



Protecting Rights by Purchasing Right

The Human Rights Provisions,
Opportunities and Limitations Under the
2014 EU Public Procurement Directives

Occasional Paper Series
Paper number 3



Institute for
Human Rights and Business

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About This Paper

This is the third in a series of occasional papers by the Institute for Human Rights and Business (IHRB). Papers in this series provide independent analysis and policy recommendations concerning timely subjects on the business and human rights agenda from the perspective of IHRB staff members and research fellows.

This Paper was written by Haley St. Dennis, with input from IHRB team members.

IHRB wishes to thank Shaun McCarthy and Jamie McRorie for their early input on the project, all those who offered comments on earlier drafts of the paper.

IHRB also wishes to thank the Open Society Foundation Migration Initiative for its financial support for this paper.

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Cite as: Institute for Human Rights and Business, "Protecting Rights by Purchasing Right: The Human Rights Provisions, Opportunities and Limitations Under the 2014 EU Public Procurement Directives" (Nov. 2015).

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This Occasional Paper has been produced to assist European Union Member States in integrating human rights considerations into their national rules and practices on public procurement consistent with the 2014 EU Public Procurement Directives.

The Paper also serves as a tool for those interested in understanding the EU rules that shape national laws and practices of Member States, in order to assist engagement and advocacy efforts at local level.

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Terms

- **Public Procurement:** Public procurement refers to the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies.
- **EU Public Sector Directive:** EU Directive 2014/24/EU, which sets out the rules for public supply, service and works contracts.
- **EU Utilities Directives:** EU Directive 2014/25/EU, which updates the rules in the transport, water, energy and postal sectors.
- **EU Concessions Directive:** EU Directive 2014/23/EU, which creates new rules for concessions over EU€5 million.
- **Contracting Authority:** In the EU procurement context, contracting authorities are those making the public purchase and are defined as State, regional or local authorities, bodies governed by public law, or associations formed by one or more of these authorities or bodies.
- **Economic Operator:** In the EU procurement context, economic operators can include any natural or legal person, grouping or public entity offering supplies, services or works.
- **Articles:** Operative, binding provisions of a Directive.
- **EU Directive:** A "Directive" is one of the legal instruments available to the European institutions for implementing European policies. It is a tool mainly used in operations to harmonise national legislations. A Directive is binding, but is also a very flexible instrument, obliging EU Member States to achieve a certain result but leaving them free to choose how to do so. Directives form part of the secondary law of the EU, and are therefore adopted by the European institutions in accordance with the founding Treaties. Once adopted at European level, the directive is then transposed by Member States into their internal law.
- **Recitals:** Recitals are meant to state the purpose of a Directive and describe its main provisions. They are not legally binding, but intended to help interpret the purpose of a Directive's provisions.
- **Social Responsible Public Procurement (SRPP):** SRPP aims to set an example and influence the market-place by giving companies incentives to implement socially responsible supply chain and management systems.
- **UN Guiding Principles on Business and Human Rights:** The global standard for States and companies in protecting and respecting human rights, endorsed unanimously by the UN Human Rights Council in 2011 and since reflected in numerous other international standards including the OECD Guidelines for Multinational Enterprises, IFC Performance Standards, ISO26000, amongst others.

1

EXECUTIVE SUMMARY

In 2014, three new European Union (EU) Directives governing the way EU Member States purchase goods, works and services came into force. Directive 2014/24/EU updates the procurement rules for public supply, service and works contracts (the “Public Sector Directive”)¹ and Directive 2014/25/EU updates the procurement rules in the transport, water, energy and postal sectors (the “Utilities Directive”)². These replace two earlier EU Directives governing each type of contract since 2004 (the “2004 Directives”).³ A third EU Procurement Directive, Directive 2014/23/EU, was also newly introduced in 2014 to cover the award of concessions over EU €5 million (the “Concessions Directive”).⁴ EU Member States are now at various stages in the process of transposing the Directives into national law.

The breadth and depth of social and human rights related provisions now available under EU public procurement rules have been dramatically strengthened in the three new 2014 EU Directives, inviting much more active use by Member States’ purchasing authorities. This Occasional Paper has been produced to assist EU Member States in understanding the range of opportunities, but also limitations, under the 2014 EU Public Procurement Directives to integrating human rights considerations into their national rules and practices on public procurement.

The three 2014 EU Public Procurement Directives explicitly welcome the use of social and human rights related criteria within procurement processes in a way most would not have thought possible only a few years ago. For example, the previous 2004 Procurement Directives they replace used quantitative approaches like “lowest price only” assessments to select between competing tenders, and resigned a narrow range of possible human rights related criteria to the contracting stage at the very end of the procurement process. The 2014

As of 2014, three new EU Procurement Directives provide the legal framework for public purchasing in all EU Member States:

- **The Public Sector Directive** (2014/24/EU) updates the rules for public supply, service and works contracts.
- **The Utilities Directive** (2014/25/EU) updates the rules in the transport, water, energy and postal sectors.
- **The Concessions Directive** (2014/23/EU) creates new rules for concessions over EU€5 million.

In the EU, some €425 billion or 3.4% of EU GDP is regulated by the 2014 EU Public Procurement Directives.

¹ [Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC](#), OJ L 94/65 (28 March 2014) (the “Public Sector Directive”).

² [Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC](#), OJ L 94/243 (28 March 2014) (the “Utilities Directive”).

³ [Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors](#), OJ L 134 (30 April 2004) pg 1; [Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts](#), OJ L 134 (30 April 2004) pg 1.

⁴ [Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts](#), OJ L 94/1 (28 March 2014) (the “Concessions Directive”).

Directives by contrast emphasise more qualitative approaches and allow a much broader range of social and human rights related measures at all phases of the procurement process – all of which cover not only the main contractor but their subcontractors as well. Table 2 in the Conclusion and Recommendations section of this Paper summarises the numerous and welcome provisions within the Directives on human rights and social issues.

There are also limitations from a human rights perspective to the way the 2014 EU Directives shape EU public procurement processes. In particular, many of the social and human rights related provisions are largely or entirely discretionary on EU Member States as to whether and how to actively implement them. This invites potential inconsistency in the way different EU Member State will express their expectations for companies participating in public tenders to demonstrate their commitment to respecting human rights in their activities and operations. Implicitly, this raises the risk of a lowest common denominator approach. Policy incoherence at the EU institutional level is also a potential outcome, specifically regarding the EU's commitment to widespread dissemination and uptake of the UN Guiding Principles on Business and Human Rights.⁵ In particular, a cross-cutting requirement for social and human rights related criteria to be "linked to the subject matter" of the contract means that measures to incentivise company-wide human rights policy commitments and risk management systems are prohibited from being used as tender criteria. Table 3 in the Conclusion and Recommendations section of this Paper summarises the limitations to effectively implementing the social and human rights related provisions available under the 2014 EU Public Procurement Directives.

See **section 4 of this Paper** for a **summary of the human rights related provisions within the 2014 EU Public Procurement Directives**, as well as a **summary of some of the provisions' limitations**.

It is now up to EU Member States to use the wide discretion granted in the 2014 Directives to ensure meaningful and progressive implementation under their national laws and procurement practices.

What is needed both at EU and Member State level is technical and practical guidance on how to implement the new approaches on human rights and social measures within the public procurement process set out in the 2014 Directives'. The principal EU-issued guidance – "Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement" – released in 2010 is not only out of date, but narrowly interpreted the previous, more limited, 2004 Directives.⁶ New guidance needs to offer clear and easy to follow directions on human rights standards, and on why and how these can be incorporated into national and local public procurement processes. A model procurement policy for public authorities and model tool kits for implementation could supplement this guidance, all of which should be developed in a consultative and transparent manner, inviting and giving full-consideration to the submissions received.

This is an important set of basic measures that will help to realise the ambitions of the 2014 Directives, and to prevent the substantial EU public procurement market from having avoidable adverse impacts on people.

⁵ OHCHR, "[Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework](#)", UN Doc A/HRC/17/31 (21 March 2011).

⁶ European Commission Staff Working Document, "[Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement](#)", (19 May 2010) SEC(2010) 1258 final.

2

INTRODUCTION

2.1 What is Public Procurement?

“Public procurement” refers to the process by which public authorities, such as government departments or local authorities, purchase work, goods or services from companies using public money.⁷ In 2014, three new European Union (EU) Directives governing the way EU Member States make these purchases entered into force. Directive 2014/24/EU updates the procurement rules for public supply, service and works contracts (the “Public Sector Directive”)⁸ and Directive 2014/25/EU updates the procurement rules in the transport, water, energy and postal sectors (the “Utilities Directive”)⁹. These replace two earlier EU Directives governing each type of contract since 2004 (the “2004 Directives”).¹⁰ A third EU Directive, Directive 2014/23/EU, was also newly introduced in 2014 to cover the award of concessions over EU €5 million (the “Concessions Directive”).¹¹

As of 2014, three new EU Procurement Directives provide the legal framework for public purchasing in all EU Member States:

- **The Public Sector Directive** (2014/24/EU) updates the rules for public supply, service and works contracts.
- **The Utilities Directive** (2014/25/EU) updates the rules in the transport, water, energy and postal sectors.
- **The Concessions Directive** (2014/23/EU) creates new rules for concessions over EU€5 million.

EU Member States have until April 2016 to transpose the new Directives into national law.

In the EU, some €425 billion or 3.4% of EU GDP is regulated by the 2014 EU Public Procurement Directives.

The three new EU Public Procurement Directives entered into force in April 2014 after four years of consultation and negotiation. Member States have until April 2016 to implement the three Directives’ provisions into their national law – until then, the 2004 Directives continue to apply.

⁷ European Commission, *Public procurement* (last accessed September 2015).

⁸ *Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC*, OJ L 94/65 (28 March 2014) (the “Public Sector Directive”).

⁹ *Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC*, OJ L 94/243 (28 March 2014) (the “Utilities Directive”).

¹⁰ *Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors*, OJ L 134 (30 April 2004) pg 1; *Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*, OJ L 134 (30 April 2004) pg 1.

¹¹ *Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts*, OJ L 94/1 (28 March 2014) (the “Concessions Directive”).

Public procurement makes up a substantial share of world trade flows, amounting to €1000 billion per year.¹² In the EU, some €425 billion or 3.4% of EU GDP is regulated by the 2014 EU Public Procurement Directives.¹³ Public purchasers are thus important market players who can directly influence commercial behaviour on the basis of their purchasing decisions and the expectations they set for their suppliers and service providers. As the European Commission itself notes, “[g]iven the amount of public money at stake, and the number of public purchasers and suppliers involved, the way in which public procurement is regulated and administered has an immediate and significant influence on the business environment”.¹⁴ As such, the 2014 Directives present new opportunities for EU Member States to prioritise respect for human rights at the core of their purchasing objectives.

The breadth and depth of social and human rights provisions have been dramatically strengthened in the new EU Public Procurement Directives, inviting much more active use by Member States purchasing authorities.

Human rights related considerations within the procurement process are part of what is commonly referred to as “socially responsible public procurement” (SRPP). The aim is to set an example and influence the market-place by giving companies incentives to implement socially responsible supply chain and management systems.¹⁵ Within the EU context take the form of “criteria” that bidders need to

meet at different stages of the tender process. The breadth and depth of these social and human rights provisions have been dramatically strengthened in the new 2014 EU Public Procurement Directives, inviting much more active use by Member States purchasing authorities.

This Paper has been produced to assist EU Member States in understanding the range of opportunities, as well as limitations, within the 2014 EU Public Procurement Directives to integrate human rights considerations into their national rules and practices on public procurement.

2.2 How can Human Rights be Impacted by Public Procurement Processes?

There are a range of ways in which public purchasing can involve adverse human rights impacts. Intense competition within global trade often leads to downward pressure on prices, which in turn can lead to harsh working conditions to save costs, at the expense of workers’ health, safety and standard of living.

