



UNIVERSITY OF  
BIRMINGHAM

University of Birmingham  
Edgbaston, Birmingham, B15  
2TT, United Kingdom

University of Birmingham Dubai  
Dubai International Academic City  
P.O. Box 341799, Dubai

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### The accommodation of sustainability in the EU Internal Market public procurement system

Natalia Spataru (Maire Curie Fellow, University of Birmingham)

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Institute of European Law  
Birmingham Law School  
University of Birmingham  
Edgbaston  
Birmingham B15 2TT  
United Kingdom

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Natalia Spataru

## 1. Introduction

The main aim of this paper is to analyse the accommodation of sustainability considerations within the European Union's (EU) Internal Market public procurement (PP) system. The paper investigates whether EU PP law can be used as a tool to further sustainability while advancing its main objective of removing barriers to trade and opening PP markets.

The paper will consider whether and how the sustainability aspects of the EU PP system can co-exist with the more traditional 'primary' PP objectives within the 'internal' EU *acquis*. To do so, the paper will start with an analysis of the evolution of the EU PP framework, its principles and instruments linked to the operation of the EU Internal Market. To grasp the characteristics of the EU PP system and to understand the logic of its foundations, it is important to review the main objectives of PP in the context of the EU Internal Market.

Considering that the main purpose behind the creation of the EU Internal Market was the elimination of barriers to trade in goods and services, free movement of workers, payments, and capital between the Member States,<sup>1</sup> the EU internally has many similarities with a Free Trade Agreement (FTA).<sup>2</sup> Consequently, another objective of this paper is to analyse the instruments through which the EU Internal Market *raison d'être* impacts the norms regulating PP activity across its Member States, also considering the 'weight' of sustainability aspects that has increased in the Internal Market. This analysis will facilitate the understanding of whether the EU PP law can be used as a tool to further sustainability aspects nationally.

In terms of research methodology, this paper applies a legal-historical approach. This will facilitate the understanding of the interconnection between the EU Internal Market and the EU PP system, which has been updated and significantly revised<sup>3</sup> since the foundation of the European Economic Communities (EEC).<sup>4</sup> This method will facilitate the analysis of fundamental principles of the EU PP framework, its basic functions and how it accommodates sustainability aspects. The historical overview of the EU PP research methodology will provide an analytic tool for looking into the evolution of the rules governing the conduct of PP procedures and analysing specifically the rules on technical specifications, selection criteria, and award criteria. These are the stages of the procurement procedure where sustainability criteria can be considered.<sup>5</sup>

As part of the methodology, the application of a narrow understanding of sustainability (limited to social and environmental objectives and small and medium-sized enterprises (SMEs) integration) will be applied to discuss the importance and effect of sustainability on EU PP regulation. This limitation will allow the reader to follow the evolution of the significance of sustainability in procurement.

## 2. The Initial Phase: Primary Law Provisions (1957-1970s)

The EU has its origins in the creation of the EEC, which was set up in Western Europe after the Second World War.<sup>6</sup> The EEC sought primarily to promote economic integration, which itself was a means to achieve security and peace in Europe.<sup>7</sup>

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<sup>1</sup> Treaty Establishing the European Community [1957] (EEC), Article 2.

<sup>2</sup> *Ibid.*, Article 9; Treaty on the Functioning of the European Union (Consolidated Version) [2012] OJ C326/47 (TFEU), Articles 3, 26, 28, 206, 207; Sue Arrowsmith, *The Law of Public and Utilities Procurement*, (3rd edn, Sweet & Maxwell, 2014), 151; Peter Trepte, *Public Procurement in the EU* (2nd edn, Oxford University Press 2007) 5-13.

<sup>3</sup> Arrowsmith (n 2), 151; Jean-Claude Piris, 'Is The constitution for Europe 'dead and buried'?' in Jean-Claude Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press, 2010) 10-12.

<sup>4</sup> EEC; Treaty establishing the European Atomic Energy Community [1957]; Treaty Establishing the European Coal and Steel Community [1951].

<sup>5</sup> See Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford, 2007) 25.

<sup>6</sup> *Ibid.*

<sup>7</sup> EEC, Article 2, Preamble, paragraph 3.

The EEC Treaty (and the subsequent Treaties) did not contain specific provisions regulating the opening-up of PP markets,<sup>8</sup> however, it established the fundamental principles underpinning the EEC, which apply to PP.<sup>9</sup> The signatories of the EEC Treaty wanted a customs union, accompanied by economic and social integration.<sup>10</sup> The establishment of the Common Market<sup>11</sup> was at the heart of European integration.<sup>12</sup> The Common Market regimes most relevant for PP are the free movement of goods, the free movement of services, and the freedom of establishment.<sup>13</sup>

The free movement rules are today set out in the Treaty on Functioning of the European Union (TFEU). According to the TFEU, which entered into force in December 2010, the EU replaced and succeeded the European Community (EC),<sup>14</sup> while the EC had replaced and succeeded the European Economic Community (EEC) in 1992.<sup>15</sup> For the purposes of this paper, the term EU will refer to the EEC, EC, and the EU, except where more precise terminology is required by the context.

A central concern of the free movement regime at its inception was the prohibition of protectionist behaviour towards Member States; meaning that Member States were banned from adopting measures raising barriers to intra-EU trade.<sup>16</sup>

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<sup>8</sup> Arrowsmith (n 2), 156; Trepte (n 2) 5; Christopher Bovis, *EU Public Procurement law* (2nd ed., Edward Elgar, 2012) 4-10.

<sup>9</sup> EEC, Articles 9, 48 and 59.

<sup>10</sup> EEC, Preamble.

<sup>11</sup> The EEC Treaty did not define the Common Market, Article 2 merely states that ‘Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities’. Laurence Gormley, ‘Competition and Free Movement: Is the Internal Market the same as a Common Market?’ (2002) 13 EBLR 517; Kamiel Mortelmans, ‘The Common Market, the Internal Market and the Single Market, What’s in a Market?’ (1998) 35 CMLR 101. However, the *Rapport des chefs de délégation aux ministres des Affaires étrangères* (Report of the Heads of Delegation to the Foreign Ministers) which placed the foundation for the EEC Treaty, stated that ‘the purpose of a European common market is to create a large area committed to a common economic policy, constituting a powerful complex of industries and ensuring a continual gain in economic strength and stability. (...) It is suggested that the common market should extend to all branches of economic activity.’ Report of the Heads of Delegation to the Foreign Ministers [1956] SG/A (56) 4, 8, 15. The White Paper introduced the concept of ‘Internal Market’ which replaced the ‘Common Market’. Commission, ‘White Paper from the Commission to the Council on Completing the Internal Market’ COM (85) 310 final, 53 (White Paper).

<sup>12</sup> The Internal Market is then stipulated partly as an area of exclusive EU competence in Article 3 TFEU but mainly as an area of shared competence between the EU and the Member States in Article 4 TFEU. Moreover, the commitment to establish an Internal Market is reiterated in Article 26(3) TFEU which provides that: ‘[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of [the TFEU]’.

<sup>13</sup> EEC, Articles 30-37, 52, 59 (now TFEU Articles 28-37, 56, 49). In addition to this, the general prohibition of discrimination on grounds of nationality, stipulated by Article 18 TFEU, is to be mentioned. This principle requires that persons in a situation governed by [EU] law be placed on equal footing with nationals of the Member States, Case C-187/87, *Cowan v. Trésor Public* [1989] ECR 195. The principle only applies to nationals of the Member States of the EU and individuals and legal persons who are resident in them, not to third-country nationals. However, given that all PP decisions are governed by the EU free movement rules, these more specific provisions, will generally derogate from the general prohibition of discrimination in Article 18 TFEU. Therefore, there is no need for Article 18 TFEU in the procurement context, see Martin Trybus, ‘European Union Law and Public Procurement’ (2017) (5) IEL Working Papers <[http://epapers.bham.ac.uk/3052/1/IEL\\_Working\\_Paper\\_05-2017\\_-\\_Trybus.pdf](http://epapers.bham.ac.uk/3052/1/IEL_Working_Paper_05-2017_-_Trybus.pdf)> accessed 25 January 2023; Arrowsmith (n 2) 301-302. Additionally to the Internal Market regimes and Article 18 TFEU, a number of other economic regimes dealing with distortions of competition in the Internal Market and partly directed at the Member States and partially at companies have a certain relevance to PP. Articles 107 *et seq* TFEU regulate the rules on State aid. Arrowsmith (n 2) 302-324 explains the relevance of this regime to PP. This will not be discussed in the context of this paper on EU law, PP, and sustainability.

<sup>14</sup> TFEU, Protocol 37.

<sup>15</sup> The Treaty on European Union [1992] OJ C 325/5 (Treaty of Maastricht). The Report of the Heads of Delegation to the Foreign Ministers, suggests that the creation of the EU Common Market follows the same rationale that shaped the GATT – the promotion of trade between states by prohibiting discriminatory and non-discriminatory trade restrictions, Joseph Weiler, ‘The Constitution of the Common Market’, in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999).

<sup>16</sup> EEC, Articles 23-31, 48, 59 (now TFEU Articles 28-37, 56, 49).

## 2.2. Free movement of goods

At the core of Common Market was (and still is) the free trade area for goods.<sup>17</sup> Article 30 TFEU prohibits custom duties on import and export of goods and charges having equivalent effect.<sup>18</sup> This prohibition is not directly connected to the EU PP regime, however, the abolition of such charges removes barriers to trade, and therefore, facilitates access to the national PP markets.<sup>19</sup> Most relevant for PP is Article 34 TFEU which prohibits quantitative restrictions on imports and measures having equivalent effect (MEQR, discussed below). Under Article 34 TFEU may fall measures that discriminate, in law or in fact (Section 2.5), between domestic and imported goods (distinctly applicable measures)<sup>20</sup> and measures that apply to imported and domestic products alike (indistinctly applicable measures), but hinder or inhibit market access anyhow (discussed in Section 2.4).<sup>21</sup>

The Treaty rules on free movement are addressed to the Member States, including their contracting authorities.<sup>22</sup> In a procurement context, these provisions apply to decisions taken by authorities and prohibit them from adopting PP measures that affect the access of foreign tenders to national PP procedures. For example, measures that discriminate against foreign undertakings (e.g. through ‘buy national’ requirements) or measures that make market access difficult for foreign tenderers (e.g. requirements to meet ostensibly objective technical specifications<sup>23</sup> which can only be met by national tenderers).<sup>24</sup> PP laws and policies, wider practices, independent decisions taken in PP activities’ context can constitute MEQR in the sense of Article 34 TFEU.<sup>25</sup>

Article 35 TFEU prohibits quantitative restrictions on exports, and all measures having equivalent effect.<sup>26</sup>

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<sup>17</sup> Goods are ‘products which can be valued in money and which are capable of forming the subject of commercial transactions’, Case 7/68 *Commission v Italy* [1968] ECR 423.

