracting authorities remain allowed not to make known their intention.</p> <p>All notices referred to in this Article must be published according to Article 51.</p>	
<p>Interactions with other EU laws</p>			

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Article 76 - Principles of awarding contracts			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.</i></p> <p>[Transposition is mandatory]</p> <p>2. <i>Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation.</i></p> <p>[Transposition is mandatory]</p> <p><i>Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services.</i></p> <p>[Transposition is optional]</p> <p>Cf. Recital 114</p>	<p>This article requires Member States to organize a specific award procurement procedure for public contracts under art. 74.</p> <p>Such a provision requires Member States to put in place rules taking into account a list of requirements to be met by contracting authorities, among which the specific needs of different categories of users, including disadvantaged and vulnerable groups.</p> <p>This provision also emphasizes the possibility for Member States to impose the award on the basis of the best price-quality ratio in the so-defined alternative awarding procedure.</p>	<p>Member States are required to put in place national rules applying to public contracts under Art. 74, provided that they ensure compliance with general principles of procurement (transparency and equal treatment of economic operators).</p> <p>Member States have discretionary power to determine such rules in order to take into account the specificities of such services to the person.</p> <p>Member States may provide that contract awards will only be made on the basis of the best price-quality ratio, which includes qualitative, environmental and / or social criteria linked to the subject-matter of the public contract in question (cf. Art. 67.2 of the 2014/24 Directive).</p> <p>In this specific framework, Member States must ensure that, when awarding, contracting authorities are able to meet the following requirements:</p> <ul style="list-style-type: none"> – Quality, – Continuity, – Accessibility, – Affordability, – Availability and comprehensiveness of services; – Specific needs of different categories of users, including disadvantaged and vulnerable groups; – Involvement and empowerment of users; – Innovation. 	<p>Recital 114 stresses that Member States are not allowed not to take into account Art. 14 TFEU, Protocol no 26 and rules related to administrative simplification when determining specific awarding rules.</p>
Interactions with other EU laws	<p><u>Importance of services of general economic interest in terms of quality, safety and affordability, equal treatment and promotion of universal access and of user rights:</u> Art. 14 TFEU and Protocol no 26.</p> <p><u>Fostering of administrative simplification:</u> Directive 2006/123/EC of 12 December 2006 on services in the internal market, in particular its Art. 5.</p> <p><u>Definition of an award criterion based on quality:</u> Voluntary European Quality Framework for Social Services; Key principles of a Quality</p>		

	<p>Framework for Early Childhood Education and Care.</p> <p>Definition of concepts such as <u>availability and comprehensiveness of services</u> or <u>involvement and empowerment of users</u>: Voluntary European Quality Framework for Social Services.</p> <p><u>Definition of a disadvantaged group</u>: See Recital 36 of the Directive 2014/24/UE mentioning, as examples of disadvantaged persons : “<i>unemployed, members of disadvantaged minorities or otherwise socially marginalised groups</i>”).</p>
Open questions	

Article 77 - Reserved contracts for certain services			
Text of the article	What the article means	What the provision allows	What the provision does not allow
<p>1. <i>Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74, which are covered by CPV codes 75121000-0, 75122000-7, 75123000-4, 79622000-0, 79624000-4, 79625000-1, 80110000-8, 80300000-7, 80420000-4, 80430000-7, 80511000-9, 80520000-5, 80590000-6, from 85000000-9 to 85323000-9, 92500000-6, 92600000-7, 98133000-4, 98133110-8.</i></p> <p>[Transposition is optional]</p> <p>2. <i>An organisation referred to in paragraph 1 shall fulfil all of the following conditions:</i></p> <p><i>its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1;</i></p> <p><i>profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;</i></p> <p><i>the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and</i></p> <p><i>the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.</i></p> <p>[Transposition is mandatory if paragraph 1 has been transposed].</p> <p>3. <i>The maximum duration of the contract shall not be longer than three years.</i></p> <p>[Transposition is mandatory if paragraph 1 has been transposed].</p>	<p>Article 77 gives Member States the possibility to reserve the right to participate in public procurements for organisations under certain strict conditions enumerated in the Art. 77.</p> <p>Recital 118 stresses that such organisations are based on employee ownership, active employee participation in their governance or is organised in the legal form of a cooperative.</p> <p>The possibility to provide for reserved contracts for certain services is to be distinguished from reserved contracts as under Art. 20 of the Directive.</p>	<p>Member states are allowed to authorize national contracting authorities to reserve the right for some organisations to participate in public contracts under Art. 74 whose CPV codes cover:</p> <ul style="list-style-type: none"> – Administrative educational services; – Administrative healthcare services; – Administrative housing services; – Supply services of domestic help personnel; – Supply services of nursing personnel; – Supply services of medical personnel; – Pre-school education services; – Higher education services; – E-learning services; – Adult-education services at university level; – Staff training services; – Training facilities; – Tutorial services; – All types of medical services; – Library, archives, museums and other cultural services; – Sporting services; – Services furnished by social membership organisations; 	<p>This provision cannot be used in order to award contracts to economic operators that have already been in charge of the same services within the past three years (EN version. Please see note below under “Legal uncertainties”).</p> <p>Duration of the awarded contract may not exceed three years.</p>

<p>4. <i>The call for competition shall make reference to this Article.</i> [Transposition is mandatory if paragraph 1 has been transposed].</p> <p>5. <i>Notwithstanding Article 92, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by 18 April 2019.</i></p> <p>Cf. Recitals 118 and 119</p>		<p>Services provided by youth associations.</p> <p>Call for competition must make reference to this Article.</p> <p>Reference to a CPV division does not implicitly entail a reference to subordinate subdivisions.</p> <p>The organization chosen to be awarded has to meet all the following requirements in terms of objective, profits and management / ownership.</p>	
<p>Interactions with other EU laws</p>	<p>Communication from the Commission about Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation: COM(2011) 682.</p>		
<p>Open questions</p>	<p>Legal scope of <u>participatory principles</u>? Such rules are pointed by the above-mentioned Communication COM(2011) 682 but remain quite unclearly defined.</p> <p><u>Scope of prohibition of consecutive contracts enclosed in Art. 77</u>: Art. 77 Some can argue that understanding of Art. 77, 2, (d) differ from some languages. For instance, the English version seems to be clear about the services that have been performed within the three past years as they cannot be renewed with another contract (“for the services concerned”). However, French or Spanish versions are more unclear as they state that this prohibition is for all services covered by Art. 77 (FR: “pour les services visés par le présent article” or ES : “ para los servicios en cuestión con arreglo al presente artículo”).</p> <p>Clarification from DG GROW on the interpretation of Article 77:</p> <p>Concerning the interpretation of Art 77, we can confirm the more “lenient” interpretation of Art 77.</p> <p>That means, in particular, that Art 77(2) d) precludes participation to a new Art 77 contract, when the operator has won in the 3 previous years another Art 77 reserved contract for the same services by the same contracting authority. In other words, if the operator already has a reserved contract with the same authority for a “light regime” service, it can still validly participate in the reserved procedure for a new contract to provide a different service that is however still subject to the “light regime”. The FR language version unfortunately seems to be worded in a way which justifies a more restrictive interpretation, but which is not confirmed in (and is in some cases inconsistent with) the other language versions.</p>		