Where those making the day-to-day purchasing decisions lack awareness of potential human rights risks, or lack the human resource, technical, financial or political capacity to do anything to prevent human rights risks from materialising, impacts can abound.

¹² European Commission, [Public procurement](#) (last accessed October 2015).

¹³ European Commission, [“Annual Public Procurement Implementation Review”](#) Brussels, 1.8.2014 SWD(2014) 262 final (2013). The Directives apply to contracts with an estimated value above certain monetary thresholds, which are linked to those under the WTO Government Procurement Agreement. Consideration of the threshold requirements is not central to incorporation of human rights and as such fall outside the scope of this paper

¹⁴ European Commission, [“EU public procurement policy: responding to new challenges”](#) (date unknown).

¹⁵ Norwegian Agency for Public Management and eGovernment (Difi), [“Walk the talk: Ensuring socially responsible public procurement”](#) (date unknown).

Where production occurs in countries where the rule of law and respect for human rights is weak or nonexistent, or where those making the day-to-day purchasing decisions lack awareness of potential human rights risks, or the human resource, technical, financial or political capacity to do anything to prevent the risks from materialising, impacts can abound. Suppliers to states have been implicated in a range of human rights abuses, including the use of child labour, forced labour, the right to associate and collectively bargain, amongst others. Industries such as health and social care, immigration, security, public utilities have been implicated in such impacts.¹⁶

There are many examples that help to illustrate these risk, a few include:

- *Electronics*: In 2011, there was an explosion and fire at a factory, owned by a large manufacturing company that is part of the U.S. government electronics supply chain, which killed three workers and injured fifteen more.¹⁷ The incident was caused by a build up of combustible aluminium dust from poor ventilation, despite a labour rights group having made the company aware of the problem just two months earlier.¹⁸
- *Services*: The Scottish Government came under pressure in 2008 to cancel its award of the £18.5m contract to carry out Scotland's 2011 census to the British subsidiary of CACI International, who was alleged to have a poor record of compliance with international human rights standards and involved in human rights abuses in Abu Ghraib.¹⁹
- *Medical supplies*: An estimated 10 million surgical instruments used in the UK each year are manufactured in northern Pakistan, where most of the 50,000 manual labourers are paid less than \$1 per day for 12 hours of work with little job security and risk of serious injury from machinery – child labour proliferates, with several thousand employed fulltime in the industry, some as young as seven years old.²⁰

2.3 The UN Guiding Principles on Business and Human Rights

On the whole, the 2014 EU Public Procurement Directives provide ample opportunity for EU Member States to implement a range of preventative, monitoring and capacity building actions necessary to respond to the expectations of the UN Guiding Principles within their purchasing activities.

All states have a legal duty under international law to protect those within their territories and jurisdictions from human rights abuses by third parties, including businesses. This was re-affirmed in the UN Guiding Principles on Business and Human Rights (UN GPs),²¹ unanimously endorsed by the UN Human Rights Council in 2011, and the 2008 "Protect, Respect, Remedy"

¹⁶ See further, ICAR, Danish Institute for Human Rights, "[DIHR-ICAR Briefing Note: Protecting Human Rights through Government Procurement](#)" (7 May 2014).

¹⁷ As reported in, ICAR, "[Turning a Blind Eye: Respecting Human Rights in Government Purchasing](#)" (2014), pg. 9.

¹⁸ Ibid.

¹⁹ As reported in, J McRorie, "[Public Procurement and Human Rights Part I](#)" *Scottish Human Rights Journal*, Issue 43(2008), pg. 1.

²⁰ ETI, BMA, Medical Fair & Ethical Trade Group, "[Ethical Procurement for Health: Overview](#)" (2011).

²¹ OHCHR, "[Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework](#)", UN Doc A/HRC/17/31 (21 March 2011).

Framework that the UN GPs operationalise.²² The UN GPs also affirmed the concept of the corporate responsibility to respect human rights, which establishes that companies should avoid adversely impacting human rights and address those impacts that occur. This is implemented through an ongoing and proactive process of human rights due diligence to anticipate human rights risks and demonstrate how they are being prevented, managed and remediated.

The UN GPs were the result of six years of global consultation with businesses, governments, academics, trade unions, civil society organisations and those affected by the impacts of companies. In the early stages of his mandate as the UN Secretary-General's Special Representative on Business and Human Rights, the author of the UN GPs, Professor John Ruggie, noted that:

*"The general nature of the state duty to protect is well understood by human rights experts within governments and beyond. What seems less well internalized is the diverse array of policy domains through which states may fulfill this duty with respect to business activities, including how to foster a corporate culture respectful of human rights at home and abroad. This should be viewed as an urgent policy priority for governments - necessitated by the escalating exposure of people and communities to corporate related abuses, and the growing exposure of companies to social risks they clearly cannot manage adequately on their own."*²³

The UN GPs affirm that the duty to protect requires states to take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication (Guiding Principle 1). The UN GPs also include several provisions dedicated to the practical issue of how states, as economic actors themselves within the "State-Business Nexus", should foster corporate cultures respectful of human rights. These include:

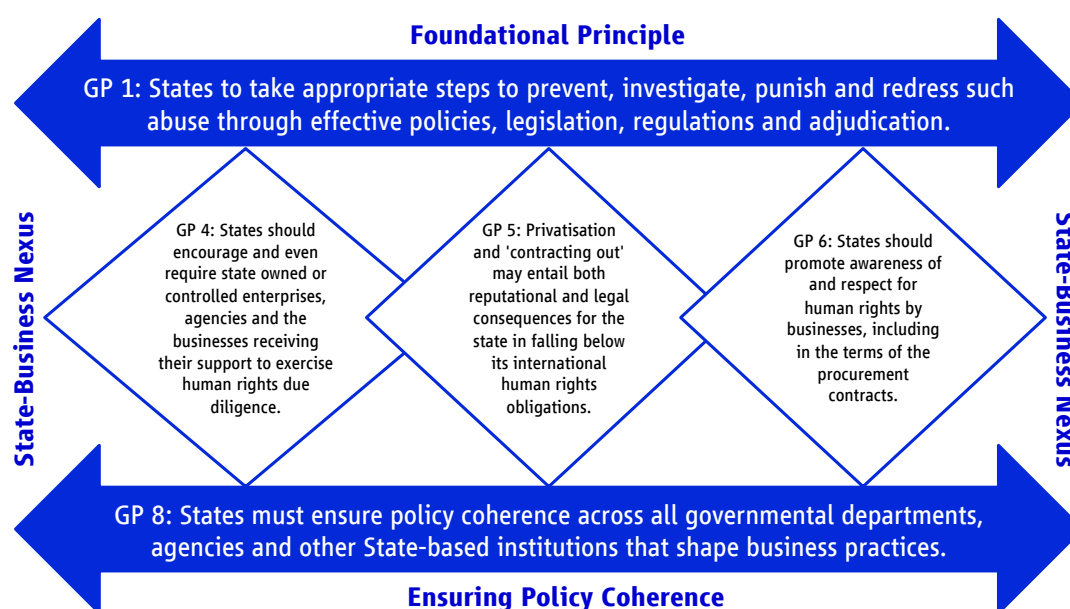
- Guiding Principle 4: Addresses the issue of state owned or controlled enterprises, as well as state agencies providing substantial support or services to businesses, such as export credit or political risk insurance. It calls for states to encourage and even require such enterprises, agencies and the businesses receiving their support to exercise human rights due diligence.
- Guiding Principle 5: Addresses the issue of "contracting out" or privatising the delivery of services, confirming that failure to exercise adequate oversight of such services – even once no longer publicly managed – may entail both reputational and legal consequences for the state in falling below its international human rights obligations to protect against abuses occurring.
- Guiding Principle 6: Addresses the issue of states conducting commercial transactions generally, and calls out procurement activities specifically. It states that procurement provides states, individually and collectively, with a unique opportunity to promote awareness of and respect for human rights by businesses, including in the terms of procurement contracts.

²² OHCHR, "[Protect, Respect and Remedy: A Framework for Business and Human Rights](#)", UN Doc A/HRC/8/5 (7 April 2008).

²³ Ibid. See further, J McRorie, "[Public Procurement and Human Rights Part I](#)" *Scottish Human Rights Journal*, Issue 43(2008), pg. 1.

The standards expected within the above UN GPs are reinforced by Guiding Principle 8, which requires States to ensure “policy coherence” across all governmental departments, agencies and other State-based institutions that shape business practices. This means ensuring that the departments, agencies and other State-based institutions are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

Figure 1: Key UN Guiding Principles on Business & Human Rights



The UN GPs make clear that within the State-business nexus there is a spectrum of action states should take to fulfill their duty to protect against human rights abuses by business – including preventative due diligence prior to entering into business relationships, maintaining adequate oversight throughout the relationship, and promoting human rights awareness and building the capacity of the businesses with which they are transacting.²⁴ On the whole, though notwithstanding concerns regarding the “subject matter” requirement noted in section 3.3.2 below, the 2014 EU Public Procurement Directives provide ample opportunity for EU Member States to implement a range of preventative, monitoring and capacity building actions necessary to respond to the expectations of the UN GPs within their purchasing activities.

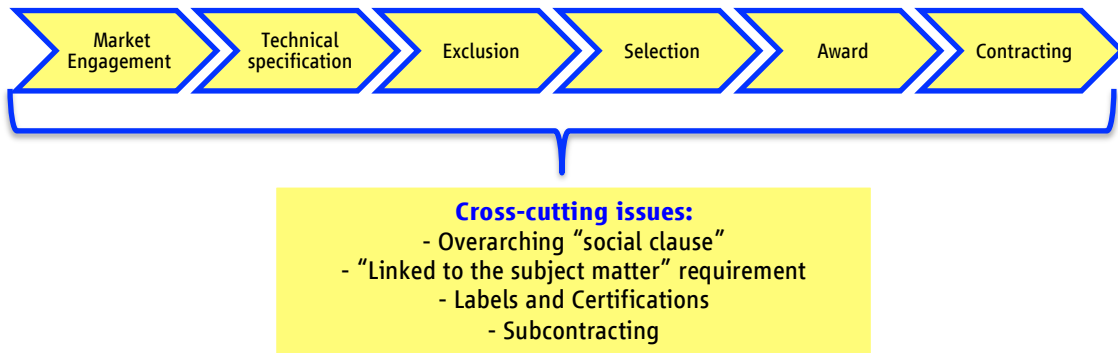
2.4 Scope of Analysis

This Occasional Paper aims to assist EU Member States in understanding the range of opportunities, as well as limitations, in human rights terms that exist under the 2014 EU Public Procurement Directives. Each phase of the procurement process and the opportunities for incorporating human rights considerations into procurement decision making is examined in turn below. Four additional cross-cutting areas affecting the way

²⁴ For further analysis of the UN Guiding Principles in the context of public procurement, see: O’Brien, “[Public Procurement and Human Rights in Northern Ireland](#)” (2013) and ICAR, “[Turning a Blind Eye? Respecting Human Rights in Government Purchasing](#)” (2014).

human rights provisions can be incorporated within EU Member States' public procurement processes are then highlighted. See figure 2 below.

Figure 2. The basic phases of the EU public procurement process



The provisions of the 2014 EU Public Sector Directive are highlighted explicitly, with the corresponding provisions in the Utilities and Concessions Directives footnoted where relevant. This Paper limits its focus to provisions concerning preventative measures to avoid adverse impacts on people,²⁵ rather than some of the more broad-based measures aimed at achieving additional positive social benefits through a public contract.²⁶

3 THE 2014 EU PROCUREMENT DIRECTIVES' COVERAGE OF HUMAN RIGHTS

3.1 The EU's Procurement History

The legal framework regulating the process of public procurement in the EU is well developed, technically sophisticated, and recently underwent a substantial update.

The rules on EU public procurement evolved out of the decision to create

"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the TFEU, and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency."