<sup>18</sup> Charges having equivalent effect are pecuniary charges imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier and which are not a custom duty in the strict sense, even if they are not imposed for the benefit of the State, are not discriminatory or protective in effect. Case 24/68 *Commission v Italy* [1969] ECR 193.

<sup>19</sup> Trybus (n 13). Trybus states that it would be difficult to offer the lowest price or be the most economically advantageous tender when tenderers had to add the cost of custom duties to the bid price in another Member State. Therefore, the elimination of custom duties plays an important role in liberalising PP markets.

<sup>20</sup> Cases C-321-4/94 *Criminal Proceedings against Pistre* [1997] ECR I-2343; Case C-448/98 *Criminal Proceedings against Guimont* [2000] ECR I-10663; Case C 67/97 *Criminal Proceedings against Bluhme* [1998] ECR I-8033; Case 154/85 *Commission v Italy* [1987] ECR I-2717. Niamh Nic Shuibhne, ‘The Positive Scope of Free Movement Law: Discriminatory Restrictions’ in Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press, 2013) Chapter 6.

<sup>21</sup> Case C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-4273, paragraphs 35–44.

<sup>22</sup> EEC, Articles 9, 48, 59 (TFEU Articles 28, 45, 48).

<sup>23</sup> Technical specifications represent the technical prescriptions set by the contracting authority which define the characteristic of work, material product, or supply enabling them to be described in such a manner that they fulfil the use for which they are intended. See Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004) 92. Technical specifications must be clearly determined from the beginning of the award procedure. They are among the essential conditions of the contract, since economic operators rely on them when deciding whether to prepare and submit a tender, or to refrain from participating in the procurement procedure altogether Case C-298/15 *Borta* EU:C:2017:266, paragraphs 69-70.

<sup>24</sup> Case 3/88 *Commission v Italian Republic* [1989] ECR I-4035; Case C-243/89 *Commission v Denmark* [1993] ECR I-3353; Case C-359/93 *Commission v Netherlands* [1995] ECR I-0157; Case C-59/00 *Vestergaard* [2001] ECR I-9505.

<sup>25</sup> *Commission v Denmark* (n 24) where the contracting entities’ requirement in the specifications to include national products and labour was held to be incompatible with Article 34 TFEU (then Article 30 EEC); *Commission v Netherlands* (n 24); *Vestergaard* (n 24). Trepte (n 2) 8.

<sup>26</sup> The CJEU found a difference in the scope of the two provisions. Article 34 applies to both discriminatory and indistinctly applicable measures because they may impose importers to comply with a dual set of rules, in their own state and also the state of import, making intra-EU trade more difficult. The CJEU held that Article 35 applies only to national measures which ‘provide for a difference in treatment between products destined for export and those sold within the Member State concerned’, Case C-12/02 *Criminal Proceedings against Marco Grilli* [2003] ECR I-11585, paragraphs 41, 42; Case 15/79 *PB Groenveld BV v Produktschap voor Veeën Vlees* [1979] ECR 3409 paragraphs 7,9. This was because an exporter who had to comply with a national law on e.g. quality standards for a product to be marketed in a state could not rely on Article 35 to claim that such a law renders exports to other markets more difficult. However, in a subsequent ruling, the CJEU was willing to find a breach of Article 35 even where the rule applied indistinctly if it had a

In addition to these Treaty-based prohibitions, the EU seeks to minimize trade barriers to the free movement of goods through secondary law instruments – harmonising directives.<sup>27</sup> (Directives will be discussed in the Sections 3 – 6). Exhaustive harmonisation occurs when a directive harmonises laws in a particular area, from which it is no longer possible to derogate.<sup>28</sup> This is important as harmonisation limits the extent to which Member States can justify measures that indirectly impact trade.

In *Dassonville*,<sup>29</sup> the CJEU was called upon to decide on the interpretation of MEQR.<sup>30</sup> This case concerned a Belgian law requiring that goods bearing a designation of origin could only be imported if they were accompanied by a certificate from the government of the exporting country certifying their right to such a designation. Obtaining the certificate would have been very difficult with respect to goods that were already in free circulation in Belgium, thus hindering the imports of that category of goods. The Court held as follows:

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are [...] measures having an effect equivalent to quantitative restrictions.<sup>31</sup>

This judgment suggests that the crucial element in proving a MEQR exists is its detrimental effect on intra-EU trade: the definition does not require that the rules actually discriminate between domestic and foreign goods.<sup>32</sup> If applied in a PP context, *mutatis mutandis*, these types of measures would restrict access to market for tenderers that might be given the opportunity to bid for the contract (‘access to contract decisions’).<sup>33</sup>

Provided the EU has not introduced harmonising legislation on a particular good, the prohibition in Article 34 TFEU applies to all obstacles to the free movement of goods where they derive from rules regarding the

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greater effect on exports than on domestic traders, Case C–205/07, *Gysbrechts and Santurel Inter* [2008] ECR I–9947, paragraph 43. This is because the consequences of such prohibition were more significant in cross-border sales made directly to consumers, because of the obstacles to bringing legal proceedings in another Member State against consumers who defaulted and was therefore caught by Article 35. It has been argued that Article 35 should be conceptualised in terms of market access, and that it should be capable of applying to both discriminatory and indistinctly applicable measures. Marek Szydło, ‘Export Restrictions within the Structure of Free Movement of Goods: Reconsideration of an Old Paradigm’ (2010) 47 CMLRev 753.

<sup>27</sup> EEC did not indicate a comprehensive definition harmonisation, reference to this notion is made in Article 117 ‘Social provisions’ (Uroš Čemalović, ‘Framework for the Approximation of National Legal Systems with the European Union’s Acquis: From a Vague Definition to Jurisprudential Implementation Authors’ (2016) 11 Croatian Yearbook of European Law and Policy 241; Stephen Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a “Drafting Guide”’ (2011) 12 German Law Journal 827). The Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards [1985] OJ C136/1, Annex II stated that legislative harmonization is the adoption, by means of Directives [based on Article 115 TFEU], of the essential safety requirements (or other requirements in the general interest) for products, which should enjoy free movement throughout the Community.

<sup>28</sup> Jan H. Jans, Hans H.B. Vedder *European Environmental Law* (3rd ed., Europa Law Publishing 2008) 94.

<sup>29</sup> Case 8/74 *Procureur du roi v Dassonville* [1974] ECR 837 (*Dassonville*).

<sup>30</sup> Guidance on the scope of MEQR can be found in Commission Directive 70/50/EEC of 22 December 1969 based on the provisions of Article 33 (7), on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty [1970] OJ L 13/29. Directive 70/50 was applicable during the Community’s transitional period, but it continues to serve as an interpretative instrument for MEQRs. Article 2 specified the list of matters which can constitute an MEQR: ‘minimum or maximum prices for imported products; less favourable prices for imported products; lowering the value of the imported product by reducing its intrinsic value or increasing its costs; payment conditions for imported products which differ from those for domestic products; conditions in respect of packaging, composition, identification, size, weight, etc, which apply only to imported goods or which are different and more difficult to satisfy than in the case of domestic goods; the giving of a preference to the purchase of domestic goods as opposed to imports, or otherwise hindering the purchase of imports; limiting publicity in respect of imported goods as compared with domestic products; prescribing stocking requirements which are different from and more difficult to satisfy than those which apply to domestic goods; and making it mandatory for importers of goods to have an agent in the territory of the importing state’.

<sup>31</sup> *Dassonville* (n 29) paragraph 5.

<sup>32</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5<sup>th</sup> ed., Oxford University Press, 2011) 675.

<sup>33</sup> Peter Kunzlik, ‘Green Public Procurement - European Law, Environmental Standards and What to Buy Decisions’ (2013) 25 J. ENVTL. L. 173, 187.

characteristics of the good.<sup>34</sup> This is so, even when such measures apply without distinction to both domestic and non-domestic goods. However, the CJEU stated that reasonable restraints to intra-EU trade may not be caught by (what is now) Article 34 TFEU.<sup>35</sup> This cemented the way for what later became known as the ‘rule of reason’ (Section 2.4).<sup>36</sup>

The defences for the prohibitions caught by Articles 34 and 35 TFEU are contained in Articles 36 TFEU, which can justify the prohibitions/restrictions on imports/exports of goods, on an exhaustive number of public interest grounds. Relevant to this study is the ground of protection of life and health of humans, animals and plants. Article 36 TFEU may justify even discriminatory measures. However, the justification grounds shall not constitute *arbitrary* discrimination<sup>37</sup> or a disguised restriction on trade and should pass the test of proportionality (analysed in Section 2.4).<sup>38</sup> Yet, when an EU measure is intended to harmonise an area totally, recourse to Article 36 is inadmissible (Section 2.4).<sup>39</sup> Member State action is thereby pre-empted.

Even though Article 36 TFEU provides for derogations (which shall be proportionate)<sup>40</sup> from the free movement of goods rules, it is hard to see how sustainability consideration could fall under it. Notwithstanding the reference to ‘protection of health or life of humans, animals or plants’ in Article 36, the CJEU stated these derogations are narrowly construed, referring to health *stricto sensu*, and do not include environmental protection as such.<sup>41</sup>

### 2.3 Free movement of services and the freedom of establishment

The free movement of services – Article 56 TFEU – protects the rights of Member States’ nationals to provide (and receive) commercial or professional services in another Member States on a temporary basis.<sup>42</sup> The

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<sup>34</sup> Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (5th edn, Oxford University Press 2016) 172. The ‘definition of MEQR’ in *Dassonville* led to an increasing tendency of traders to invoke Article 34 TFEU as a means of challenging any rules whose effect is to limit their commercial freedom. This was the main reason for Cases C–267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I–6097 judgment in which, while upholding the previous case law regarding rules concerning the characteristics of the goods, the CJEU stated that contrary to what has been previously decided certain selling arrangements shall no longer be regarded as hindering State trade within the meaning of *Dassonville*, provided they ‘affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States’, paragraph 16. Thus, even if a national regulation is categorized as being about selling, it will still be caught by Article 34 if it has a differential impact, in law or fact, for domestic traders and importers Cases C–34–36/95 *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB* [1997] ECR I–3843, paragraph 44.

<sup>35</sup> *Dassonville* (n 29) paragraph 6.

<sup>36</sup> Commission, ‘Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement’ COM (2001) 274 final (Communication on integrating environmental considerations into public procurement); Robert Schütze, ‘From ‘Dassonville’ to ‘Cassis’: The Revolution That Did Not Take Place’ in Catherine Barnard, Albertina Albors-Llorens, Brigitte Leucht (eds.), *Cassis de Dijon: Forty Years On* (Bloomsbury Publishing, 2021) 17.

<sup>37</sup> Arbitrary discrimination occurs when imported goods are subject to more stringent compliance requirements for distribution than domestic goods Case C-4/75, *Rewe Zentralfinanz v Landwirtschaftskammer Bonn* [1975] ECR I-0843, paragraph 2.

