

**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

<b>PRE-TENDER / MARKET ENGAGEMENT PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
Not actively regulated by the Directives	N/A
<b>TECHNICAL SPECIFICATION PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
<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"> <li>– <i>Annex VII PSD;</i></li> <li>– <i>Annex VIII UD;</i></li> <li>– 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>”</li> </ul>
<b>EXCLUSION PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
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"> <li>– <i>Art. 57(2) PSD</i></li> <li>– <i>Recital 105 and 106 UD</i></li> <li>– <i>Art. 38(5) CD</i></li> </ul>
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"> <li>– <i>Art. 57(1)(f) PSD</i></li> <li>– The UD does not contain an equivalent provision, but does allow reference to criteria under the PSD (<i>Art. 80</i>)</li> <li>– <i>Art. 38(4)(f) CD</i></li> </ul>
Procurers <i>may</i> exclude a bidder due to non-compliance with environmental, social or labour law obligations.	<ul style="list-style-type: none"> <li>– <i>Art. 57(4)(a) PSD</i></li> <li>– The UD does not contain an equivalent provision, but allows reference to criteria under the PSD (<i>Art. 80</i>)</li> <li>– <i>Art. 38(7)(a) CD</i></li> </ul>
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"> <li>– <i>Art. 69(3) PSD</i></li> <li>– <i>Art. 84(3) UD</i></li> <li>– The CD does not contain an equivalent provision</li> </ul>
<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"> <li>– <i>Art. 57(6) PSD</i></li> <li>– <i>Recital 107 UD</i></li> <li>– <i>Art. 38(9) CD</i></li> </ul>
The list of exclusion grounds are not exhaustive.	– <i>Case C-213/07 Mikhaniki v</i>

	<i>Ethniko Simvoulío Radiotileorasis</i> [2008] ECR I-9999.
<b>SELECTION PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
<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"> <li>– <i>Art. 58(1) PSD</i></li> <li>– <i>Art. 80 UD</i></li> <li>– <i>Art. 38 CD</i></li> </ul>
<b>AWARD PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
<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"> <li>• be linked to the subject matter of the contract;</li> <li>• not give contracting authorities an unrestricted freedom of choice;</li> <li>• be expressly mentioned in the contract documents or the tender notice;</li> <li>• comply with the fundamental principles of EU law, including non-discrimination.</li> </ul>	<ul style="list-style-type: none"> <li>– <i>Art. 67(1) PSD</i></li> <li>– <i>Art. 82(1) UD</i></li> <li>– 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”. (<i>Art. 41</i>)</li> </ul>
<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"> <li>– <i>Art. 56(1) PSD</i></li> <li>– <i>Art. 76(6) UD</i></li> <li>– The <i>CD</i> does not contain an equivalent provision</li> </ul>
<p>The environmental and social criteria suggested in the Directives are not exhaustive.</p>	<ul style="list-style-type: none"> <li>– <i>Recital 92 PSD</i></li> <li>– <i>Recital 97 UD</i></li> <li>– The <i>CD</i> does not contain an equivalent provision, but confirms that award criteria can relate to utilisation of fair trade</li> </ul>

	products (and, by extension, other human rights related criteria) ( <i>Recital 64</i> ).
<b>CONTRACTING PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
Contractual conditions can cover implementation of measures to comply with fundamental ILO Conventions.	<ul style="list-style-type: none"> <li>– <i>Recital 98 PSD</i></li> <li>– <i>Recital 103 UD</i></li> <li>– <i>Recital 65 CD</i></li> </ul>
Such contractual conditions may also include “economic, innovation-related, environmental, social or employment-related considerations”.	<ul style="list-style-type: none"> <li>– <i>Art. 70 PSD</i></li> <li>– <i>Art. 87 UD</i></li> <li>– <i>Recital 64 CD</i></li> </ul>
Allows for termination of the contract where child labour or human trafficking is discovered following the award.	<ul style="list-style-type: none"> <li>– <i>Art. 57(1) PSD</i></li> <li>– <i>Art. 90(b) UD</i></li> <li>– <i>Art. 44(b) CD</i></li> </ul>
<b>CROSS-CUTTING ISSUES</b>	
<b>THE OVERARCHING ‘SOCIAL CLAUSE’</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
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"> <li>– <i>Art. 18(2) PSD</i></li> <li>– <i>Art. 36(2) UD</i></li> <li>– <i>Art. 30(3) CD</i></li> </ul>
<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"> <li>i. Procurers <i>must</i> exclude an abnormally low tender where it is due to such non-compliance</li> <li>ii. Procurers <i>may</i> exclude a bidder due to non-compliance with such obligations</li> <li>iii. Procurers <i>may</i> choose not to award a contract, due to non-compliance</li> </ul> <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"> <li>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></li> <li>ii. <i>Art. 69(3) PSD; Art. 84(3) UD; the CD does not contain an equivalent provision</i></li> <li>iii. <i>Art. 56(1) PSD; Art. 76(6) UD; the CD does not contain an equivalent provision</i></li> </ul> <ul style="list-style-type: none"> <li>– <i>Art. 71(4)(a) PSD; Art. 88(1) UD; Art. 42(1) CD</i></li> </ul>
<b>LABEL AND CERTIFICATION REQUIREMENTS</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
Social labels can be used in the technical specifications, award criteria or the contract performance conditions.	<ul style="list-style-type: none"> <li>– <i>Art. 43(1) PSD</i></li> <li>– <i>Art. 61(1) UD</i></li> <li>– the <i>CD</i> does not contain any provisions on the use of labels</li> </ul>
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"> <li>– <i>Art. 64(1)-(4) PSD</i></li> <li>– <i>Art. 62(1) UD</i></li> <li>– the <i>CD</i> does not contain any provisions on the use of certifications</li> </ul>

<b>SUBCONTRACTING</b>	
<b>Human Rights Related Provisions</b>	<b>Recital or Article Number</b>
Procurers must verify that subcontractors fulfill the exclusion and selection criteria.	<ul style="list-style-type: none"> <li>- Art. 63 PSD</li> <li>- Art. 88(1) UD</li> <li>- Art. 42(1) CD</li> </ul>
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"> <li>- Art. 71(1) PSD</li> <li>- Art. 88(6) UD</li> <li>- Art. 42(4) CD</li> </ul>
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"> <li>- Art. 71(7) PSD</li> <li>- Recital 110 UD</li> <li>- Recital 72 CD</li> </ul>

**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

<b>PRE-TENDER / MARKET ENGAGEMENT PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Limitations</b>
Not actively regulated by the Directives	N/A
<b>TECHNICAL SPECIFICATION PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Limitations</b>
<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"> <li>- Recital 99 PSD</li> <li>- Recital 104 UD</li> <li>- Recital 66 CD</li> </ul>	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.
<b>EXCLUSION PHASE</b>	
<b>Human Rights Related Provisions</b>	<b>Limitations</b>
<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"> <li>- Art. 57(1)(f) PSD</li> <li>- Art. 38(4)(f) CD</li> <li>- The UD does not contain an equivalent provision, but does allow reference to criteria under the PSD (Art. 80).</li> </ul>	<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