- Recital 1 Public Sector Directive 2014
- Recital 2 Utilities Directive 2014
- Recital 4 Concessions Directive 2014

²⁵ For example, concerning publicly tendered goods made in factories lacking adequate protections from health and safety risks, that use child labor, pay low wages, or operate excessive working hours.

²⁶ Such as those within the new "light touch" regime concerning social and other specific services, or through tying social benefits to the delivery of particular tenders, e.g. apprenticeship schemes or the increased participation of women in the labour market. These issues fall outside the scope of this paper, but merit further analysis and guidance on how Member States can maximise the opportunities and realise the ambitions within the 2014 EU Public Procurement Directives.

a single European market and encourage intra-EU trade. At the core of the way EU public procurement rules and processes have been developed are the core EU principles of free movement of goods, services and workers, the freedom to establish a business, and the development of the EU single market. These principles must be respected at all times during procurement processes. However, they can at times lead to incoherence in respecting and implementing core human rights principles.²⁷

EU procurement rules are intended to facilitate removal of any barriers impeding these core principles within the EU single market. It is therefore a fundamental principle of EU procurement law that any procurement criteria must not discriminate, either directly or indirectly, against EU nationals and EU companies. In other words, in order for the EU single market to function as intended, EU national bidders (referred to as “economic operators” in the Directives²⁸) must be able to do business with EU Member State authorities conducting the tender (referred to as “contracting authorities”²⁹ in the Directives) regardless of which Member State they are from.

The governing rationale has therefore been chiefly economic, with the Directives seeking to ensure free market competition. This foundation has meant the EU legal framework for public procurement has – until recently – read largely as a set of procedural rules giving little consideration to other issues, such as the safeguard processes necessary to avoid adverse human rights impacts stemming from purchasing decisions.³⁰

In October 2010, the European Commission announced its intention to consult on amending the existing rules under the 2004 EU Procurement Directives to make the award of contracts more flexible, but also to facilitate greater strategic use of public procurement to pursue environmental and social objectives.³¹ This

In October 2010, the European Commission announced its intention to consult on amending the existing rules under the 2004 EU Procurement Directives to make the award of contracts more flexible, but also to facilitate greater strategic use of public procurement to pursue environmental and social objectives.¹ This represented a significant shift from the European Commission, involving a more explicit approach to ensuring greater inclusion of “common societal goals”, including human rights, in the procurement process.

²⁷ As set out in Art. 26, 28, 34, 49 and 56 of the [Treaty on the Functioning of the European Union](#) and acknowledged early on in each Directive: Recital 1 Public Sector Directive; Recital 2 Utilities Directive; Recital 4 Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts (the “Concessions Directive”). See further, Arrowsmith and Kunzlik (Eds.), *Social and Environmental Policies in EC Procurement Law, New Directives and New Directions* (Cambridge University Press, 2009).

²⁸ “Economic operators” can include any natural or legal person, grouping or public entity offering supplies, services or works on the market. Art. 2(1)(10) Public Sector Directive; Art. 2(4) Utilities Directive; Art. 5(1)(2) Concessions Directive.

²⁹ Defined as State, regional or local authorities, bodies governed by public law, or associations formed by one or more of these authorities or bodies. A body governed by public law is one which: (i) has legal personality; (ii) has been established to meet “needs in the general interest, not having an industrial or commercial character”; and (iii) is publicly financed or controlled. Art. 2(1)(4) Public Sector Directive; Art. 3(4) Utilities Directive; Art. 6(4) Concessions Directive.

³⁰ McRorie J, “[Public Procurement and Human Rights – Part I](#)” 43 *Scottish Human Rights Journal* (November 2008), p. 2.

³¹ Monti M, “[A new strategy for the Single Market at the Service of Europe’s Economy and Society, Report to the President of the European Commission Jose Manuel Barroso by Mario Monti](#)” (9 May 2010);

represented a significant shift from the European Commission, involving a more explicit approach to ensuring greater inclusion of “common societal goals”, including human rights, in the procurement process.³²

After four years of negotiation between the European Commission, Parliament and Council, the two existing 2004 Directives were replaced and an additional Directive was adopted, all entering into force in April 2014. Both the European Parliament and Council played key roles in ensuring the possibility of addressing social considerations as part of the public procurement process.³³

3.2 Human Rights within the Phases of EU Public Procurement

As above, a core function of EU procurement law is to support and facilitate the free movement of goods, services, capital and workers within the EU. Non-economic considerations, such as human rights related criteria, have nonetheless been explicitly provided for at every stage of the procurement process under the new 2014 Directives. This contrasts starkly with the 2004 Directives, which confined such possibilities to the contracting stage alone (see section 3.2.6).

The basic EU public procurement process is systematic, following distinct stages (see figure 2 below). It often starts with pre-tender engagement, where contracting authorities conduct market consultations with potential bidders. A technical specification of the goods, works or services needed is then drawn up. That specification is advertised in the *Official Journal of the European Union*, inviting candidates to submit their tenders or take part in further dialogues (depending on the procedure used).³⁴ Exclusion criteria are then applied to eliminate unsuitable candidates from further deliberation, and a group of bidders deemed capable of fulfilling all the procurement criteria is selected for further comparative assessment. Award criteria are then applied to determine a successful bidder. Once awarded, the contract detailing the performance requirements is finalised. All of this must be precisely executed by contracting authorities, who must guarantee transparency, objectivity and proportionality at each stage. Each phase of the procurement process is considered in turn below, with the relevant human rights provisions highlighted.

Non-economic considerations, such as human rights, have been explicitly invited at every stage of the process under the new 2014 Directives. This contrasts starkly with the 2004 Directives, which confined such possibilities to the contracting stage alone.

European Commission, “Green Paper on modernisation of EU public procurement policy: Toward a more efficient European Procurement Market” COM (2011) 15. See also, European Commission, “[Europe 2020 Flagship Initiative Innovation Union](#)” COM(2010) 546 final.

³² Council of the EU, “[Agreement on the reform of public procurement policy, Council of the European Union](#)” 11998/13 (OR.en) PRESSE 320 (17 July 2013).

³³ Rapporteur Marc Tarabella put forward some 750 proposed amendments to the draft text of the public sector directive, a large proportion of which aimed to ensure the possibility for contracting authorities to take social considerations into account. See further, Semple, “[The link to the subject-matter: A glass ceiling for sustainable public contracts?](#)” (2014).

³⁴ The use of the different tender procedures falls outside the scope of this paper.

Figure 3. The basic phases of the EU public procurement process



3.2.1 Market Engagement

Beyond acknowledging that contracting authorities are free to conduct pre-tender market consultations in order to prepare the procurement and make their plans and requirements known, the 2014 Directives do not actively regulate this phase of the process.³⁵ While not considered further here, it is worth noting that pre-market engagement represents the earliest possible engagement opportunity for public procurers to make social, labour and other human rights related priorities clearly known to the widest array of potential bidders.³⁶

Pre-market engagement represents the earliest possible engagement opportunity for public procurers to make social, labour and other human rights related priorities clearly known to the widest array of potential bidders.

3.2.2 Technical Specification

The 2014 EU Public Procurement Directives include new and welcome provisions enabling Member States to include environmental and climate performance criteria, as well as criteria around end-use to ensure accessibility for those with disabilities, within technical specifications.

The requirements for technical specifications are set out under Article 42 of the Public Sector Directive and are defined in Annex VII as *"the technical prescriptions defining the characteristics required of a material, product or supply so that it fulfills the use for which it is intended by the contracting authority"*.³⁷

The 2014 EU Public Procurement Directives include new and welcome provisions enabling Member States to include environmental and climate performance criteria, as well as criteria around end-use to ensure accessibility for those with disabilities, within

technical specifications.³⁸ Technical specifications can play a significant role in enforcing minimum standards, as contracting authorities are required to reject tenders that do not comply with them.³⁹

³⁵ Art. 40 Public Sector Directive; Art. 58 Utilities Directive; there is not an equivalent provision in the Concessions Directive.

³⁶ See for example, Landmark Project, ["Verifying Social Responsibility in Supply Chains: A Practical and Legal Guide for Public Procurers"](#) (ICLEI, 2012), p. 9.

³⁷ Art. 42 and Annex VII Public Sector Directive; Annex VIII Utilities Directive; the Concessions Directive does not contain a similar Annex and instead refers in Art. 37(1) to the "minimum requirements" set by the contracting authority that the tender must comply with, which must contain the "conditions and characteristics (particularly technical, physical, functional and legal) that any tender should meet or possess".

³⁸ Annex VII Public Sector Directive; Annex VIII Utilities Directive; there is no equivalent Annex in the Concessions Directive, with Recital 66 merely stating: *"In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users."*

³⁹ Art. 56(1)(a) Public Sector Directive; Art. 76(5) Utilities Directive; Art. 37(1)(a) Concessions Directive. The obligation to reject tenders which do not meet the technical specifications was highlighted in [Case C-243/89 Commission v Kingdom of Denmark \('Storebaelt'\)](#) [1993] ECR I-03353, para 37 and Case C-

Recital 99 of the Public Sector Directive has however preserved a limitation from the 2004 Directives that constrains the use of some human rights criteria within technical specifications.⁴⁰ Recital 99 indicates that criteria regarding the production *process*, such as measures aimed at protecting the health of staff involved, must be confined to award criteria or contract performance conditions only.⁴¹ In other words, requirements bearing no relation to the specific goods, works or services in question, such as a requirement relating to the way in which a business is responsibly managed, are not technical specifications and cannot be imposed.⁴²

Including human rights considerations in the technical specification would serve to advertise that rights respecting approaches are a core design requirement and enables a consistent minimum operating standard to become the norm.

3.2.3 Exclusion Criteria

Explicit mandatory exclusion criteria related to human rights protections includes cases where the bidder is in breach of tax payments or social security obligations, or has been convicted of child labour or other forms of human trafficking.

Public purchasers' use of exclusion criteria must follow distinct rules aimed at determining the suitability and capacity of economic operators to carry out a contract, based on their past and present track records.

The main provision governing the exclusion of unsuitable economic operators is contained in Article 57 of the Public Sector Directive,⁴³ though the list is not exhaustive.⁴⁴ Explicit mandatory

exclusion criteria related to human rights protections includes cases where the bidder (or a member of its administrative, management or supervisory body) is in breach of tax payments or social security obligations,⁴⁵ or has been "convicted" of child labour or other forms of human trafficking.⁴⁶ The latter is a welcome advance from the 2004 Directives, and an attempt to protect against some of the gravest forms of human rights abuse. By contrast, the 2004 Directives included such abuses only to the extent that

561/12 *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium* ('*Nordecon*'), not yet reported, paras 37–9.

⁴⁰ It is important to note that Recitals are not in themselves binding, though they do express legislators' intentions and should inform the Directive's interpretation.

⁴¹ Recital 99 Public Sector Directive; Recital 104 Utilities Directive; Recital 66 Concessions Directive.

⁴² *Ibid.*

⁴³ Art. 38 Concessions Directive; Recitals 105 and 106 Utilities Directive. Notably, the Utilities Directive does not contain a dedicated set of Articles or Annexes on exclusion criteria, limiting references to a few non-binding Recitals.

⁴⁴ The non-exhaustive nature of the provisions was highlighted in [Case C-213/07 *Mikhaniki v Ethniko Simvoulío Radiotileorasis*](#) [2008] ECR I-9999.

⁴⁵ Article 57(2) Public Sector Directive; Recital 105 and 106 Utilities Directive; Art. 38(5) Concessions Directive.

⁴⁶ This can include conviction of either the entity or an individual who is a member of the administrative, management or supervisory body of the bidder. Article 57(1)(f) Public Sector Directive; Art. 38(4)(f) Concessions Directive; notably, the Utilities Directive does not explicitly address either abuse, reserving all coverage to the overarching social clause in Art. 36(2) and the (limited) list of international instruments contained in Annex XIV (see section 1).