<sup>38</sup> EEC Article 36, (TFEU Article 36); Case 72/83 *Campus Oil* [1984] ECR I-2727, paragraph 26; Stephen Weatherill, ‘Justification, Proportionality and Consumer Protection’ in Panos Koutrakos, Niamh Nic Shuibhne, Phil Syrpis (eds.) *Exceptions from EU Free Movement Law - Derogations, Justifications, and Proportionality* (Bloomsbury, 2016) 241.

<sup>39</sup> Case 190/87 *Oberkreisdirektor v Moormann BV* [1988] ECR 4689; Case 5/77 *Tedeschi v Denkavit* [1977] ECR 1555; Cases C–277, 318, and 319/91 *Ligur Carni Srl v Unità Sanitaria Locale No XV di Genova* [1993] ECR I–6621; Case C–294/92 *Commission v Italy* [1994] ECR I–4311; Case C–5/94 *R v Ministry of Agriculture, Fisheries and Food ex p Hedley Lomas (Ireland) Ltd* [1996] ECR I–2553; Case C–1/96 *R v Minister of Agriculture, Fisheries, and Food, ex p Commission in World Farming Ltd* [1998] ECR I–1251; Case C–443/02 *Nicolas Schreiber* [2004] ECR I–7275; Case C–309/02 *Radlberger Getränkegesellschaft mbH and Co and Spitz KG v Land Baden-Württemberg* [2004] ECR I–11763.

<sup>40</sup> *Campus Oil* (n 38) paragraph 25; Case 174/82 *Sandoz* [1983] ECR I-2445, paragraph 18; Case C-463/01 *Commission v Germany* [2004] ECR I-11705, paragraph 75; Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, paragraph 75.

<sup>41</sup> Case C-67/97 *Bluhme* [1998] ECR I-8033, paragraphs 33-38.

<sup>42</sup> The temporary nature of the activities in questions is to be ‘determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity, or continuity. The providers of services may equip

freedom of establishment – Article 49 TFEU – protects the rights of Member States’ nationals to take up and pursue self-employed activity or form and operate, undertakings agencies, branches or subsidiaries in any other Member State permanently.<sup>43</sup> PP laws and policies, wider practices, independent decisions taken in PP activities’ context can constitute measures in the sense of Article 56 TFEU.<sup>44</sup>

Given that services share many similarities with goods – mainly the location of the tenderer being in another Member State than the contracting authority – these two regimes are the most relevant for the PP of goods, services, and works. PP decision is less likely to affect the freedom of establishment as violations of these rules usually happen independently from PP procedures.<sup>45</sup> However, as outlined above, the regime is very similar and partly overlaps with that of services.

Similar to the public interest grounds in Article 36, Article 52 TFEU provides for a number of public interest grounds that can justify proportionate Member State measures derogating from the prohibition of restrictions of the free movement of services and the freedom of establishment.

## 2.4 Cassis de Dijon ruling

*Cassis de Dijon*<sup>46</sup> concerned a preliminary ruling on the interpretation of EEC Articles 30, 37 (on the free movement and marketing of goods) (Articles 34, 37 TFEU).<sup>47</sup> The German authorities refused to allow the sale of a French drink because it was not of sufficient alcoholic strength to be marketed as liqueur in Germany. The Court stated that the effect of such requirements is to exclude from the national market products of other Member States and that this ‘constitutes an obstacle to trade which is incompatible with [...] Article 30 of the Treaty’.<sup>48</sup>

In this case, the Court affirmed and developed the *Dassonville* ruling (Section 2) – that Article 34 TFEU could apply to national rules that lacked a discriminatory intent, but their effect restricted trade flows anyhow.<sup>49</sup> This signalled the CJEU’s willingness to extend Article 34 to indistinctly applicable measures, which are national provisions that do not discriminate against imported products in law but inhibit trade because they are different from the trade rules applicable in the country of origin<sup>50</sup> (by requiring economic operators to comply with a dual set of provisions<sup>51</sup>).<sup>52</sup> Hence, authorities may not exclude or disregard goods lawfully marketed in other

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themselves with some form of infrastructure in the host Member State (including an office, chambers, or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question’ Case C-55/94 *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 27.

<sup>43</sup> *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (n 42), paragraph 23. The self-employed individual or company integrates into another Member States economic system, such integration also involves a social aspect for these economic actors and their families. The rationale and application of the free movement of services and establishment is similar and many aspects that are regulated under the freedom of establishment provisions to which the section on the free movement of services merely refer, e.g. Article 62 TFEU (services) stipulates that Articles 51 to 54 (which regulate rights of establishment) ‘shall apply to the matters covered by this Chapter’.

<sup>44</sup> *Commission v Netherlands* (n 24); *Vestergaard* (n 24). These may include requirements for companies tendering for contracts involving data processing to be in the Italian public ownership, Case 3/88, *Commission v. Italy* (‘Re Data Processing’) [1989] ECR 4035; contract clauses demanding the use of Danish labour, *Commission v Denmark* (n 24); French limitation on bringing a labour force from Portugal to perform a contract in France, Case C-113/89, *Rush Portuguesa v. Office national d’immigration* [1990] ECR I-1417.

<sup>45</sup> *Trybus* (n 13).

<sup>46</sup> C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein*, [1979] ECR I-0649 (Cassis de Dijon).

<sup>47</sup> Regulation on the Minimum Wine-Spirit Content of Potable Spirits of 28 February 1958 (Bundesanzeiger No 48 of 11 March 1958), Article 100 (3).

<sup>48</sup> *Cassis de Dijon* (n 46), paragraph 14.

<sup>49</sup> *ibid*, paragraph 8.

<sup>50</sup> *ibid*, paragraph 15; Case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming* [1998] ECR I-1251, paragraph 41; Case C-148/85 *Direction Générale des Impôts v Forest* [1986] ECR I-3449, paragraph 14.

<sup>51</sup> Case 121/81 *Commission v United Kingdom* [1983] ECR I-203, paragraph 27-28, 30; Stephen Weatherill and Paul Beaumont, *EC Law - The Essential Guide to the Legal Workings of the European Community* (3<sup>rd</sup> ed., Penguin, 1999) 608-609; Jacques Pelkmans, ‘The New Approach to Technical Harmonization and Standardization’ (1987) 25 J. Common Mkt. Stud. 249, 3; René Barents ‘New Developments in Measures Having Equivalent Effect’ (1981) 18 CMLRev 271.

<sup>52</sup> *Craig, de Búrca* (n 32).

Member States.<sup>53</sup> This encapsulates the principle of mutual recognition, which presupposes that a product lawfully manufactured in State A should be capable of being sold in State B. This fosters the Internal Market by reducing barriers to trade.<sup>54</sup> Mutual recognition has also gained fundamental importance for the free movement of services<sup>55</sup> and for the freedom of establishment.<sup>56</sup>

Yet, besides mutual recognition, *Cassis de Dijon* also introduced the rule of reason under a non-exhaustive list of ‘mandatory requirements’ to clarify the reach of Article 34 TFEU.<sup>57</sup> The Court stated that in the absence of common rules relating to the production and marketing of products

obstacles to movement (...) resulting from disparities between the national laws (...) must be accepted [if they] may be recognised as being necessary [to] satisfy mandatory requirements relating to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.<sup>58</sup>

If a measure that affects trade is non-discriminatory<sup>59</sup> and responds to a mandatory requirement, the Court will consider proportionality to assess whether the hindrance to trade is justified. The proportionality test has two limbs.<sup>60</sup> The Court will consider whether the measure is i) suitable ii) necessary.<sup>61</sup> ‘Suitability’ requires that measures have a causal connection with the attainment of the objective. This criterion gives the CJEU a means of acting against national measures that are protectionist but are presented as being necessary to protect legitimate interests.<sup>62</sup>

Under ‘necessity’ the Court will consider whether the measure represents the least restrictive means of obtaining the objective.<sup>63</sup> The concept of necessity implies a less strict causal relationship than ‘indispensable’ and less flexibility than ‘useful’.<sup>64</sup> Possible alternative instruments would be assessed to evaluate whether they would or would not protect the interest equally efficiently.<sup>65</sup> For example, in *Cassis*, the Court reasoned that

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<sup>53</sup> Mutual recognition is also reflected in the current PP Directives, which will be analysed in Section 6. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65, Recitals 1, 74.

<sup>54</sup> Susanne K. Schmidt, ‘Mutual Recognition as a New Mode of Governance’ (2007) 14 JEPP 667; Dagne Sabockis, *Competition and Green Public Procurement in EU Law – a Study under Directive 2014/24/EU* (Jure Förlag, 2022) 54.

<sup>55</sup> Case 16/78 *Choquet* [1978] ECR I-2293, paragraph 8; Joined Cases 110/78 and 111/78, *Van Wesemael* [1979] ECR I-35, paragraphs 28–30; Case 279/80, *Webb* [1981] ECR I-3305, paragraphs 17–20.

<sup>56</sup> Case C-153/02, *Valentina Neri v. European School of Economics* [2003] ECR I-13555, paragraphs 42–43. See also Case 2/74 *Reyners* [1974] ECR I-631, paragraph 25; - Benedetto Brancoli Busdraghi, ‘Mutual recognition, deregulation and harmonization: an everlasting dilemma’ (2021) 2 *Rivista Della Corte Dei Conti* 58.

<sup>57</sup> Case 286/81, *Oosthoek*, [1982] ECR I-4575, Opinion of AG VerLoren van Themaat, 1.3; Eric L. White, ‘In search of the Limits to Article 30’ (1989) 26 *CMLR* 235.

<sup>58</sup> *Oosthoek* (n 57) paragraph 14.

<sup>59</sup> Case 788/79 *Gilli* [1979] ECR I-2071 paragraph 6; Case 113/80, *Commission v Ireland* [1981] ECR I-1625, paragraph 10.

<sup>60</sup> Some scholars regard proportionality as a three-limb test. The third part of the test being proportionality *stricto sensu*, which states that a measure would be disproportionate if the impact of the measure on intra-EU trade is excessive relative to the intended objective or the result to be achieved. Jan H. Jans, ‘Proportionality Revisited’ (2009) 27 *Leg. Issues Econ. Integr.* 239. See also Walter van Gerven, ‘The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe’ in Evelyn Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 38.

<sup>61</sup> Case T-125/96 *Boehringer v Council and Commission* [1999] ECR II-03427, paragraph 73; Case C-312/89, *Union départementale des syndicats CGT de l’Aisne v Conforama and Others* ECR I-0997, Opinion AG Van Gerven, paragraph 14; Case C-145/88 *Torfaen Borough Council v B & Q PLC* [1989] ECR I-3851, paragraph 15; Case C-234/03, *Contse and Others* [2005] ECR I-9315 paragraph 25.

<sup>62</sup> Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 75.

<sup>63</sup> Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32.

<sup>64</sup> Jans (n 60).

<sup>65</sup> *Cassis de Dijon* (n 46) paragraph 13; Case C-331/88, *The Queen v Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraph 96; Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4863, paragraph 41.



consumers could have been protected by a requirement to ‘display [...] the alcohol content on the packaging of products’ which would have been less restrictive than mandating minimum alcohol content.<sup>66</sup>

Mandatory requirements are distinct from Article 36 TFEU justifications.<sup>67</sup> The latter are Treaty-based, can potentially justify discriminatory and non-discriminatory measures and list the justification grounds exhaustively.<sup>68</sup> Mandatory requirements are case-law based, therefore subsequent case-law may add mandatory requirements to the list created in *Cassis* (as shown below) and apply only to non-discriminatory measures. However, both require that the measure satisfies the proportionality test.<sup>69</sup>

It is important to note that the Court stated that the reasoning applied ‘in the absence of common rules’.<sup>70</sup> The *Cassis de Dijon* mandatory requirement would only be relevant when there is no exhaustively-harmonised EU measure on the matter.<sup>71</sup> Therefore if a PP area is covered by a framework exhaustively harmonising legislation on the standards of a particular good, then states will not be able to rely on mandatory requirements where their PP policies affect trade in that particular category of goods.<sup>72</sup> In the case of minimum harmonization, Member States are permitted to maintain and introduce more stringent regulatory standards than those prescribed by the EU law, provided that such standards are compatible with the TFEU.<sup>73</sup> CJEU’s point of departure is that, in the absence of harmonisation measures, each Member State is considered competent to conceive rules that will be valid in its own territory<sup>74</sup> as long as they compatible with the TFEU free movement provisions.<sup>75</sup>

The classical test to which the CJEU has systematically submitted every non-discriminatory national measure since *Cassis de Dijon* that could hinder the free movement of goods is summarised by Janssens as follows:<sup>76</sup> it first checks whether there is no exhaustively harmonised European measure on the matter that prevents the Member State from regulating. Second, whether the Member State has invoked an acceptable mandatory requirement. Thirdly, whether the national measure is proportionate to satisfy the mandatory requirement. The test is aimed at ensuring that free movement and mutual recognition are counterbalanced with interests that are deemed worthy of protection from a Member State’s perspective.

An important matter affirmed in a subsequent CJEU judgement, in line with which sustainability considerations may be included in PP, is that the protection of the environment is a mandatory requirement.<sup>77</sup> This suggests that it may be lawful, under the *Cassis*-test, to include environmental considerations that impact the import of goods when regulating PP. However, these shall be subject to non-discrimination and proportionality requirements. As the analysis has shown, this ensures that intra-EU trade is not restricted.

The implications of the ‘*Cassis*-test’ and sustainability aspects in PP will be further analysed in Section 6.

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<sup>66</sup> *Cassis de Dijon* (n 46) paragraph 13.

<sup>67</sup> Alberto Quintavalla, Orlin Yalnazov, ‘The Death of Law: Mandatory Requirements and Environmental Protection’ (2021) 13 Eur. J. Legal Stud. 9, 17.

<sup>68</sup> Stefan Enchelmaier, ‘Article 36 TFEU: General’ in Peter Oliver (ed), *Oliver on Free Movement of Goods in the European Union* (5th ed., Hart Publishing, 2010) 216.

<sup>69</sup> Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) (2021) OJ C100/38, 7.4.

<sup>70</sup> *Cassis de Dijon* (n 46) paragraph 8.

<sup>71</sup> *Cassis de Dijon* (n 46) paragraph 8; *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming* (n 50), paragraph 41; *Direction Générale des Impôts v Forest* (n 50), paragraph 14.

<sup>72</sup> Brigitte Pircher, ‘EU public procurement policy: the economic crisis as trigger for enhanced harmonisation’ (2020) 42 Journal of European Integration 509.

<sup>73</sup> *Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB* (n 34) paragraphs 32-35; Michael Dougan, ‘Minimum Harmonization and the Internal Market’ (2000) 37 CMLRev 853, 855.

<sup>74</sup> Consolidated Version of the Treaty on European Union [2012] OJ C 326/13, Article 5 (2).

<sup>75</sup> Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013) 39.

<sup>76</sup> *ibid.* See also C-148/78 *Ratti* [1979] ECR I-1629, paragraph 36.

<sup>77</sup> Case 302/86 *Commission v Denmark* [1988] ECR I-4607, paragraph 9. Environment protection can be classified under SDG 13, Transforming our world: the 2030 Agenda for Sustainable Development UNGA Res 70/1 (25 September 2015).

## 2.5 Dundalk ruling

The *Dundalk* case provides an example of the direct application of the Treaty free movement rules to the PP process.<sup>78</sup> This case was decided after the adoption of the first EU PP Directives, however, it is relevant because it illustrates how the EU primary law applies directly to PP. At that time, public works contracts awarded for water services were outside the scope of the PP Directives.<sup>79</sup>

In *Dundlak* the Court declared measures that favour domestic products and are discriminatory in their effect unlawful, violating (what is now) Article 34 TFEU.<sup>80</sup> In that case, the technical specifications for the Dundalk Water Supply PP contract required that certain pipes to be used in construction works should comply with Irish national standards.

The Court stated that such practices restrict access to PP for tenderers from other Member States, contrary to (what is now) Article 34 TFEU, which indicates that the lawfulness of technical specifications must be assessed by reference to the fundamental rules of the Treaty.<sup>81</sup> The CJEU highlighted that even in the absence of a directive, the main Treaty provisions<sup>82</sup> relevant to PP are binding and enforceable without the need for implementing measures by Member States.<sup>83</sup> This includes those contracts which are outside the scope of the EU procurement directives (for example, because their value is below the financial thresholds for the EU directives to apply).<sup>84</sup>

The technical specifications of the contract in *Dundalk* were indistinctly applicable to both imported and domestic products, in law. However, in practice, only one firm – an Irish firm – produced products compliant with the required technical specification based on an Irish national standard.<sup>85</sup> The CJEU found this requirement to be discriminatory since it is more likely that products from Ireland would comply with the Irish standard, which would make tenderers who produce or utilise pipes of an equivalent standard refrain from tendering.<sup>86</sup> The ruling specified that such indication is permissible if the technical specifications are accompanied by the words ‘or equivalent’ where the authorities are unable to describe the subject of the contract.<sup>87</sup>

Thus, the prohibition on discriminatory measures for product characteristics covered by what is now Article 34 TFEU prevents defining technical specifications in a way that excludes products that can meet the government’s requirements. Accordingly, they must not be defined in a way that restricts trade and denies suitable products access to national markets.<sup>88</sup>

As there has been a traditional protectionist tendency in many Member States to award PP contracts to domestic national industries and service providers, trade barriers to intra-EU PP were difficult to remove just by regulating free movement principles in the primary EU law.<sup>89</sup> Moreover, it was difficult to prove

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<sup>78</sup> Case C-45/87 *Commission of the European Communities v. Republic of Ireland* [1988] ECR I-4929 (*Dundalk*).

<sup>79</sup> Council Directive 71/305 of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts [1971] OJ L185/5, Article 3.

<sup>80</sup> *ibid.*

<sup>81</sup> *Dundalk* (n 78) paragraph 16; Christopher Vajda, ‘Law as a Tool to Build Cross-Border Markets: The Experience of the Court of Justice of the EU in opening up Government Contracts’ (2018) 47 PCLJ 357.

<sup>82</sup> EEC, Articles 28-30 (TFEU, Articles 34-36).

<sup>83</sup> Case 26/62 *Van Gend en Loos* [1963] ECR I-0003; Case 6/64 *Costa v E.N.E.L.* [1964] ECR I-1141.

<sup>84</sup> Arrowsmith (n 2), 211; Carina Risvig Hansen, *Contracts Not Covered, or Not Fully Covered, by the Public Sector Directive* (DJØF Publishing, 2012); Francois Lichère, ‘Public Procurement Contracts below EU thresholds and Annex II B Services France’ Dacian Dragos and Roberto Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?* (DJØF Publishing, 2012) 98.

<sup>85</sup> *Dundalk* (n 78) paragraph 20.

<sup>86</sup> *ibid.*; Visiola Pula, ‘Public Procurement in the Internal Market: Free Movement of Goods and Freedom to Provide Services’ Study Paper 6/15 (Institute for European Integration 2015) 24.

<sup>87</sup> *Dundalk* (n 78) paragraph 7.

<sup>88</sup> Sue Arrowsmith, *The Law of Public and Utilities Procurement*, (1st edn, Sweet & Maxwell, 1996), 85.

<sup>89</sup> Friedl Weiss, *Public Procurement in European Community Law* (Athlone 1993) 33-34; Case C-95/10 *Strong Segurança* [2011] ECR I-1865, paragraphs 37-41.

discriminatory treatment. If the contract was awarded to a national firm, it was difficult to establish whether the award was made for commercial or national preference reasons.<sup>90</sup>

Further, trade barriers did not arise merely by cause of discriminatory conduct. They also arose from entrenched fragmentation of national PP markets and a lack of detailed regulation of the PP procedures.<sup>91</sup> Fragmentation would result in different standards for e.g. construction materials for public infrastructure works. Accordingly, a product that complied with the standards of State 1, could be considered non-compliant by State 2, thus being denied market access. The lack of EU-wide regulation of PP procedures, characterised by discrepancies in national PP regulation (which presupposed different time limits, procedural requirements, advertising rules, tender/tenderer requirements), reduced the possibilities for foreign tenderers to be compliant with the requirements of a national call for a bid.<sup>92</sup>

As the Treaty provisions were considered insufficient to open PP markets, the EU legislator<sup>93</sup> adopted a set of secondary law instruments – directives – that aimed to promote the Internal Market and to regulate in more detail the EU PP (discussed in the next section).<sup>94</sup>

### 3. First secondary law (1970s-1990s)

There are two main instruments to facilitate intra-EU trade. As it has been shown in the previous Section, the first one is negative and deregulatory – the Treaty rules on free movement entail the prohibition of barriers to trade, which is an important starting point for opening-up PP markets.

However, this prohibition can hardly achieve its purpose if not supported by ‘means of positive market integration’ to abolish barriers to intra-EU trade.<sup>95</sup> Such barriers can be caused by diverse national rules (exemplified above) and can be overcome by approximating diverse national provisions through EU directives.<sup>96</sup> The Council, acting unanimously on a proposal from the Commission, issued, *inter alia*, directives.<sup>97</sup> Directives are binding legal instruments upon each Member State and leave the choice of form and methods on the result to be achieved to national authorities.<sup>98</sup> The first EU directives set out a timetable and procedures for eliminating restrictions to trade.<sup>99</sup> This legislation is called secondary because it depends on the primary legal bases in the TFEU.<sup>100</sup>

The first PP directives regulated the PP of goods through Directive 70/32 (which covered solely the public purchase of goods);<sup>101</sup> the PP of works through Directive 71/305; and public supply contracts (which covered more types of public contracts regarding the delivery, including siting and installation of products) through

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<sup>90</sup> Sue Arrowsmith, *Remedies for Enforcing the Public Procurement Rules* (Earlgate Press 1993); Kees Gelderman, Paul Ghijsen, Jordie Schoonen, ‘Explaining Non-Compliance with European Union Procurement Directives: A Multidisciplinary Perspective’ (2010) 48 *JCMS* 243.