Member States could argue such cases constituted “grave professional misconduct”, which was an undefined term left to Member States to clarify in national law.⁴⁷

However, exclusion for child and forced labour represents only a small proportion of the types of adverse human rights impacts associated with businesses activities. Companies can potentially impact all human rights – economic, social, civil, political, cultural and collective.⁴⁹ Moreover, *convictions* for corporate involvement in such impacts represent a fraction of reported cases.⁵⁰ Convictions are rare for a number of reasons, including contested concepts of extraterritorial jurisdiction over parent companies for the acts of their subsidiaries and the difficulties of piercing the corporate veil. As such, in practice, the scope of this explicit human rights related exclusion criteria under Article 57 may be limited.

Under Art. 18(2) of the Public Sector Directive, contracting authorities *must* also exclude economic operators where their bids appear to be “abnormally low” due to non-compliance with environmental, social or labour law obligations under an “overarching social clause” (see section 3.3.1 below).⁵¹ However, it is only where the contracting authority decides to investigate the reason for the low bid (or is compelled to do so under national law) that the requirement to reject arises.

In addition, procurers *may* exclude bidders due to non-compliance with their environmental, social or labour law obligations (the overarching social clause, again section 3.3.1 below). It is notable that “non-compliance” rather than “convictions” is

US Procurement Rules Against Human Trafficking⁴⁸

New rules governing US federal procurement were set in January 2015 to strengthen protections against human trafficking. For contracts performed outside the US over \$500,000, contractors must:

- Develop an anti-trafficking compliance plan
- Certify annually that the compliance plan has been implemented

The rules also prohibit a range of activities by all federal contractors, for example:

- Confiscating employee identity or immigration documents
- Charging employees recruitment fees
- Using recruiters that do not comply with local labour laws in countries where recruitment occurs
- Providing housing that breaches host country safety standards

The rules also require all contractors to:

- Pay the cost of or provide return transport at the conclusion of employment for non-nationals brought to the country to work on a US government contract

⁴⁷ A term undefined in the Directives. This term has been maintained in the new Directives, where Recital 39 Public Sector Directive notes: “Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of **violations of environmental or social obligations...or other forms of grave professional misconduct....**” (emphasis added); Recital 106 Utilities Directive; Recital 70 Concessions Directive.

⁴⁸ See further, US Federal Register, [Federal Acquisition Regulation; Ending Trafficking in Persons](#) (last accessed October 2015).

⁴⁹ Report of the UN Special Representative on Business and Human Rights, “[Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse](#)” Addendum, A/HRC/8/5/Add.2 (23 May 2008); UN OHCHR et al, “[Human Rights Translated: A Business Reference Guide](#)” (2008).

⁵⁰ See for example the work of the [Business and Human Rights Resource Centre](#), which tracks the reported human rights impacts of over 7000 companies worldwide.

⁵¹ Art. 69 Public Sector Directive; Art. 84 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

used in this provision, as this opens the possibility for a much wider scope of company action that authorities can consider (although neither term is specifically defined).

As such, there are new and powerful opportunities to explicitly exclude from participation in the public procurement process those that have a poor track record of environmental, social or labour law non-compliance or convictions for child or forced labour. These welcome provisions must however be checked against the practical realities of implementation. There were far fewer possibilities available to exclude bidders under the 2004 Directives, yet they were still widely considered by day-to-day procurement officers and managers as both mystifying and potentially menacing for contracting authorities fearful of falling foul of the rules and facing legal challenges by bidders.⁵² If a procurer failed to ensure the fundamental principles of transparency, proportionality and non-discrimination in a procedure, an unsuccessful bidder could challenge the entire process. If successful, the entire contract could be invalidated. This threat is explicitly noted in the new 2014 EU Public Procurement Directives, which state:

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*“Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, or other forms of grave professional misconduct, ... **Bearing in mind that the contracting authority will be responsible for the consequences of its possible erroneous decision**, contracting authorities should also remain free to consider that there has been grave professional misconduct...”* (emphasis added)

Given there are now many more grounds on which procurers can exclude bidders (environmental, social or labour law non-compliance or child or forced labour convictions), it is possible public purchasers' may be even more hesitant, rather than less, to use their discretion to investigate and exclude bidders. If public purchasers do not use this discretion to actively apply the environmental, social, labour law and other human rights related criteria, they will miss an important opportunity to incentivise robust company systems and processes to proactively manage human rights risks. The European Commission could helpfully issue clear guidance to Member States that provides more specifications and therefore comfort to further encourage active implementation of the provisions.

The 2014 EU Procurement Directives provide for the “self cleaning” of economic operators who can provide evidence of measures taken to demonstrate their reliability despite the existence of valid grounds for exclusion... This is welcome in so far as it provides an economic incentive for the remediation of adverse human rights impacts, and proactive systems of human rights risk management by companies to prevent, mitigate and remediate adverse impacts on workers and communities – if so interpreted.

The 2014 EU Public Procurement Directives also mandate maximum periods for exclusion – five years for convictions for child labour or human trafficking, and three years for environmental, social and labour violations under the overarching social

⁵² See for example, in a UK context, Who's Who Legal, [“Win Some, Lose Some: New Procurement Litigation Risks”](#) (Aug. 2010).

⁵³ Recital 101 Public Sector Directive; Recital 106 Utilities Directive; Recital 70 Concessions Directive.

clause.⁵⁴ They also allow for the “self cleaning” of economic operators who can provide evidence of measures taken to demonstrate their reliability despite the existence of valid grounds for exclusion, such as paying compensation for damage caused, comprehensively clarifying the facts by actively collaborating in an authority’s investigation, or taking concrete technical, organisational, or personnel measures to ensure future prevention.⁵⁵ This is welcome in so far as it provides an economic incentive for the remediation of adverse human rights impacts, and proactive systems of human rights risk management by companies to prevent, mitigate and remediate adverse impacts on workers and others – if so interpreted.

However, Member States’ and procurers’ must take the initiative in requiring these self cleaning measures from bidders regarding their child labour, forced labour and other environmental, social and labour impacts. Further study is needed on the implementation of such measures in practice and their effectiveness in providing effective remedy as well as improving bidders’ overall risk management systems.

3.2.4 Selection Criteria

Selection criteria may relate to (a) the suitability of the economic operator to pursue the activity, (b) their economic and financial standing or (c) their technical and professional ability.

There are several possibilities that Member States could consider to build human rights considerations into the selection criteria.

Like exclusion criteria, selection criteria involve distinct rules aimed at determining the suitability and capacity of economic operators to carry out a contract, based on their past and present situations.

Selection criteria are used to short-list capable operators for further consideration at the subsequent award stage. Selection criteria may relate to (a) the suitability of the economic operator to pursue the activity, (b) their economic and financial standing or (c) their technical and professional ability.⁵⁶ The means of proof by which contracting authorities can determine these

factors is defined in Annex XII.⁵⁷ There are several possibilities that Member States could consider to build human rights considerations into the selection criteria.

For example, as part of their consideration of technical capabilities, contracting authorities could ask for an indication of responsible supply chain management and tracking systems that will be utilised to deliver the goods, works or services for the contract.⁵⁸ If contracting authorities specifically asked for evidence of management and tracking systems to prevent and remedy impacts on workers in the supply chain, this would be an important leverage point for prompting operators to address and manage impacts on workers.

⁵⁴ Art. 57(7) Public Sector Directive; Art. 38(10) Concessions Directive; the Utilities Directive does not contain an equivalent provision, but Art 80 states the exclusion criteria contained in the Public Sector Directive can be used.

⁵⁵ Art. 57(6) Public Sector Directive; Art. 38(9) Concessions Directive; Recital (107) Utilities Directive.

⁵⁶ Art. 58(1) Public Sector Directive; Art 80 Utilities Directive; Art. 38 Concessions Directive.

⁵⁷ Art. 62 Utilities Directive; the Concessions Directive does not contain an equivalent provision, simply stating under Art. 80 that means of proof is limited to self declarations and references submitted as proof in accordance with the requirements specified in the concession notice.

⁵⁸ Annex XII Public Sector Directive; neither the Concessions Directive or the Utilities Directive contain an equivalent Annex or provision.

Similarly, the educational and professional qualifications of the operator and their managerial staff can be considered. If EU Member States were willing to include criteria requiring bidders to have on staff social and human rights specialists as part of the teams delivering the goods or services procured, this could signal an expectation that bidders have sufficient understanding, through qualified staff, of the ways in which their activities can adversely impact people.

3.2.5 Award

Contracting authorities are to base their award decisions on the most economically advantageous tender (MEAT).

The MEAT incorporates (a) quality, including environmental and (for the first time) social characteristics and trading and its conditions, and (b) organisation, qualification and experience of staff assigned to performing the contract.

Award criteria form the basis for a comparative assessment as to future performance of the contract (rather than assessing past or present situations of the bidder, which are the focus of the exclusion and selection stages). Under the 2004 Directives, contracts could be awarded on the basis of either “lowest price only” or the “most economically advantageous tender” (MEAT).⁵⁹ In contrast, the 2014 EU Public Procurement Directives state that contracting authorities must base the award of public contracts on the MEAT.⁶⁰ The MEAT explicitly incorporates both (a) quality, including environmental and (for the first time) social characteristics and trading and its conditions,

and (b) organisation, qualification and experience of staff assigned to perform the contract (the opportunities to require staffing of qualified social and human rights specialists highlighted in section 3.2.4 therefore also apply here).⁶¹ The 2014 Directives also explicitly confirm these award criteria set out are “non-exhaustive”, meaning Member States are free to develop other award criteria as they see fit.⁶²

The reference in the 2004 Directives to awards based on the “lowest price only” was criticised for the potentially perverse incentives this could create with respect to protecting workers and others as a result of pressures to drive down costs and prices. While quality is much more of a focus under the new 2014 EU Public Procurement Directives, they nonetheless still strongly emphasise financial factors in award decisions. Alongside uninhibited competition and transparency, value for money is a prevailing foundational objective underpinning all EU public purchasing. As such, the MEAT can

⁵⁹ Art. 53(1) Public Sector Directive 2004; Art. 55(1) Utilities Directive 2004. Research by the Commission indicated that under the 2004 Directives lowest price was being used in approximately one-third of procedures advertised in the Official Journal, whereas MEAT was used in the remaining two-thirds. European Commission, “Commission Staff Working Paper: Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation Part 1” (27 June 2011), p. xix.

⁶⁰ Art. 67(1) Public Sector Directive; Art. 82(1) Utilities Directive; the Concessions Directive does not contain an equivalent provision, merely requiring under Art. 41 that concessions are awarded “on the basis of objective criteria which comply with the principles set out in Article 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority or the contracting entity”.

⁶¹ Art. 67(2) Public Sector Directive; Art. 82(2) Utilities Directive; the Concessions Directive does not contain an equivalent provision.

⁶² Recital 92 Public Sector Directive; Recital 97 Utilities Directive; the Concessions Directive does not contain an equivalent provision, but confirms under Recital 64 that award criteria can relate to utilisation of fair trade products (and by extension, other human rights related criteria).

be identified on the basis of “price or cost, using a cost effectiveness approach”.⁶³ While Member States are also free to prohibit price and cost as the sole award criterion, the Directives go on to state that contract award decisions to identify the MEAT “should not be based on non-cost criteria only”.⁶⁴

Moreover, while the 2014 Directives have been praised for no longer using a lowest price only approach, Recital 90 seems to contradict this:⁶⁵

The 2014 Directives still strongly emphasise financial factors in award decisions. Alongside uninhibited competition and transparency, value for money is a prevailing foundational objective underpinning all EU public purchasing.