<sup>91</sup> Commission, ‘Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation’ SEC (2011) 853 final, Part 1.

<sup>92</sup> José Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (Clarendon Press, 1996) 10.

<sup>93</sup> The legislative bodies of the EU are the Commission, the Council, and the European Parliament. The author will refer to them as ‘the EU legislator’, Articles 14, 16 and 17 Consolidated Version of the Treaty on European Union [2012] OJ C326/25 (TEU).

<sup>94</sup> Commission, ‘Information Memorandum: Award of public works contracts’ P-48/64 (1964); Economic and Social Committee, ‘Proposal for a first Council Directive on the coordination of procedures for the award of public works contracts’ OJ L174/ 2745; C-158/80, *Rewe v Hauptzollamt Kiel*, ECLI:EU:C:1981:163.

<sup>95</sup> Craig, de Búrca (n 32) 582; Arrowsmith (n 2) 121-123.

<sup>96</sup> EEC Article 100 (TFEU, Article 115) (and other more sector-specific articles: EEC Articles 37, 54, 57, 75, TFEU Articles 43, 50, 53, 91). The EEC did not define the term ‘approximation’, yet Article 101 EEC suggests that ‘approximation’ aims to eliminate ‘disparities existing between the legislative or administrative provisions of the Member States’ through the adoption of Directives.

<sup>97</sup> *Ibid.*

<sup>98</sup> EEC, Article 189 (TFEU, Article 228); C-433/93, *Commission v Germany*, ECLI:EU:C:1995:263.

<sup>99</sup> EEC, Article 100 (TFEU, Article 115).

<sup>100</sup> The legal bases for the EU institutions to introduce more specialised ‘secondary’ legislation in the EEC: Articles 57, 66, 100 (now Articles TFEU 53 (2), 62, 114) are most relevant for PP legislation.

<sup>101</sup> Commission Directive 70/32/EEC of 17 December 1969 on provision of goods to the State, to local authorities and other official bodies [1970] OJ L13/1.

Directive 77/62.<sup>102</sup> The regulation of the services sector by secondary legislation came much later and will be discussed in Section 4.<sup>103</sup>

These directives sought to promote the Common Market by eliminating rules or practices that affected foreign tenderers' participation in national PP and introducing transparency requirements to ensure that arbitrary decision-making were eliminated from PP procedures.<sup>104</sup>

Regarding the monitoring role of transparency, the Recitals to Directive 77/62 stated that the prohibition of discrimination should be supplemented by 'a degree of transparency allowing the observance of such prohibition to be better supervised'. These Recitals illustrate the monitoring function of transparency and probably indicate the rationale behind Directive 71/305 (which did not specifically refer to the role of transparency, but required the publication of contract notices EU-wide) was also to ensure non-discrimination by monitoring compliance with it.<sup>105</sup> Transparency was meant to limit the discretionary powers of authorities within sufficiently strict bounds for any arbitrary element to be avoided when awarding PP contracts.<sup>106</sup>

The Directives applied just to PP procedures above certain thresholds.<sup>107</sup> Public contracts under specified thresholds were and are, however, caught by the Treaty provisions (Section 2).<sup>108</sup>

The instruments through which the PP Directives supported the EU PP objectives will be analysed in the next sections. As explained above, to do so, this paper will discuss technical specifications, selection criteria, and award criteria under each legal reform of the EU PP system. This will allow tracking the focus of the EU regulation of PP and determine the 'weight' given to sustainability aspects in PP.

### 3.1 Technical Specifications

Recital 8 to Directive 77/62 prohibited technical specifications with discriminatory effect, while Directive 71/305 did not allow Member States to introduce technical specifications which mention 'products of a specific make or source (...) which favour or eliminate certain undertakings'.<sup>109</sup> Directive 70/32, under Article 3, prohibited technical specifications indistinctly applicable to domestic products and imported products where they had a restrictive effect on trade.

The Directives imposed a general obligation of EU-wide advertisement of PP contracts and required authorities to grant access to PP information by publicising a contract notice with the technical specifications.<sup>110</sup> The key reason for introducing the advertising of contracts – transparency – as a PP requirement at the EU level was to support the non-discrimination obligation by ensuring 'for the benefit of any potential tenderer, a degree of advertising sufficient to enable [...] impartiality of the procedures to be reviewed'.<sup>111</sup> As confirmed by the

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<sup>102</sup> Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts [1977] OJ L13/1, Article 3 (1).

<sup>103</sup> Arrowsmith (n 2) 182.

<sup>104</sup> Commission, 'Information Memorandum: Proposal for a Directive Coordinating Procedures for Concluding Public Supply Contracts' P-9/71 (1971) (Commission Memorandum).

<sup>105</sup> Directive 71/305, Article 12. Sue Arrowsmith, 'The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies' (2011-2012) 14 CYELS 1.

<sup>106</sup> Commission Memorandum (n 104).

<sup>107</sup> Case C-160/08 *Commission v Germany* [2010] ECR I-3713, paragraphs 18, 27; Case C-318/15 *Tecnoedi Costruzioni*, EU:C:2016:747, paragraph 15.

<sup>108</sup> *Commission v Netherlands*, (n 19); *Dundalk* (n 78).

<sup>109</sup> Directive 71/305, Article 10 (2).

<sup>110</sup> Directive 71/305, Articles 3, 10, 12; Directive 77/62, Article 9.

<sup>111</sup> Arrowsmith (n 2) 264; Peter Braun, 'A matter of principle(s) - the treatment of contracts falling outside the scope of the European public procurement directives' (2000) 1 PPLR 39, 42; Matthias Krugner, 'The principles of equal treatment and transparency and the Commission Interpretative Communication on Concessions' (2003) 5 PPLR 181, 193.

CJEU, the purpose of the obligation of transparency was to make it possible to verify compliance with the principle of non-discrimination.<sup>112</sup>

These provisions clearly suggest that the technical specifications' main purpose was to eliminate barriers to national PP contracts for foreign tenderers. The PP Directives provisions on technical specifications made no reference to sustainability aspects at all, which indicates this was not the focus of the EU legislator at that time.

### 3.2 Selection criteria<sup>113</sup>

The 1970s Directives aimed to add objectivity to the selection criteria. Directive 71/305 mentioned the following criteria for tenderers' qualitative selection: proof of the contractor's financial and economic standing,<sup>114</sup> technical knowledge,<sup>115</sup> and registration in a national professional or trade register.<sup>116</sup> All these criteria had to be published in the contract notice (transparency).<sup>117</sup>

These criteria permitted the authority to evaluate the human and technical resources as well as the reliability and skills of a candidate to perform the contract.<sup>118</sup> With pre-established selection criteria, discriminatory measures could not be concealed behind a cloak of subjective decision-making.<sup>119</sup> Therefore, transparent and objective selection criteria aimed to limit the discretion of authorities and monitor the compliance with non-discrimination.<sup>120</sup>

Yet, PP could be used by governments to achieve certain narrower social policy functions, such as relieving unemployment, through selection criteria.<sup>121</sup> These decisions hinder intra-EU trade when they negatively impact foreign tenderers' participation in national PP.<sup>122</sup> In the 1980s the CJEU examined a case in which it considered whether (what is nowadays) a sustainability aspect – the promotion of employment<sup>123</sup> – might be considered a criterion for tenderers' selection. In the *Beentjes* case, the Court concluded that such an aspect could be considered if it was mentioned in the contract notice and was considered consistent with Directive 71/305 by the national courts.<sup>124</sup> The CJEU stated that authorities are free to exclude bidders on certain 'additional specific conditions', if those conditions were non-discriminatory and transparent.<sup>125</sup> Such clauses could be discriminatory when only tenderers from the state concerned could comply with them.<sup>126</sup> The CJEU did not suggest that authorities could exclude tenderers based on sustainability aspects of that was detrimental to the Internal Market;<sup>127</sup> it merely emphasised the Member States' national discretion to decide on the

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<sup>112</sup> Case C-324/98 *Telaustria and Telefonadress* ECR I-10745, paragraphs 60, 61; Case C-6/05 *Medipac - Kazantzidis*, [2007] ECR I-4557, paragraph 42. In Case C-275/98 *Unitron Scandinavia and 3-S* [1999] ECR I-8291, paragraph 31 the Court held that non-discrimination implies 'an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with'.

<sup>113</sup> Selection criteria refer to tenderers and their professional or financial capacity to perform a certain contract. They are intended to ensure the suitability of an economic operator as a contractual partner of a contracting authority. Steen Treumer, 'Exclusion, Qualification and Selection of Candidates and Tenderers in EU Procurement' in Martin Burgi, Martin Trybus, and Steen Treumer (eds.), *Qualification, Selection and Exclusion in EU procurement* (DJØF 2016) 15.

<sup>114</sup> Directive 71/305, Article 25.

<sup>115</sup> Directive 71/305, Article 26.

<sup>116</sup> Directive 71/305, Article 24.

<sup>117</sup> Directive 71/305, Article 16. Similar provisions were adopted under Directive 77/62, Articles 13, 19-24.

<sup>118</sup> Abby Semple, *A Practical Guide to Public Procurement* (1st ed., Oxford University Press, 2015), 189.

<sup>119</sup> As stated in Joined Cases C-27-29/86, *CEI v Association intercommunale pour les autoroutes des Ardennes* [1987] ECR 3347; Arrowsmith (n 2) 31; Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (1st ed., Oxford University Press, 2016) 67.

<sup>120</sup> Adrian Brown, 'EU Primary Law Requirements in Practice: Advertising, Procedures and Remedies for Public Contracts outside the Procurement Directives' (2010) 19 PPLR 169.

<sup>121</sup> McCrudden (n 5) 25.

<sup>122</sup> Case C-31/87 *Beentjes v State of the Netherlands*, [1988] ECR I-4635, paragraph 37.

<sup>123</sup> 2030 Agenda for Sustainable Development (n 77), SDG 8.

<sup>124</sup> *Beentjes* (n 122), paragraphs 20, 37.

<sup>125</sup> *Ibid*, paragraph 37.

<sup>126</sup> *Ibid*, paragraph 30.