*“It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender **could also be carried out on the basis of either price or cost effectiveness only.**”* (emphasis added)

As such, the provisions in the 2014 EU Public Procurement Directives make for a confusing set of boundaries within which Member States can freely prioritise quality and experience (including characteristics based on social, environmental and trading conditions) whilst ensuring sufficient quantitative rigour in obtaining the “economically best solution among those offered”.⁶⁶ The case of *Concordia Bus Finland* sought to clarify that criteria not of a purely economic nature (such as human rights criteria) may be used to assess the MEAT, provided that the criteria must:⁶⁷

- be linked to the subject matter of the contract;
- not give contracting authorities an unrestricted freedom of choice;
- be expressly mentioned in the contract documents or the tender notice;
- comply with the fundamental principles of EU law, including non-discrimination.

To aid these determinations, the 2014 Directives introduce new provisions around the use of “life cycle costing”.⁶⁸ This is a welcome addition as it aims to incorporate the “true” price of goods, works or services, from inception to delivery and from raw material to acquisition, production, transport, use and disposal. However, the boundaries are confined to “costs imputed to environmental externalities” only and do not yet allow for consideration of similar social externalities.⁶⁹ This is likely because

⁶³ Art. 67(2)(a) and (b) Public Sector Directive; Art. 82(2) Utilities Directive; the Concessions Directive merely refers to achieving an “overall economic advantage” for contracting authorities under Art. 41.

⁶⁴ Art. 67(2) Public Sector Directive; Recital 97 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

⁶⁵ Recital 59 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

⁶⁶ Recital 89 Public Sector Directive; Recital 94 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

⁶⁷ [Case C-513/99, 17.9.2002 Rep 2002 pl-07213](#), *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne*

⁶⁸ Art. 68 Public Sector Directive; Art. 83 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

⁶⁹ Such as the impacts on local farmers or fisherman whose livelihoods are adversely affected when toxic chemicals are not properly disposed of and alter local ecosystems, or the impacts on children and young people forced miss or leave school in order to work to support their families because their parents are not paid a living wage.

such costs are traditionally more difficult to monetise and monitor. It is therefore an area ripe for further study, and the Commission's call to develop common methodologies for the calculation of life-cycle costs for specific categories of supplies or services is well placed to incorporate such a focus.⁷⁰

3.2.6 Contracting

Historically, the contract was seen as the only real "safe" point for contracting authorities to incorporate human rights related considerations without falling foul of the rules, as the execution phase of the contract is not actively regulated by the Directives.⁷¹ As the preceding sections indicate, this should no longer be the case under the 2014 EU Public Procurement Directives, which welcome measures around human rights related issues (generally referred to as "environmental, social and labour" issues in the Directives) at every stage of the procurement process.

Historically, the contract was seen as the only real "safe" point for contracting authorities to incorporate human rights related considerations without falling foul of the rules, as the execution phase of the contract is not actively regulated by the Directives. This is no longer the case under the 2014 EU Public Procurement Directives, which welcome measures around human rights related issues at every stage of the procurement process.

The contracting stage provides the opportunity to establish specific requirements relating to the performance of the contract. Recital 98 reiterates the 2004 Directives' position that contractual conditions can cover implementation of measures to comply with fundamental ILO Conventions.⁷² Article 70 adds welcome new recognition expanding this beyond the core ILO Conventions, affirming that contractual conditions may also include "economic, innovation-related, environmental, social or employment-related considerations"⁷³ – though Recital 98 limits contractual conditions regarding basic working conditions (such as minimum rates of pay) to levels set by national legislation or collective agreements.⁷⁴

The Directives also allow for termination of the contract where child labour or human trafficking is discovered following the award, such that it should have served as grounds for mandatory exclusion (see section 1.3).⁷⁵

While contracts are an important lever to ensure successful bidders comply with their human rights responsibilities, they should not be the sole focus of public purchasers'

⁷⁰ Recital 96 Public Sector Directive; Recital 101 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

⁷¹ For example, a 2011 study found that only 23% of contracting authorities reported including social criteria in tenders either "regularly" or "as much as possible". Essig M et al, "[Strategic Use of Public Procurement in Europe: Final Report to the European Commission](#)" (2011) MARKT/2010/02/C, 74. Moreover, the European Commission's own 2010 "[Buying Social](#)" guide made clear that *at most*, under certain conditions, requirements relating to labour conditions of the workers involved in the production process of supplies to be procured could be included in contract performance clauses. European Commission Staff Working Document, "[Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement](#)" (2010) SEC(2010) 1258 final.

⁷² Recital 98 Public Sector Directive; Recital 103 Utilities Directive; Recital 65 Concessions Directive. This was the only explicit human rights related provision under the 2004 Directives.

⁷³ Art. 70 Public Sector Directive; Art. 87 Utilities Directive; Recital 64 Concessions Directive.

⁷⁴ Recital 98 Public Sector Directive; Recital 103 Utilities Directive; Recital 65 Concessions Directive.

⁷⁵ Art. 57(1) Public Sector Directive; Art. 90(b) Utilities Directive; Art. 44(b) Concessions Directive.

efforts to integrate human rights considerations into their procurement processes. Focusing solely on contractual conditions can miss the opportunity for procurers to widely communicate baseline expectations for rights respecting business models by all bidders for public contracts, not just from those ultimately successful.

While contracts are an important lever to ensure successful bidders comply with their human rights responsibilities, public purchasers should not focus solely on contractual conditions as that misses the opportunity for procurers to widely communicate baseline expectations for rights respecting business models by all bidders for public contracts, not just from those ultimately successful.

3.3 Cross-Cutting Issues

3.3.1 The Overarching “Social Clause”

The overarching “social clause”

Member States must take “appropriate measures” to ensure compliance with applicable environmental, social and labour law obligations by bidders. However, Member States have complete discretion over implementation.

- Art. 18(2) Public Sector Dir.
- 36(2) Utilities Dir.
- 30(3) Concessions Dir.

Article 18(2) of the Public Sector Directive introduces a new crosscutting “social clause” that did not exist under the 2004 Directives. It requires Member States to take “appropriate measures” to ensure compliance with applicable environmental, social and labour law obligations by bidders.⁷⁶ Recital 40 clarifies that this should be performed at the relevant stages of the procurement procedure – when applying the exclusion criteria and provisions concerning abnormally low tenders, and when awarding the contract.⁷⁷

In other words, there are three points where non-compliance with environmental, social or labour law obligations can lead to action within the procurement process under the overarching social clause:

- Exclusion: Procurers *may* exclude a bidder due to non-compliance with such obligations;⁷⁸
- Exclusion: Procurers *must* exclude an abnormally low tender where it is due to such non-compliance;⁷⁹
- Award: Procurers *may* choose not to award a contract, due to non-compliance;⁸⁰

A welcome provision enables the social clause to extend beyond the main subcontractor, to their subcontractors. This allows more direct action in ensuring compliance with environmental, social and labour law obligations throughout the supply chain for a publicly purchased good, work or service. The 2014 Directives for example suggest “appropriate action” by Member State authorities in ensuring subcontractor compliance

⁷⁶ Art. 36(2) Utilities Directive; Art. 30(3) Concessions Directive.

⁷⁷ Recital 55 Utilities Directive; Recital 58 Concessions Directive.

⁷⁸ Art. 57(4)(a) Public Sector Directive; Art. 38(7)(a) Concessions Directive; the Utilities Directive does not contain an equivalent provision, but allows reference to the PSD criteria

⁷⁹ Art. 69(3) Public Sector Directive; Art. 84(3) Utilities Directive; the Concessions Directive does not contain an equivalent provision

⁸⁰ Art. 56(1) Public Sector Directive; Art. 76(6) Utilities Directive; the Concessions Directive does not contain an equivalent provision.

under the overarching social clause could include joint liability with the main contractor (where national law allows) or replacing the subcontractor.⁸¹

However, Member States again have wide discretion over implementation. Even in the case of abnormally low tenders – where procurers “must” reject abnormally low tenders that are low due to non-compliance with environmental, social or labour law obligations – it is up to Member States to investigate this possibility in the first place. As such, the 2014 Directives invite a breadth and depth of approaches in taking these “appropriate measures” to ensure compliance with bidders’ environmental, social and labour law obligations. This could create inconsistency in application and uncertainty for bidding companies.

Member States have some freedom to refer to international instruments when seeking to take these “appropriate measures” regarding environmental, social and labour law. Where a measure to ensure compliance with environmental, social or labour law obligations is not already provided for in national law, Member States may make reference to the list of international legal instruments listed in the Annex of each Directive. These are reproduced in Table 1 below. In terms of human rights instruments, the Directives’ Annexes include the eight ILO core Conventions. This is extremely welcome explicit confirmation of the validity of international labour conventions’ applicability to public procurement processes, and one that was missing from the previous 2004 Directives.

However, the Directives’ Annexes omit the Universal Declaration of Human Rights and two International Covenants on Civil and Political and Economic, Social and Cultural Rights (making up the International Bill of Human Rights collectively). As such, the international instruments available under the Directives’ Annexes fall short of recognising the full international human rights framework.

At a practical level, this may only play out within the small number of EU Member States that have not yet signed and ratified the International Covenants and other human rights conventions listed in Table 1 below. At a policy level however, the absence of these international human rights instruments points to incoherence across the EU’s commitments to human rights, and to the implementation of the UN Guiding Principles on Business and Human Rights within public procurement processes in particular. It is likely this was an oversight, rather than intentional omission, but nonetheless one that would ideally be corrected in the EU Public Procurement Directives directly,⁸² and in the interim carefully considered by Member States when utilising international instruments within their procurement processes.

⁸¹ Art. 71(4)(a) Public Sector Directive; Art. 88(1) Utilities Directive; Art. 42(1) Concessions Directive. Confusingly, Art. 71(5) indicates that the overarching social clause (Art. 18(2)) does not apply to suppliers, but goes on to grant procurers authority to extend coverage of Art. 18(2) for example down the subcontracting chain.

⁸² The European Commission reserves the right to periodically revise the Annexes. See Recital 129 of the Public Sector Directive.

Table 1: Alignment of the 2014 EU Public Procurement Directives with International Human Rights Instruments

International Social and Environmental Conventions Available Under the 2014 EU Public Procurement Directives	International Human Rights Instruments Missing from the 2014 EU Public Procurement Directives
<ul style="list-style-type: none"> • ILO Convention 87 on Freedom of Association and the Protection of the Right to Organise • ILO Convention 98 on the Right to Organise and Collective Bargaining • ILO Convention 29 on Forced Labour • ILO Convention 105 on the Abolition of Forced Labour • ILO Convention 138 on Minimum Age • ILO Convention 111 on Discrimination (Employment and Occupation) • ILO Convention 100 on Equal Remuneration • ILO Convention 182 on Worst Forms of Child Labour • Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer • Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) • Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention) • Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10 September 1998, and its 3 regional Protocols. 	<ul style="list-style-type: none"> • Universal Declaration of Human Rights • International Covenant on Economic, Social and Cultural Rights • International Covenant on Civil and Political Rights • ILO 1998 Declaration on Fundamental Principles and Rights at Work <p>Additional international standards that apply to those belonging to potentially vulnerable or marginalised groups include:</p> <ul style="list-style-type: none"> • Convention on the Elimination of All Forms of Racial Discrimination • Convention on the Elimination of All Forms of Discrimination Against Women • Convention on the Rights of the Child • Convention on the Rights of Persons with Disabilities • Convention on the Protection of the Rights of All Migrant Workers and Members of their Families • Declaration on the Rights of Indigenous Peoples • Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

3.3.2 The Subject Matter Test

One of the main limitations to integrating meaningful human rights considerations within the EU public procurement process is the requirement for such criteria to be “link to the subject matter” of the contract.

One of the main limitations to integrating meaningful human rights considerations within the EU public procurement process is the requirement for such criteria to be “linked to the subject matter” of the contract. Article 67(3) of the Public Sector Directive provides a partial definition of the subject matter concept, describing criteria as “linked to the subject

Criteria within the technical specifications, award criteria and contract performance clauses is not “linked to the subject matter” if it does not directly relate to the individual good, work or service being purchased; it cannot relate to the bidder at a company-wide level.

matter” where it relates to the works, supplies or services in question at any stage of their life cycle, including production and trading.⁸³ In other words, criteria within the technical specifications, award criteria and contract performance clauses is not “linked to the subject matter” if it does not directly relate to the individual good, work or service being purchased. The criteria therefore cannot relate to the bidder at a company-wide level.