<sup>127</sup> Roberto Caranta, 'Sustainable Public Procurement in the EU' in Roberto Caranta and Martin Trybus (eds.), *The Law of Green and Social Procurement in Europe* (DJØF Publishing 2010) 20.

accommodation of social sustainability in PP, which is a common PP objective for many States, as long as these decisions are objective, non-discriminatory and do not hinder intra-EU PP.<sup>128</sup> This suggests that the Internal Market concerns of free movement were at the core of the CJEU's reasoning.<sup>129</sup>

The accommodation of sustainability aspects in selection criteria was also considered by the CJEU in *Du Pont de Nemours*.<sup>130</sup> This case regarded an Italian law obliging authorities to procure 'at least 30 per cent of the material needed [for PP] from industrial, agricultural and artisan companies' established in Mezzogiorno.<sup>131</sup> These represent contractual requirements laid down by the procuring entity that are reserved solely for certain groups of suppliers (reserved contracts).<sup>132</sup> These provisions indicate that the accommodations of social sustainability was one of the objectives of the Italian PP system, as promoting economic growth and mitigating unemployment is classified today as an SDG.<sup>133</sup>

Such sustainability considerations in national PP were declared incompatible with the Internal Market principles. The CJEU, in its preliminary ruling in *Du Pont de Nemours*, stressed that such measures had an equivalent effect to a quantitative restriction under Article 30 EEC (now 34 TFEU).<sup>134</sup> The CJEU concluded that reserving the award of PP contracts for firms from low-income regions, favours goods processed in those regions, thus discriminating against foreign products and hindering the normal course of intra-EU trade.<sup>135</sup> The Court underlined that such measures could be justified when applicable to domestic products and imported products without distinction.<sup>136</sup>

Common Market rules had precedence over PP sustainability policies, and selection criteria were subordinated to the Common Market principle of non-discrimination.<sup>137</sup> Sustainability aspects could be applied to the extent that they complied with these principles.<sup>138</sup>

### 3.3 Award criteria<sup>139</sup>

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<sup>128</sup> T-14/96 *BAI v Commission* [1999] ECR II-0139 regarded a case where the Basque authorities concluded an agreement with a Spanish shipping company, providing that the latter would ensure the crew, the goods and catering services on board the vessel were procured from the Basque Country. The authorities undertook to buy 46.500 travel vouchers that were to be used, as part of a social programme, for certain low-income groups. Also in this case, the CJEU stated that such PP arrangements were incompatible with the internal market free movement rules, as the government made a purchase for which it had no genuine need on excessively favourable terms, paragraphs 66-71. For a discussion on national objectives aiming relieving unemployment see Fabrizio Barca, 'New Trends and the Policy Shift in the Italian Mezzogiorno' (2001) 1 Italy: Resilient and Vulnerable: The European Challenge 93; Aldo Servidio, Ignazio Scotto *Commentario della legislazione per il Mezzogiorno* (Italedi, 1972) 143; Christoph Arhold, 'The Case-Law of the European Court of Justice and the Court of First Instance on State Aids in 2003/2004' (2004) 3 *EstAL* 167.

<sup>129</sup> *ibid*, as underlined by Caranta in Caranta and Trybus (n 127), *Beentjes*, cannot be regarded as completely unconditional support for inserting sustainability aspects in PP; Sabockis (n 54) 134.

<sup>130</sup> Case 21/88, *Du Pont de Nemours Italiana SpA v Unita Sanitaria Locale No.2 Di Carraraè* [1990] ECR I-0889 (*Du Pont de Nemours*).

<sup>131</sup> Legge 1 marzo 1986, n. 64, Articles 17 (16), (17); Aldo Servidio, Ignazio Scotto *Commentario della legislazione per il Mezzogiorno* (Italedi, 1972) 143.

<sup>132</sup> Sue Arrowsmith, 'A taxonomy of horizontal policies in public procurement' in Sue Arrowsmith, and Peter Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press, 2009) 109.

<sup>133</sup> 2030 Agenda for Sustainable Development (n 77) SDG 8.

<sup>134</sup> *Du Pont de Nemours* (n 130) paragraph 18.

<sup>135</sup> *Ibid*, paragraph 11.

<sup>136</sup> *Ibid*, paragraph 14.

<sup>137</sup> *Du Pont de Nemours* (n 130), paragraph 11; *BAI v Commission* (n 128), paragraph 15; Peter Braun, 'Selection of bidders and contract award criteria: the compatibility of practice in PFI procurement with European law' (2001) 10 *PPLR* 1.

<sup>138</sup> Sue Arrowsmith, 'The Legality of "Secondary" Procurement Policies under the Treaty of Rome and the Works Directive' (1992) 1 *PPLR* 414; Catherine Weller and Janet Meissner Pritchard, 'Evolving CJEU Jurisprudence: Balancing Sustainability Considerations with the Requirements of the Internal Market' (2013) 8 *EPPPLR* 55.

<sup>139</sup> Award criteria define preferences for contract performance and define the method to compare tenderers' specific proposals for carrying out the contract as well as their costs. They represent the basis on which bidders compete and evaluators make their decisions. See Trepte (n 28) 92.

Under Directive 71/305, authorities could apply one of two criteria to award the contract – ‘the lowest price’ or ‘the most economically advantageous tender’ (MEAT).<sup>140</sup> MEAT included a (non-exhaustive) list of factors<sup>141</sup> chosen by the contracting authority, such as ‘price, period for completion, running costs, profitability, or technical merit’.<sup>142</sup> As confirmed by the CJEU, authorities could use MEAT as an award criterion, provided that the factors were mentioned in hierarchical order in the contract notice.<sup>143</sup> This allowed tenderers and interested parties to clearly ascertain their weight. The Court mentioned that factors that had no relevance in determining MEAT by reference to objective criteria involved an element of arbitrary choice and were incompatible with the EU directives.<sup>144</sup> This suggests that the main aim of the award criteria in the 1970s directives was to ensure objective and transparent rules to eliminate protectionist decision-making when determining the winner of PP procedures.<sup>145</sup> Through transparency and objectivity, the functions of the EU Common Market were facilitated, as they enhanced intra-EU trade.<sup>146</sup>

Despite the PP Directives’ objectives to promote the Common Market, little attempt was made to enforce their rules.<sup>147</sup> Besides, the 1970s directives failed to cover large areas of the utilities sectors – water, transport, energy and telecommunications<sup>148</sup> which constituted important barriers to trade by cause of discriminatory practices.<sup>149</sup> These factors meant that the original PP secondary legislation inevitably had only a marginal impact.<sup>150</sup> For this reason, in 1985, the Commission introduced the White Paper for the completion of the Internal Market, which aimed at, *inter alia*, addressing the non-tariff barriers that could distort free movement within the Internal Market.<sup>151</sup> The implications of this reform for the EU PP system will be analysed below.

#### 4. After the Single European Act: The Directives of the 1990s

In 1986, the Single European Act<sup>152</sup> (SEA) was adopted, and it contained new procedures designed to facilitate the adoption of legislation to complete the Internal Market.<sup>153</sup>

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<sup>140</sup> Directive 71/305, Article 29.

<sup>141</sup> Case C-324/93 *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith* [1995] ECR I-0563, paragraph 41.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Beentjes* (n 122) paragraph 19.

<sup>144</sup> *Ibid.*, paragraph 37.

<sup>145</sup> Case C-19/00 *SIAC Construction*, [2001] ECR I-7725, paragraphs 41-42; Christopher Bovis, *The Law of EU Public Procurement* (2nd ed., Oxford University Press, 2015).

<sup>146</sup> C-199/85 *Commission v Italy*, [1987] ECR I-1039, paragraph 16.

<sup>147</sup> White Paper (n 11).

<sup>148</sup> Arrowsmith (n 2) 183; Stephen Woolcock, ‘Procurement in European utilities: Towards more open markets?’ (1991) 1 *Utilities Policy* 116, 117.

<sup>149</sup> Commission, ‘The “cost of non-Europe” in public-sector procurement’ vol. 5 (1988) 4.2.

<sup>150</sup> Paolo Cecchini, *The European Challenge 1992* (Gower 1988) 65.

<sup>151</sup> White Paper (n 11), 6

<sup>152</sup> The Single European Act [1987] OJ L 169/1 (SEA).

<sup>153</sup> The SEA introduced two major legislative changes, which are now regulated under Articles 26 and 114 TFEU, Treaty on European Union [1992] OJ C 191/1, Articles 14, 95. To achieve the objectives set in Article 26 TFEU – the functioning of the Internal Market – Article 114 TFEU empowered the enactment of directives and regulations (the later are binding legal acts in their entirety and directly applicable in all Member States, Article 288 TFEU) made by *ordinary legislative* procedure, for the approximation of laws of the Member States that affect the establishment of the Internal Market, SEA (n 153), Article 18. Under the EEC, the enactment of directives required unanimity – Article 115 TFEU (Section 3) which constituted a major difficulty in approximating Member States’ laws, Craig, de Búrca (n 32) 598. Article 114 TFEU is *lex generalis* and Article 115 TFEU is *lex specialis*, and it applies without prejudice to Article 114 TFEU, Manuel Kellerbauer, ‘Approximation of Laws’ in Manuel Kellerbauer et al (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (1st ed., Oxford University Press, 2019) 1231. Article 114 (10) TFEU, states that harmonisation measures may concern the safeguard clause, which authorises States to take, for one or more grounds referred to in Article 36 TFEU, provisional measures subject to EU control procedures. Safeguard clauses are to be interpreted strictly, and their aim is to enable the State to cope in crisis situations. Case 11/82 *Piraiki - Patraiki v. Commission*, [1985] ECR I-207, paragraph 26; Joanna Osiejewicz, ‘The Opt-out-Clause of Article 114 TFEU: Remarks on the Judgment of the General Court of 7 March 2013 - Republic of Poland v. European Commission (Case T-370/11)’ (2016) 154 *Studia IURIDICA AUCTORITATE Universitatis Pecs PUBLICATA* 161.

The most relevant aspect for PP introduced by the White Paper was the adoption of an action programme and a timetable for opening-up PP markets in the sectors excluded from the scope of Directive 77/62 and Directive 71/305 (which were replaced by the subsequent legislation).<sup>154</sup> Six new directives were adopted to regulate PP in various sectors:

Directive 93/37<sup>155</sup> on public works;

Directive 93/36<sup>156</sup> on public supplies;

Directive 92/50<sup>157</sup> extended the regime to services PP, which had not been regulated until then. The directive applied only to services based on PP contracts, excluding the provision of services on other bases (e.g. employment contracts).<sup>158</sup>

Directive 93/38<sup>159</sup> on public utilities coordinated the PP procedures of entities operating in the water, energy, transport and telecommunications. This sector was excluded from the scope of EU regulation until the adoption of the White Paper.

To ensure that the above Directives can be effectively enforced, Directive 89/665 was adopted to coordinate remedies for public supply and public works contracts, and Directive 92/13 was adopted to coordinate remedies in the utilities sector.<sup>160</sup> The Directives on remedies secured that the rules of the substantive directive could be effectively enforced in the national courts, which ensured that Internal Market rules were respected and applied correctly.<sup>161</sup> This facilitated intra-EU trade.

These directives applied to PP contracts where the value of the contract exceeded stated thresholds and where the contract was awarded by the state, regional or local authorities and legal persons governed by public law.<sup>162</sup> In the utilities sectors, the directive applied to 'bodies governed by public law', given the heterogeneous regulation of the utilities sector EU-wide.<sup>163</sup>

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<sup>154</sup> White Paper (n 11), 81-87. Directive 71/305 on public works and Directive 77/62 on public supply contracts were replaced by Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts [1989] OJ L210/1 and Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC [1988] OJ L127/1 respectively. The two new directives merely amended the original texts of the replaced directives, without implementing a new consolidated text, which meant that the texts were complex and difficult to piece together. Soon afterwards Directive 93/37 and Directive 93/36 were adopted to consolidate the existing PP secondary law, Arrowsmith (n 2) 184.