This requirement was significantly expanded in the 2014 Directives.⁸⁴ Previously confined only to award criteria under the 2004 Directives, this requirement now spans every stage of the procurement process,⁸⁵ except for provisions on exclusion criteria.⁸⁶

Recital 97 reinforces the subject matter requirement by explicitly prohibiting using criteria within the procurement process that relates to general corporate policies, such as those on corporate social responsibility or environmental responsibility.⁸⁷ This is because such general company-wide policies are not considered “linked to the subject matter” of the specific contract in question. This means overarching expectations for companies to have in place robust policies and processes to manage their social and human rights impacts on workers, communities, customers and others cannot form part of public purchasers’ criteria.

This represents a significant lack of policy coherence from a business and human rights perspective. Since the unanimous endorsement of the UN Guiding Principles in 2011 by the UN Human Rights Council, Governments around the world have been expressing their expectation that companies should publicly commit to respecting human rights and implement that commitment through company-wide policies and risk management

⁸³ Art. 67(3) Public Sector Directive; Art. 82(3) Utilities Directive; Recital 66 Concessions Directive.

⁸⁴ The Commission’s Green Paper published at the outset of the reform process cited numerous reasons in favour of the subject matter requirement. These included *inter alia*: ensuring efficient use of public monies; guarding against state aid arising in the process if the test was not used; potential discrimination against operators from other member states without the link; difficulties SMEs would have in complying to criteria not linked to the subject matter; and non-linked requirements potentially impeding innovation in public procurement. However, the Commission’s ultimate proposals were not accompanied by any evidence regarding the alleged effects of loosening, maintain or expanding the test. European Commission, [“Green Paper on modernization of EU public procurement policy: Toward a more efficient European Procurement Market”](#) COM (2011) 15, p 39-40.

⁸⁵ Art. 57 Public Sector Directive; the subject matter requirement appears in six separate provisions in the Public Sector Directive, regarding: technical specifications (Art. 42(1)), criteria underlying references to labels (Art. 43(1)(a)), variants (Art. 45(1)), selection criteria (Art. 58(1)), award criteria (Art. 67(2)), contract performance clauses (Art. 70)). Equivalent provisions exist under the Utilities Directive, except for the provision on variants which do not need to be linked under Art. 64. Regarding selection criteria, Art. 80 Utilities Directive only applies the subject matter link in so far as the contracting authority chooses to apply the criteria for qualitative selection (as set out in the Public Sector Directive). Recital 66 holds the only reference to the test in the Concessions Directive, concerning measures aimed at the protection of health of staff involved in performance of the concession.

⁸⁶ *Ibid.* Semple A notes this may have the effect of prompting a stricter approach at the exclusion stage, running directly contrary intentions of the reform to streamline selection processes and reduce supplier burdens at that stage. Semple, [“The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?”](#) European Law Conference 2014 (2014), p. 14.

⁸⁷ Recital 97 Public Sector Directive; Recital 102 Utilities Directive; the Concessions Directive does not contain an equivalent provision.

processes (referred to as human rights due diligence).⁸⁸ This is evidenced in the increasing number of National Action Plans on Business and Human Rights, many of which have been issued by EU Member States (i.e. the UK, Finland, Italy, Sweden, Denmark, amongst others),⁸⁹ as well as specific legislative and regulatory measures taken globally to make this expectation mandatory.⁹⁰ The European Commission's own Corporate Social Responsibility Communication in 2011 states:

"The Commission also... Expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UN Guiding Principles."

As each company's human rights risks are often unique to their size, sector, operational context, ownership and structure, it is important that their prevention, management and remediation processes are risk led.

As the 2014 EU Public Procurement Directives are currently framed, requiring all criteria to be "linked to the subject matter" of the contract and prohibiting any criteria around company-wide human rights or CSR policies, they are instead in effect dictating where companies must focus their time and efforts. This runs counter to the European Commission's policy commitments to the UN Guiding Principles on Business & Human Rights, as well as to specific EU initiatives mandating human rights due diligence, for example the proposed Conflict Mineral's Regulation, the 2014 Non-Financial Reporting Directive, the proposed Data Protection Regulation and the 2010 Timber Regulation.

As such, the primary means through which companies can effectively seek to prevent, mitigate and remediate human rights impacts – through corporate-wide policies and systematic and ongoing human rights due diligence – is not allowed to be a criteria by which procurers can consider a company's suitability and reliability to deliver the goods, works or services being procured. As each company's human rights risks are often unique to their size, sector, operational context, ownership and structure, it is important that their prevention, management and remediation processes are risk led. Requiring all criteria to be "linked to the subject matter" of the contract and prohibiting any criteria around company-wide human rights or CSR policies effectively dictates where companies must focus their time and resources. This runs counter to the European Commission's policy commitments to the UN Guiding Principles on Business & Human Rights, as well as to specific EU initiatives mandating human rights due diligence, for example the proposed Conflict Minerals Regulation, the 2014 Non-Financial Reporting Directive, the proposed Data Protection Regulation and the 2010 Timber Regulation.

In addition to creating a lack of policy coherence at the EU level on business and human rights, there are a range of other reasons why at a practical level this is problematic and runs against many of the stated

⁸⁸ As outlined under the UN Guiding Principles on Business and Human Rights. See further, Report of the Special Representative on business and human rights, "[Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework](#)", A/ HRC/17/31 (2011).

⁸⁹ UN OHCHR, [Repository for State National Action Plans on Business and Human Rights](#) (last accessed October 2015).

⁹⁰ See IHRB, "[State of Play: Human Rights in the Political Economies of States – Avenues for Application](#)" (2014).

objectives of the Directives' reform. It may actually undermine the procurer's intended objectives of seeking to work with responsible bidders. For example, confining criteria regarding adequate working conditions to the specific goods and services under the contract could prompt bidders to focus on issues that may in reality be less high risk in terms of potential impacts on their workers. In other words, forcing a focus on only meeting human rights criteria relating to the specific, goods, works or services, rather than the bidder's performance writ large, could create a perverse incentive to ignore more high risk areas within the company simply because they are not considered "linked to the subject matter" of the public contract.⁹¹

This also has efficiency and cost implications, if such criteria are prompting bidders to spend time, resources and money in changing their policies, processes or practices related to the goods, works or services under the contract to successfully win the tender that may in fact not have high risks to human rights. They may in reality be working well but need to be changed only to ensure compliance with criteria, rather than because such processes were not adequately preventing or detecting human rights risks. This may potentially take attention away from genuinely high-risk activities or operations deserving of time, energy and resources, and focus limited budgets and staff resources to lower risk areas that happen to be "linked" to the contract.⁹²

3.3.3 Labels and Certification

The 2014 Directives for the first time reference social labels, and confirm they can be used in technical specifications, award criteria or the contract performance conditions.

Member States are also free to provide for certification as a means of proving operators' suitability.

Many contracting authorities include environmental and social requirements by referring to labels. The 2014 EU Public Procurement Directives for the first time reference social labels,⁹³ and confirm they can be used in technical specifications, award criteria or contract performance conditions.⁹⁴ This is a major expansion from the 2004 Directives, which were limited to eco-labels. Social labels have the potential to prompt positive internal reform within companies in order that they qualify with the label requirements. As such, this is one way in which EU public procurement can trigger positive systems change within a company or industry.

Use of social labels is allowed provided they meet a series of strict requirements regarding their verifiability, transparency and independence.⁹⁵ Public purchasers are also not permitted to insist that a product or service carry a *specific* label or certification. Evidence of meeting the same requirements through other "equivalent" labels must be accepted in order to ensure unrestricted competition for public contracts. As such, the *characteristics* of the label requirements are used in EU public procurement

⁹¹ See further, Semple A, "[The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?](#)" European Law Conference 2014 (2014), p. 10.

⁹² *Ibid.*

⁹³ Recital 75 Public Sector Directive; Recital 85 Utilities Directive; the Concessions Directive does not contain any provisions on the use of labels.

⁹⁴ Art. 43(1) Public Sector Directive; Art. 61(1) Utilities Directive; the Concessions Directive does not contain any provisions on the use of labels.

⁹⁵ *Ibid.*

The use of both labels and certifications is a potentially promising area of opportunity for strengthening social and human rights related procurement requirements in the EU. However, substantial progress must be made in the expansion of adequate social and human rights labels and certifications that are in line with international standards on business and human rights. Currently, the existence of social and human rights related labels and certifications are extremely limited compared to the vast array covering environmental issues.

processes to describe contracting authorities' criteria, rather than requiring the specific label itself.

Member States are also free to provide for certification as a means of proving operator suitability. If certified, this raises a presumption of sufficient quality at the Selection stage (see section 3.2.4).⁹⁶ However, a judgment from the European Court of Justice regarding fair trade certifications (and by proxy other human rights related certifications), given while the 2014 Directives were under negotiation, limits the use of such certification to award criteria only, not within the technical specifications.⁹⁷

Social labels and certifications must also be "linked to the subject matter" of the contract (see section 3.3.2 above). The same concerns regarding the narrowing effect of the "link to the subject matter" requirement noted above also apply in the case of labels and certifications, which may force a focus on demonstrable characteristics of individual products or services, rather than the operator's overall performance in respecting the human rights of workers, customers, communities and others. Labeling schemes typically cover a range of such criteria relevant to the industry in question, many of which can only be meaningfully enforced at organisational level. This is similarly the case for certification requirements, and the subject matter test could force bidders to cherry pick certifications for individual goods, services or works, rather than choosing certifications that deliver the greatest social protections based on their overall activities.⁹⁸

The use of both labels and certifications is a potentially promising area of opportunity for strengthening social and human rights related procurement requirements in the EU. However, substantial progress must be made to expand the number of social and human rights labels and certifications in line with international standards on business and human rights.⁹⁹ Currently, the existence of social and human rights related labels and certifications are extremely limited compared to the vast array covering environmental issues.¹⁰⁰

⁹⁶ Art. 64(1)-(4) Public Sector Directive; Art. 62(1) Utilities Directive; the Concessions Directive does not contain any provisions on the use of certifications.

⁹⁷ Case C-368/10 *Commission v Kingdom of the Netherlands* ('Dutch Coffee'), not yet reported.

⁹⁸ See further, Semple A, "[The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?](#)" European Law Conference 2014 (2014), p. 10.

⁹⁹ Including *inter alia* the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, and the IFC Performance Standards.

¹⁰⁰ For example, FSC (for paper and wood products), Energy Star and TCO (for IT equipment) and the EU Ecolabel, Nordic Swan and Blue Angel (covering a wide range of products and services). There are enough environmental labels to require the use of an ISO classification system to distinguish between them. See further, ISO, "[Environmental labels and declarations: How ISO standards help](#)" (2012).

3.3.4 Subcontracting

One of the most promising areas of advancement within the new Directives concerns the specific provisions on subcontracting. While the 2004 Directives were confined to asking operators to indicate whether they intended to use subcontractors, the 2014 Directives introduce numerous requirements that should contribute to improved supply chain transparency and accountability.

Seemingly one of the most promising areas of advancement within the 2014 EU Public Procurement Directives concerns the provisions on subcontracting. The 2004 Directives were limited to asking operators to indicate whether they intended to use subcontractors. The 2014 Directives introduce numerous requirements that should contribute to improved supply chain transparency and accountability in EU public purchasing.

Article 63 of the Public Sector Directive requires contracting authorities to verify that subcontractors fulfill the exclusion and selection criteria.¹⁰¹ The 2014 Directives refer to subcontractors generally, and do not suggest limiting this to a certain

number of tiers down the subcontracting chain. Article 71(1) confirms the overarching social clause (Article 18(2), see section 3.3.1 above) requiring Member States to take “appropriate measures” to ensure compliance with environmental, social and labour law obligations applies equally to subcontractors. It lists examples for approaching this, including requiring joint liability between subcontractors and the main contractor (where national law allows) or replacing the subcontractor.¹⁰² Article 71(7) confirms Member States should also be able to “go further”, such as extending transparency obligations, enabling direct payments to subcontractors, or enabling public purchasers to explicitly verify that subcontractors do not fall foul of any of the exclusion criteria.¹⁰³

Deep and complex supply chains pose one of the most pressing challenges for tackling human rights abuses involving companies. Many industry sectors are characterised by adverse impacts within the supply chain.¹⁰⁴ These provisions present potentially significant possibilities for contracting authorities to require meaningful measures are taken to try to tackle these impacts, provided Member States take up the opportunities the Directives offer within their transpositions and practices.

¹⁰¹ It states: “The contracting authority shall, in accordance with Articles 59, 60 and 61, verify whether the entities on whose capacity the economic operator intends to rely fulfill the relevant selection criteria and whether there are grounds for exclusion pursuant to Article 57”; Art. 88(1) Utilities Directive; Art. 42(1) Concessions Directive.

¹⁰² Art. 88(6) Utilities Directive; Art. 42(4) Concessions Directive.

¹⁰³ Art. 71(7) Public Sector Directive; Recital 110 Utilities Directive; Recital 72 Concessions Directive.

¹⁰⁴ Including apparel, electronics, mineral extraction, agriculture, seafood, and logistical and security support, amongst many others.

4 CONCLUSION AND RECOMMENDATIONS

As noted at the outset of this Paper, the breadth and depth of social and human rights related provisions now available under EU public procurement rules have been dramatically strengthened in the three new 2014 EU Public Procurement Directives, inviting much more active use by Member States' purchasing authorities. This Occasional Paper has been produced to assist EU Member States in understanding the range of opportunities, but also limitations, under the 2014 EU Public Procurement Directives to integrating human rights considerations into their national rules and practices on public procurement.

Recommendations to EU Member States

It is up to EU Member States to use the wide discretion granted in the 2014 Directives to ensure meaningful and progressive implementation under their national laws and procurement practices.

Table 2 below summarises the numerous and welcome provisions within the Directives on human rights and social issues that have been highlighted throughout this Paper. Member State authorities should carefully reflect on these opportunities to progressively reflect human rights related considerations in their national laws, policies and practices on public procurement. Table 3 also summarises some of the main limitations to effectively implementing the social and human rights related provisions available under the 2014 EU Public Procurement Directives. Member States should closely consider the limitations noted – both in how the way the Directives are transposed but also in how these provisions are implemented in practice – to ensure the opportunities are maximised and limitations minimised.

Recommendations to the European Commission

What is needed both at EU and Member State level is technical and practical guidance on how to implement the new approaches on human rights and social measures within the public procurement process set out in the 2014 Directives.¹⁰⁵ The principal EU-issued guidance – “Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement” – released in 2010 is not only out of date, but narrowly interpreted the previous, more limited, 2004 Directives.¹⁰⁶ New guidance needs to offer clear and easy to follow directions on human rights standards, and on why and how these can be incorporated into national and local public procurement processes. A model procurement policy for public authorities and model tool kits for implementation could supplement this guidance, all of which should be developed in a consultative and transparent manner, inviting and giving full-consideration to the submissions received.

¹⁰⁵ See for example calls from the European Network of National Human Rights Institutions, “[Recommendations for the Next Strategy on CSR](#)” (April 2015).

¹⁰⁶ European Commission Staff Working Document, “[Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement](#)”, (19 May 2010) SEC(2010) 1258 final.

Table 2: Opportunities to Incorporate Human Rights Considerations into EU Public Procurement Processes

Key: PSD = 2014 EU Public Sector Directive; UD = 2014 EU Utilities Directive; CD = 2014 EU Concessions Directive

PRE-TENDER / MARKET ENGAGEMENT PHASE	
Human Rights Related Provisions	Recital or Article Number
Not actively regulated by the Directives	N/A
TECHNICAL SPECIFICATION PHASE	
Human Rights Related Provisions	Recital or Article Number
<p>Explicitly includes in its definition levels of environmental and climate performance, and design requirements such as accessibility for persons with disabilities.</p> <p>Contracting authorities are required to reject tenders that do not comply with the technical specifications.</p>	<ul style="list-style-type: none"> – <i>Annex VII PSD;</i> – <i>Annex VIII UD;</i> – There is no equivalent Annex in the CD, but <i>Recital 66</i> states: “<i>In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users.</i>”
EXCLUSION PHASE	
Human Rights Related Provisions	Recital or Article Number
Procurers <i>must</i> exclude bidders where aware they are in breach of tax or social security contribution payments	<ul style="list-style-type: none"> – <i>Art. 57(2) PSD</i> – <i>Recital 105 and 106 UD</i> – <i>Art. 38(5) CD</i>
Procurers <i>must</i> exclude bidders where they have been convicted of child labour or other forms of trafficking in human beings.	<ul style="list-style-type: none"> – <i>Art. 57(1)(f) PSD</i> – The UD does not contain an equivalent provision, but does allow reference to criteria under the PSD (<i>Art. 80</i>) – <i>Art. 38(4)(f) CD</i>
Procurers <i>may</i> exclude a bidder due to non-compliance with environmental, social or labour law obligations.	<ul style="list-style-type: none"> – <i>Art. 57(4)(a) PSD</i> – The UD does not contain an equivalent provision, but allows reference to criteria under the PSD (<i>Art. 80</i>) – <i>Art. 38(7)(a) CD</i>
Procurers <i>must</i> exclude “abnormally low” tenders where due to non-compliance with environmental, social or labour law obligations (the overarching social clause – see below).	<ul style="list-style-type: none"> – <i>Art. 69(3) PSD</i> – <i>Art. 84(3) UD</i> – The CD does not contain an equivalent provision
<p>Provides for the “self cleaning” of bidders to demonstrate their reliability despite valid grounds for exclusion.</p> <p>Has the potential to be used by Member States to prioritise remediation for human rights impacts, and require bidders to demonstrate the improvements made to human rights risk management processes and systems based on previous impacts.</p>	<ul style="list-style-type: none"> – <i>Art. 57(6) PSD</i> – <i>Recital 107 UD</i> – <i>Art. 38(9) CD</i>
The list of exclusion grounds are not exhaustive.	– <i>Case C-213/07 Mikhaniki v</i>

	<i>Ethniko Simvoulio Radiotileorasis [2008] ECR I-9999.</i>
SELECTION PHASE	
Human Rights Related Provisions	Recital or Article Number
<p>Selection criteria may relate to:</p> <p>(a) the suitability of the economic operator to pursue the activity,</p> <p>(b) their economic and financial standing</p> <p>(c) their technical and professional ability.</p> <p>This could be interpreted to include e.g. robust responsible supply chain management systems or use of qualified social and human rights specialists.</p>	<ul style="list-style-type: none"> – <i>Art. 58(1) PSD</i> – <i>Art. 80 UD</i> – <i>Art. 38 CD</i>
AWARD PHASE	
Human Rights Related Provisions	Recital or Article Number
<p>Procurers must base the award on the “most economically advantageous tender” (MEAT), which explicitly incorporates both:</p> <p>(a) quality, including environmental and social characteristics and trading and its conditions, and</p> <p>(b) organisation, qualification and experience of staff assigned to performing the contract</p> <p>This is the first time social characteristics have explicitly been included in award provisions within EU Public Procurement Directives. Price and cost are no longer the sole criteria by which award decisions are made.</p> <p>Non-economic criteria, such as human rights criteria, must satisfy certain requirements in order to be used to assess the MEAT. They must:</p> <ul style="list-style-type: none"> • be linked to the subject matter of the contract; • not give contracting authorities an unrestricted freedom of choice; • be expressly mentioned in the contract documents or the tender notice; • comply with the fundamental principles of EU law, including non-discrimination. 	<ul style="list-style-type: none"> – <i>Art. 67(1) PSD</i> – <i>Art. 82(1) UD</i> – The <i>CD</i> does not contain an equivalent provision, merely requiring that concessions are awarded “on the basis of objective criteria which comply with the principles set out in Art. 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority/entity”. (Art. 41)
<p>Procurers <i>may</i> choose not to award a contract due to non-compliance with environmental, social or labour law obligations.</p>	<ul style="list-style-type: none"> – <i>Art. 56(1) PSD</i> – <i>Art. 76(6) UD</i> – The <i>CD</i> does not contain an equivalent provision
<p>The environmental and social criteria suggested in the Directives are not exhaustive.</p>	<ul style="list-style-type: none"> – <i>Recital 92 PSD</i> – <i>Recital 97 UD</i> – The <i>CD</i> does not contain an equivalent provision, but confirms that award criteria can relate to utilisation of fair trade

	products (and, by extension, other human rights related criteria) (<i>Recital 64</i>).
CONTRACTING PHASE	
Human Rights Related Provisions	Recital or Article Number
Contractual conditions can cover implementation of measures to comply with fundamental ILO Conventions.	<ul style="list-style-type: none"> – <i>Recital 98 PSD</i> – <i>Recital 103 UD</i> – <i>Recital 65 CD</i>
Such contractual conditions may also include “economic, innovation-related, environmental, social or employment-related considerations”.	<ul style="list-style-type: none"> – <i>Art. 70 PSD</i> – <i>Art. 87 UD</i> – <i>Recital 64 CD</i>
Allows for termination of the contract where child labour or human trafficking is discovered following the award.	<ul style="list-style-type: none"> – <i>Art. 57(1) PSD</i> – <i>Art. 90(b) UD</i> – <i>Art. 44(b) CD</i>
CROSS-CUTTING ISSUES	
THE OVERARCHING ‘SOCIAL CLAUSE’	
Human Rights Related Provisions	Recital or Article Number
Member States <i>must</i> take “appropriate measures” to ensure in the performance of a contract compliance with applicable environmental, social and labour law obligations by economic operators.	<ul style="list-style-type: none"> – <i>Art. 18(2) PSD</i> – <i>Art. 36(2) UD</i> – <i>Art. 30(3) CD</i>
<p>There are three points where non-compliance with environmental, social or labour law obligations can lead to action within the procurement process:</p> <ul style="list-style-type: none"> i. Procurers <i>must</i> exclude an abnormally low tender where it is due to such non-compliance ii. Procurers <i>may</i> exclude a bidder due to non-compliance with such obligations iii. Procurers <i>may</i> choose not to award a contract, due to non-compliance <p>Observance by sub-contractors of such obligations is ensured through “appropriate action” by the national authority, such as joint subcontractor-main contractor liability (where national law allows) or replacing the subcontractor.</p>	<ul style="list-style-type: none"> i. <i>Art. 57(4)(a) PSD; Art. 38(7)(a) CD; the UD does not contain an equivalent provision, but allows reference to the PSD criteria</i> ii. <i>Art. 69(3) PSD; Art. 84(3) UD; the CD does not contain an equivalent provision</i> iii. <i>Art. 56(1) PSD; Art. 76(6) UD; the CD does not contain an equivalent provision</i> <ul style="list-style-type: none"> – <i>Art. 71(4)(a) PSD; Art. 88(1) UD; Art. 42(1) CD</i>
LABEL AND CERTIFICATION REQUIREMENTS	
Human Rights Related Provisions	Recital or Article Number
Social labels can be used in the technical specifications, award criteria or the contract performance conditions.	<ul style="list-style-type: none"> – <i>Art. 43(1) PSD</i> – <i>Art. 61(1) UD</i> – the <i>CD</i> does not contain any provisions on the use of labels
Procurers can require certification as a means of proving operators’ suitability. If so certified, this raises a presumption of sufficient quality at the Selection phase (see above).	<ul style="list-style-type: none"> – <i>Art. 64(1)-(4) PSD</i> – <i>Art. 62(1) UD</i> – the <i>CD</i> does not contain any provisions on the use of certifications