<sup>155</sup> Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts [1993] OJ L199/54.

<sup>156</sup> Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts [1993] OJ L199/1.

<sup>157</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1992] OJ L209/1.

<sup>158</sup> Directive 92/50 Preamble.

<sup>159</sup> Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L199/84.

<sup>160</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33; Similar provisions were adopted for remedies in procurement procedures utilities sectors by Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L76/14.

<sup>161</sup> Fernandez (n 92) 206.

<sup>162</sup> Directive 93/38, Article 14; Directive 92/50, Article 7; Directive 93/37, Article 3.

<sup>163</sup> Directive 93/38, Article 1 (1). Some of the utilities sectors are privatised. However, utilities, either in the form of a state-controlled or a privatised enterprise, are subject to the PP directives. This is because companies directed by private law created for the explicit function of meeting needs in the general interest, not having industrial or commercial character, holding legal personality; are financed by public authorities or other 'entities governed by public law'; or are subject to supervision by the latter, or have an administrative/managerial board consisting of +50 % members appointed by public authorities or other entities governed by public law, are deemed 'contracting authorities' for the purposes of PP Directives. Joined Cases C-223/99, C-260/99, *Agorà and Excelsior* [2001] ECR I-3605, paragraph 32; Christopher Bovis, 'The



## 4.1 Technical specifications

In the 1990s, the EU legislator expressly provided for the EU-wide recognition of equivalent standards already established under the CJEU jurisprudence (Section 3.1). The 1990s directives provided that ‘technical specifications shall be defined by reference to national standards implementing European standards or by reference to European technical approvals’.<sup>164</sup> The Directives stated that when national standards were referred to, a tender could not be rejected where it satisfied in an ‘equivalent manner’ the technical specifications’ requirements.<sup>165</sup> These provisions ‘cemented’ the obligation to avoid technical barriers frustrating the benefits of an integrated Internal Market<sup>166</sup> and facilitated the participation of foreign tenderers<sup>167</sup> through the prohibition of discrimination.<sup>168</sup> As stated later by the CJEU, ‘the aim of the directives is to avoid (...) the risk of preference being given to national tenderers’.<sup>169</sup> Accordingly, authorities could not exclude bids that offered equivalents for reasons of non-discrimination. This was monitored through transparency requirements.<sup>170</sup>

A further means to secure non-discrimination was to favour competition. As stated by the CJEU:

“the basic aim of [Directive 93/37 on public works] is to open up public works contracts to competition. Exposure to Community competition in accordance with the procedures provided for by the Directive ensures that the public authorities cannot indulge in favouritism.”<sup>171</sup>

Also with regard to competition transparency plays a key role as it ensures equal opportunities for tenders on a level playing field and reduces the risk of favouritism.

The high emphasis on transparency in these provisions indicates that the EU legislator aimed at securing the Internal Market by monitoring compliance with the free movement rules and the fundamental Treaty principles.<sup>172</sup> The lack of reference to sustainability considerations suggests they were of no concern for the EU legislator; Internal Market promotion being the main objective behind the regulation of technical specifications of 1990s directives.

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Regulation of Public Procurement as a Key Element of European Economic Law’ (1998) 4 ELJ 220; Charles Clarke, ‘The Meaning and Requirements of the Term ‘Contracting Authority’ Under EU Public Procurement Law’ (2012) 7 EPPPLR 57.

<sup>164</sup> Directive 92/50, Article 14; Directive 93/36, Article 8, 18; Directive 93/37, Article 10.

<sup>165</sup> Ibid. The CJEU stated that Council Directive 93/42/EEC of 14 June 1993 concerning medical devices [1993] OJ L169/1 that provides for harmonised standards for the marketing of medical devices (including surgical sutures) based on the European Pharmacopoeia and which required Member States to presume that medical devices bearing the ‘CE’ mark complied with those standards. Authorities having specified only that bidders must offer sutures attaining the minimum standard provided by Directive 93/42 and which bore the ‘CE’ mark, the hospital could not reject a bid that offered sutures that complied with those requirements, *Medipac - Kazantzidis* (n 112) paragraph 55.

<sup>166</sup> Weiss (n 89) 129.

<sup>167</sup> Christian Servenay, ‘The New Provisions of Supplies Directive 93/36’ (1994) 3 PPLR 163.

<sup>168</sup> Case C-489/06 *Commission v Greece* [2009] ECR I-1797; *Medipac - Kazantzidis* (n 112).

<sup>169</sup> Case C-380/98 *University of Cambridge* [2000] ECR I-8035, paragraph 17. According to Arrowsmith, by implementing transparency requirements, the directives allow authorities’ discretion to be monitored so that the principle of non-discrimination is respected, Arrowsmith (n 2) 166.

<sup>170</sup> Commission, ‘Public Procurement in the European Union’ COM (1998) 143 final (Public Procurement in the European Union), 6; Sue Arrowsmith, ‘The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?’ (2006) 35 PCLJ 337.

<sup>171</sup> Case C-399/98 *Ordine degli Architetti and others* [2001] ECR I-5409, paragraph 75. A few months later, this was reiterated in Joined Cases C-285/99 and C-286/99 *Impresa Lombardini* [2001] ECR I-9233, paragraph 35. Arrowsmith supports this view by stating that the idea of competition in the context of the EU PP Directives should be understood as a means to non-discrimination, Arrowsmith (n 2) 165-166. Trepte (n 2) 344.

<sup>172</sup> Public Procurement in the European Union (n 171).

## 4.2 Selection criteria

Transparency requirements were strengthened under the 1990s reform.<sup>173</sup> Authorities were required to produce a report after the selection stage, indicating the ‘reasons for [tenderers] selection’.<sup>174</sup> Previously, it was sufficient to specify in the contract notice or in the tender invitation which of these references were to be produced.<sup>175</sup> These provisions facilitated the participation of tenderers in PP procedures through increased monitoring of non-discrimination.<sup>176</sup> This can be deduced from the evolution of originally very general rules on tenderers’ selection (in the 1970s) to detailed provisions prohibiting discrimination in the selection stage.<sup>177</sup>

As in the previous regime, no reference to sustainability aspects was made, which emphasises the EU legislator’s objective was to promote the Internal Market.

## 4.3 Award Criteria

The 1990s directives, like their predecessors, provided two options for applying the award criteria – the lowest price or MEAT.<sup>178</sup> The first criterion indicated that the lowest offer must be awarded the contract. The second criterion – MEAT – included a list of non-exhaustive factors such as ‘quality, technical merit, aesthetic and functional characteristics, price’<sup>179</sup>. These factors served as a guideline for authorities in the weighted evaluation process of the contract award.<sup>180</sup>

In the 1990s, the CJEU case-law contributed to EU PP law, for the first time recognising the authorities’ relative discretion to utilise sustainability considerations as award criteria. Although, on numerous occasions, the CJEU has maintained the importance of an economic approach to the regulation of PP contracts,<sup>181</sup> in *Concordia Bus*, the Court stressed that given the list of MEAT factors was not exhaustive, authorities could specify what did MEAT imply for them.<sup>182</sup> In that case, the Court was asked whether environmental considerations, such as low carbon emissions of vehicles, could be among the factors to determine MEAT. The CJEU stressed that environmental criteria could be considered during the MEAT evaluation, but there were limitations to this.<sup>183</sup> Firstly, award criteria had to comply with the principle of non-discrimination,<sup>184</sup> meaning that authorities could not apply different rules to domestic and foreign suppliers or specify award criteria that have a greater impact on imported products than on domestic products.<sup>185</sup> Secondly, the transparency requirements were meant to monitor the non-discrimination obligation by making it difficult to manipulate the award criteria.<sup>186</sup> Thirdly, the award criteria had to be linked to the subject-matter of the contract – a limitation highly relevant to sustainability aspects in PP specified in *Concordia Buses*.<sup>187</sup> Award criteria are related to the subject-matter of the contract when they relate to the object of that contract and not to the

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<sup>173</sup> Case C-315/01 *GAT* [2003] ECR I-6351; Christopher Bovis, ‘Developing Public Procurement Regulation: Jurisprudence and its Influence on Law Making’ (2006) 43 CMLR 461.

<sup>174</sup> Directive 92/50, Article 12; Directive 93/36, Article 7 (3); Directive 93/37, Article 8 (3).

<sup>175</sup> Directive 71/305 Article 26 (e); Sue Arrowsmith, ‘The EC Procurement Directives, national procurement policies and better governance: the case for a new approach’ (2006) 3 PPLR 86.

<sup>176</sup> *Unitron Scandinavia and 3-S* (n 112), paragraph 31; Julia A. Sohrab, ‘The Single European Market and Public Procurement’ (1990) 10 OJLS 522, 529.

<sup>177</sup> Jean-Jacques Verdeaux, ‘Public Procurement in The European Union and in the United States: A Comparative Study’ (2003) 32 PCLJ 713, 721.

<sup>178</sup> Directive 93/36, Article 26; Directive 93/38, Article 34; Directive 93/37, Article 30; Directive 92/50, Article 36.

<sup>179</sup> *Ibid.*

<sup>180</sup> Bovis (n 174) 431.

<sup>181</sup> *University of Cambridge* (n 170) paragraph 17; Case C-44/96 *Mannesmann Anlagenbau Austria and Others v Strohal Rotationsdruck*, [1998] ECR I-0073, paragraph 33; Case C-237/99 *Commission v France* [2001] ECR I-0939, paragraphs 41-42; Case C-360/96 *Gemeente Arnhem and Gemeente Rheden v BFI Holding*, [1998] ECR I-6821, paragraphs 42-43.

<sup>182</sup> Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, paragraph 54.

<sup>183</sup> *Ibid.*, paragraph 57.

<sup>184</sup> *Ibid.*, paragraph 64.

<sup>185</sup> Case 263/85 *Commission v Italy* [1991] ECR I-2457; *Du Pont de Nemours* (n 130) paragraph 14.

<sup>186</sup> Case C-225/98 *Commission v France* [2000] ECR I-7445; Communication on integrating environmental considerations into public procurement (n 36).