SUBCONTRACTING	
Human Rights Related Provisions	Recital or Article Number
Procurers must verify that subcontractors fulfill the exclusion and selection criteria.	<ul style="list-style-type: none"> - Art. 63 PSD - Art. 88(1) UD - Art. 42(1) CD
The overarching social clause (see above) applies to subcontractors, requiring “appropriate measures” to be taken by Member States to avoid environmental, social and labour law breaches, such as requiring joint liability between subcontractors and the main contractor (where national law allows) or replacing the subcontractor.	<ul style="list-style-type: none"> - Art. 71(1) PSD - Art. 88(6) UD - Art. 42(4) CD
Member States are free to establish “more stringent liability rules” around subcontracting and are able to “go further” under national law regarding direct payments to subcontractors.	<ul style="list-style-type: none"> - Art. 71(7) PSD - Recital 110 UD - Recital 72 CD

Table 3: Limitations to Incorporating Human Rights Considerations into EU Public Procurement Processes

Key: PSD = 2014 EU Public Sector Directive; UD = 2014 EU Utilities Directive; CD = 2014 EU Concessions Directive

PRE-TENDER / MARKET ENGAGEMENT PHASE	
Human Rights Related Provisions	Limitations
Not actively regulated by the Directives	N/A
TECHNICAL SPECIFICATION PHASE	
Human Rights Related Provisions	Limitations
<p>Criteria <i>must</i> relate to the goods, works or services directly; it is not possible to stipulate the <i>process</i> by which they are delivered.</p> <ul style="list-style-type: none"> - Recital 99 PSD - Recital 104 UD - Recital 66 CD 	Procurers unable to specify measures relating to the way (i.e. the <i>process</i> by which) the business is managed, e.g. requiring systems to protect the health and safety of staff involved in production.
EXCLUSION PHASE	
Human Rights Related Provisions	Limitations
<p>Procurers <i>must</i> exclude bidders where they have been convicted of child labour or other forms of trafficking in human beings</p> <ul style="list-style-type: none"> - Art. 57(1)(f) PSD - Art. 38(4)(f) CD - The UD does not contain an equivalent provision, but does allow reference to criteria under the PSD (Art. 80). 	<p>Child labour and human trafficking cover only a small proportion of the types of impacts companies can have across the spectrum of human rights.</p> <p>Limits to cases of formal <i>conviction</i>, which is rare in practice for most corporate-related human rights abuses.</p>
Procurers <i>may</i> exclude a bidder due to non-compliance with environmental, social or labour law obligations (the overarching social clause – see below).	Implementation is discretionary by Member States. This potentially invites inconsistency in EU-wide implementation and risks a lowest common denominator

<ul style="list-style-type: none"> - The <i>UD</i> does not contain an equivalent provision, but allows reference to criteria under the <i>PSD</i> (Art. 80) - Art. 57(4)(a) <i>PSD</i> - Art. 38(7)(a) <i>CD</i> 	<p>approach.</p> <p>Member States' recourse to international law limited to the 8 ILO core Conventions only (not the International Bill of Rights or additional international human rights conventions).</p>
<p>Procurers <i>must</i> exclude "abnormally low" tenders where due to non-compliance with environmental, social or labour law obligations (the overarching social clause – see below)</p> <ul style="list-style-type: none"> - The <i>CD</i> does not contain an equivalent provision. - Art. 69(3) <i>PSD</i> - Art. 84(3) 	<p>Rejection of abnormally low tenders will only occur where procurers decide to investigate <i>why</i> the price is so low (or are compelled to do so under national law) – inviting inconsistent application across the EU.</p>
<p>Provides for the "self cleaning" of bidders to demonstrate their reliability despite valid grounds for exclusion</p> <ul style="list-style-type: none"> - Art. 57(6) <i>PSD</i> - Art. 38(9) <i>CD</i> - Recital 107 <i>UD</i> 	<p>What constitutes satisfactory self-cleaning is discretionary for public purchasers, who could overlook the need for human rights impacts to be remediated as part of the self-cleaning process in order for an excluded bidder to regain status as a potential bidder.</p>

SELECTION PHASE

Human Rights Related Provisions	Limitations
<p>Selection criteria may relate to (a) the suitability of the economic operator to pursue the activity, (b) their economic and financial standing or (c) their technical and professional ability. This could be interpreted to include e.g. robust responsible supply chain management systems or use of qualified social and human rights specialists</p> <ul style="list-style-type: none"> - Art. 58(1) <i>PSD</i> - Art. 80 <i>UD</i> - Art. 38 <i>CD</i> 	<p>Requires progressive interpretation by public purchasers to prioritise human rights related criteria. Procurers can be discouraged from such progressive interpretation, as it may raise legal and procedural challenge that could invalidate the entire contract.</p>

AWARD PHASE

Human Rights Related Provisions	Limitations
<p>Procurers must base the award on the “most economically advantageous tender” (MEAT), which explicitly incorporates both (a) quality, including environmental and (for the first time) social characteristics and trading and its conditions, and (b) organisation, qualification and experience of staff assigned to performing the contract.</p> <ul style="list-style-type: none"> – <i>Art. 67(1) PSD</i> – <i>Art. 82(1) UD</i> – The CD does not contain an equivalent provision, merely requiring that concessions are awarded “on the basis of objective criteria which comply with the principles set out in Art. 3 and which ensure that tenders are assessed in conditions of effective competition so as to identify an overall economic advantage for the contracting authority/entity”. (Art. 41) 	<p>While the 2014 Directives have been praised for no longer using a lowest price only approach, certain provisions contradict this, stating the MEAT “could also be carried out on the basis of either price or cost effectiveness only”</p> <ul style="list-style-type: none"> – <i>Recital 90 PSD</i> – <i>Recital 59 UD</i> – the CD does not contain an equivalent provision <p>Price-only decisions can create perverse incentives to abuse the human rights of workers and others involved in delivery in order to drive down costs and increase price competitiveness.</p> <p>The provisions make for a confusing set of boundaries within which procurers can freely prioritise quality and experience (including characteristics based on social, environmental and trading conditions) whilst ensuring sufficient quantitative rigour in obtaining the “economically best solution among those offered”.</p>
<p>Procurers <i>may</i> choose not to award a contract, due to non-compliance with environmental, social or labour law obligations (the overarching social clause, see below)</p> <ul style="list-style-type: none"> – <i>Art. 56(1) PSD</i> – <i>Art. 76(6) UD</i> – The CD does not contain an equivalent provision. 	<p>Implementation is discretionary by Member States – invites inconsistency in EU-wide implementation and risks a lowest common denominator approach.</p>

CONTRACTING PHASE

Human Rights Related Provisions	Limitations
<p>Contractual conditions can cover implementation of measures to comply with fundamental ILO Conventions.</p> <ul style="list-style-type: none"> – <i>Recital 98 PSD</i> – <i>Recital 103 UD</i> – <i>Recital 65 CD</i> 	<p>Limits contractual requirements concerning basic working conditions to levels set by national legislation or collective agreements (<i>Recital 98 PSD; Recital 103 UD; Recital 65 CD</i>), prohibiting the inclusion of contractual terms specifying that the delivery of public works, goods or services must be compliant with international human rights instruments.</p>

CROSS-CUTTING ISSUES

THE OVERARCHING "SOCIAL CLAUSE"

Human Rights Related Provisions	Limitations
<p>Member States <i>must</i> take "appropriate measures" to ensure in the performance of a contract compliance with applicable environmental, social and labour law obligations by economic operators.</p> <ul style="list-style-type: none"> - <i>Art. 18(2) PSD</i> - <i>Art. 36(2) UD,</i> - <i>Art. 30(3) CD</i> <p>There are four points where non-compliance with environmental, social or labour law obligations can lead to action within the procurement process:</p> <ol style="list-style-type: none"> i. Procurers <i>may</i> exclude a bidder due to non-compliance with such obligations ii. Procurers <i>must</i> exclude an abnormally low tender where it is due to such non-compliance iii. Procurers <i>may</i> choose not to award a contract, due to non-compliance iv. Observance by sub-contractors of such obligations is ensured through "appropriate action" by the national authority, such as joint liability with the main contractor (where national law allows). 	<p>What constitutes an "appropriate measure" is discretionary by Member States – invites inconsistency in EU-wide implementation and risks a lowest common denominator approach.</p> <p>Member States' recourse to international human rights instruments limited to the 8 ILO core Conventions only – not the International Bill of Rights or additional international human rights conventions.</p> <p>The UD does not explicitly allow exclusion for breaches of the overarching social clause, but does allow reference to the provisions of the PSD.</p>

REQUIREMENTS FOR CRITERIA TO BE LINKED TO THE SUBJECT MATTER

Human Rights Related Provisions	Limitations
<p>All procurement criteria must be "linked to the subject matter" of the contract. Criteria is "linked" where it relates to the works, supplies or services in question at any stage of their life cycle, including production and trading.</p> <ul style="list-style-type: none"> - <i>Art. 67(3) PSD</i> - <i>Art. 82(3) UD</i> - <i>Recital 66 CD</i> <p>Criteria that relates to general corporate policies are prohibited, such as those on corporate social responsibility, human rights or the environment.</p> <ul style="list-style-type: none"> - <i>Recital 97 PSD</i> - <i>Recital 102 UD</i> - the <i>CD</i> does not contain an equivalent provision 	<p>The primary means through which companies can effectively seek to prevent, mitigate and remediate human rights impacts – through company policies and systematic and ongoing processes of human rights due diligence – is not allowed to be a criteria by which procurers can consider a company's suitability and reliability to deliver the goods, works or services being procured.</p> <p>This may actually undermine the procurer's intended objectives of seeking to work with responsible bidders, as well as force inefficiencies in focusing bidders' time and resources to lower risk issues that are "linked", rather than higher risk issues that may not be "linked" but are nonetheless reflective of the bidders' most severe human rights risks.</p>

LABEL AND CERTIFICATION REQUIREMENTS

Human Rights Related Provisions	Limitations
<p>Social labels can be used in the technical specifications, award criteria or the contract performance conditions.</p> <ul style="list-style-type: none"> – Art. 43(1) PSD – Art. 61(1) UD – the CD does not contain any provisions on the use of labels <p>Criteria referring to labels must be “linked to the subject matter of the contract”, verifiable, transparent and independent.</p> <p><i>Equivalent</i> evidence must be accepted in order to ensure unrestricted competition for public contracts. As such, the <i>characteristics</i> of the label requirements should be used to describe contracting authorities’ criteria, rather than requiring the label itself.</p>	<p>As label and certification criteria must be “linked to the subject matter” of the contract, the same considerations in the section above apply.</p> <p>Currently, the existence of social and human rights related labels and certifications are extremely limited compared to the vast array covering environmental issues.</p>
<p>Certifications can only be used during the award stage; they cannot be included as part of the technical specification.</p> <ul style="list-style-type: none"> – Case C-368/10 <i>Commission v Kingdom of the Netherlands</i> ('Dutch Coffee') 	<p>Limits procurers’ ability to integrate human rights considerations into the earliest phases of the process, where preferences for rights respecting business models can be applied to the entire pool of interested tenderers, rather than the shorter list considered for award.</p>
SUBCONTRACTING	
Human Rights Related Provisions	Limitations
N/A	N/A

In 2014, three new European Union (EU) Directives governing the way EU Member States purchase goods, works and services came into force. The breadth and depth of social and human rights related provisions now available under EU public procurement rules have been dramatically strengthened in these new EU Directives, inviting much more active use by Member States' purchasing authorities.

This Occasional Paper has been produced to assist EU Member States in understanding the range of opportunities, but also limitations, under the new Directives to integrating human rights considerations into their national rules and practices on public procurement. The Paper also serves as a tool for those interested in understanding the rules that shape EU public procurement, in order to assist engagement and advocacy efforts at local level.

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