<sup>187</sup> *Concordia Bus Finland* (n 182) paragraph 59.

company's overall sustainability performance.<sup>188</sup> The CJEU stated 'since a tender relates to the subject-matter of the contract, the award criteria (...) must themselves also be linked to the subject-matter of the contract'.<sup>189</sup> This limitation was adopted to limit the authorities' discretion and impede possible violations of the free movement principles through an arbitrary award of the contract.<sup>190</sup>

It shall be emphasised that fulfilling a public need on the best possible terms (value for money), securing the State's financial interests (economy) through an efficient allocation of resources and, thus, enhance the quality of public services (efficiency) represent national PP objectives that are common to many jurisdictions.<sup>191</sup> It is the competence of national authorities to establish how to achieve these through PP.<sup>192</sup>

In *Concordia Bus*, the award was made to the tender, which proved to fulfil the requirements of a public need on the best possible terms – that is achieving value for money.<sup>193</sup> This case reflects a judgment over a government *buying* decision, including on what to buy, and does not involve hindrances to trade as the government established what the market is, rather than restrict access to the market just for the national tenders.<sup>194</sup> The CJEU case law suggests that 'what to buy' decisions *Concordia Bus* are different from 'access to contract' decisions *Dassonville* (Section 2).<sup>195</sup> In *Concordia Bus*, access to the contract (and therefore to the national market) was not hindered, as compliant tenders were admitted to the PP procedure and evaluated to determine the winning bid. In a 'what to buy' decision, even when tenders do not satisfy the authority's environmental award criteria, they still could win the contract if they score so highly against other criteria as to be the highest-scoring tender overall.<sup>196</sup> Accordingly, such decisions, subject to the above-mentioned limitations, do not violate the Treaty provisions on free movement.<sup>197</sup>

These provisions indicate that the primary aim of the EU PP system in the 1990s was to support the functioning of the Internal Market by removing barriers to market access. This is proved by the enhanced requirements on non-discrimination, transparency, and objectivity in three phases of the contract award procedure. Sustainability aspects could be incorporated in the contract award if they satisfied a public need and complied with the Internal Market principles. It does not seem that the EU legislator was concerned with promoting sustainability through PP, quite the opposite; the law indicates that the EU PP system aimed to promote the Internal Market by removing barriers to access and, limitedly, allowed for sustainability aspects for fulfilling national PP objectives.

## 5. Major reform: the 2004 Directives

The 1990s PP regulation was followed by an extensive reform introducing a new legislative package on PP that aimed to simplify the rules,<sup>198</sup> increase the authorities' flexibility, and modernise the PP process.<sup>199</sup> A New

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<sup>188</sup> Marc Martens and Stanislas de Margerie, 'The Link to the Subject-Matter of the Contract in Green and Social Procurement' (2013) 8 EPPPPLR 8.

<sup>189</sup> *Concordia Bus Finland* (n 182) paragraphs 47, 49, 59.

<sup>190</sup> *Ibid.*

<sup>191</sup> Arrowsmith (n 105); Steven L. Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 PPLR 103; Trepte (n 23) 77.

<sup>192</sup> *ibid.*

<sup>193</sup> *Concordia Bus Finland* (n 183) Opinion AG Mischo, paragraph 153.

<sup>194</sup> Sue Arrowsmith, 'Application of the EC Treaty and directives to horizontal policies: a critical review' in Sue Arrowsmith, and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press, 2009) 158.

<sup>195</sup> Sue Arrowsmith, Peter Kunzlik, 'Public procurement and horizontal policies in EC law: general principles' in Arrowsmith, Kunzlik (n 194) 56-67.

<sup>196</sup> Communication on integrating environmental considerations into public procurement (n 36); Kunzlik (n 33).

<sup>197</sup> European Commission, *Buying green! A handbook on environmental public procurement* (2004) <[https://www.publictendering.com/pdf/buying\\_green\\_handbook\\_en.pdf](https://www.publictendering.com/pdf/buying_green_handbook_en.pdf)> accessed 20 July 2023.

<sup>198</sup> Commission, 'Interpretative Communication on Concessions under Community Law' (2000) OJ C121/2.

<sup>199</sup> Commission, 'Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts' COM (2000) 275 final, II; Commission, 'Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors' COM (2000) 276 final; Rhodri Williams, 'The New Procurement Directives of the European Union' (2004) 13 PPLR 153.

Public Sector Directive – 2004/18<sup>200</sup> and a New Utilities Directive – 2004/17<sup>201</sup> replaced the previous directives (except for the directives on remedies amended by Directive 2007/66<sup>202</sup>). Each directive within its field covered works, supplies, and services. The 2004 Directives, for the first time included provisions that permitted Member States to use procurement to incorporate sustainability considerations.<sup>203</sup> The following sections will analyse the EU PP objectives during this reform and how they accommodated the sustainability aspects.

## 5.1 Technical specifications

The 2004 PP Directives stipulated that technical specifications had to ‘afford equal access for tenders and not have the effect of creating unjustified obstacles [to competition]’.<sup>204</sup> Direct exposure to competition removed obstacles to PP and provided free access to the national PP markets,<sup>205</sup> which is the primary objective of the EU PP system.<sup>206</sup>

In terms of sustainability aspects, for the first time, the 2004 PP Directives provided the possibility of considering them in the technical specifications. The Directives read: ‘[P]erformance or functional requirements (...) may include environmental characteristics. [These] must be sufficiently precise to allow tenderers to determine the subject-matter of the contract’.<sup>207</sup> Moreover, the Directives’ Recitals suggested the possibility of including (some) social considerations in technical specifications stating that authorities, whenever possible, should ‘take into account accessibility criteria for people with disabilities’.<sup>208</sup> However, these provisions were of an interpretative nature, as Recitals are not binding.<sup>209</sup> The provisions on technical specifications left the application of sustainability aspects at the authorities’ discretion.<sup>210</sup> Such aspects had to comply with non-discrimination requirements and not create obstacles to competition.<sup>211</sup> This suggests they were exclusively focused on opening the PP Internal Market and regulating the PP for that purpose and that any sustainability provisions were subordinate to these objectives.<sup>212</sup>

## 5.2 Selection Criteria

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<sup>200</sup> 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 [2004] OJ L134/114.

<sup>201</sup> 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 [2004] OJ L 134/1.

<sup>202</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31.

<sup>203</sup> Arrowsmith in Arrowsmith and Kunzlik (n 194) 38; Williams (n 199).

<sup>204</sup> Directive 2004/18, Article 23 (2); Directive 2004/17, Article 34 (2).

<sup>205</sup> Directive 2004/17, Recital 41.

<sup>206</sup> Bovis (n 8) 271.

<sup>207</sup> Directive 2004/18, Article 23 (3) (b); Directive 2004/17, Article 34 (3) (b). The requirement of sufficient precision allows tenderers to ‘know what the requirements established by the contracting authority cover’, Case C-368/10, *Commission v Netherlands* [10 May 2012] (*Max Havelaar*) paragraph 63.

<sup>208</sup> Directive 2004/18, Article 23 (1), Recital 29; Directive 2004/17, Recital 42.

<sup>209</sup> European Parliament, the Council and the Commission, ‘Joint Practical Guide for persons involved in the drafting of European Union legislation’ [2015] 10.1.

<sup>210</sup> Antti Palmujoki, Katriina Parikka-Alhola, and Ari Ekroos, ‘Green Public Procurement: Analysis on the Use of Environmental Criteria in Contracts’ (2010) 19 RECIEL 250, 260.

<sup>211</sup> Rosemary Boyle, ‘Disability issues in public procurement’ in Arrowsmith and Kunzlik (n 194) 358.

<sup>212</sup> Ibid; Christopher Bovis, ‘Reforming the Public Sector in the EU: The New Public Procurement Regime’ (2005) 60 *Amicus Curiae* 4.

Compared to its predecessor that provided for transparent selection criteria for the tenderers' technical characteristics,<sup>213</sup> Directive 2004/18 set an exhaustive list of evidence for tenderers' technical capacities.<sup>214</sup> The proofs for tenderers' economic capacities were non-exhaustively mentioned in the Directives, with the Member States enjoying a wider discretion in this sense.<sup>215</sup> This is because deciding on the price premium paid for economic capacity is an aspect of value for money that is a national PP objective related to efficiency (Section 4.3). Mandatory objective criteria reduced the discretion of the authorities and gave all tenderers equal opportunities for competing.<sup>216</sup> This decreased the possibilities for discrimination,<sup>217</sup> which indicates that the main objective behind the selection stage was to open-up the PP markets.<sup>218</sup>

Measures to promote (very indirectly) SMEs' participation in PP<sup>219</sup> were adopted by permitting as evidence of tenderers' technical abilities the 'proportion of the contract which the [tenderer] intends to subcontract' (linked to the rationale discussed in Section 5.1).<sup>220</sup> However, this provision merely permitted subcontracting, leaving the discretion about its use to the Member States.<sup>221</sup>

The CJEU case law following the 2004 Directives suggests that authorities could only use the criteria explicitly listed under the Directives. In *Max Havelaar*, the requirement that tenderers had to respect criteria of 'sustainable purchasing and socially responsible business' was deemed unlawful because it was not connected to any of the selection criteria listed in Directive 2004/18.<sup>222</sup> Directive 2004/18 does not refer to any sustainability aspects in the selection stage, other than the *possibility* (and only in appropriate cases)<sup>223</sup> of indicating the environmental management measures as evidence of technical ability.<sup>224</sup> The permissive reference to environmental aspects suggests their usage was left at the authorities' discretion in limited cases. The 2004 PP Directives regulated in more detail mechanisms that were permitted under the old directives,<sup>225</sup> aimed at supporting the Internal Market operation. It does not appear, however, that the merits of tenderers' sustainability policies in their business were relevant for selecting between qualified undertakings.<sup>226</sup>

### 5.3 Award Criteria

As their predecessors, the 2004 PP Directives provided for two criteria under which authorities could award the contract: the lowest price and MEAT.<sup>227</sup> The lowest price criterion had the same rationale as in the 1990s' regime (Section 4.3). The MEAT criterion, however, was amended and reflected the CJEU case-law (Section

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<sup>213</sup> Directive 95/50, Article 32 (2); Directive 93/37, Article 27; Directive 93/38, Article 20 (2) (e).

<sup>214</sup> Article 48.

<sup>215</sup> *CEI v Association intercommunale pour les autoroutes des Ardennes* (n 119).

<sup>216</sup> Case C-87/94 *Commission of the European Communities v Kingdom of Belgium*, [1996] ECR I-2043.

<sup>217</sup> Christopher Bovis and Giacomo Calzolari, 'Dialogue' in Gustavo Piga and Steen Treumer (eds), *The Applied Law and Economics of Public Procurement* (Routledge 2013).

<sup>218</sup> Bovis (n 213); Treumer in Burgi, Trybus, and Treumer (n 113) 20, 23.

<sup>219</sup> Directive 2004/18, Recital 32.

<sup>220</sup> Directive 2004/18, Article 48 (2) (i).

<sup>221</sup> Albert Sanchez Graells, *Public Procurement and the EU Competition Rules* (2<sup>nd</sup> ed., Bloomsbury Academic, 2015) 348.

<sup>222</sup> *Max Havelaar* (n 208) paragraphs 105-106.

<sup>223</sup> Directive 2004/18 in Recital 44 states that where 'the nature of the works and/or services justifies applying environmental management measures or schemes during the performance of a public contract, the application of such measures or schemes may be required'.

<sup>224</sup> Article 48 (2) (f); Directives 2004/17 contains a similar provision in Article 52 (3).

<sup>225</sup> Bovis (n 212).

<sup>226</sup> Christopher Bovis, 'The New Public Procurement Regime: A Different Perspective on the Integration of Public Markets of the European Union' (2006) 1 EPL 73.

<sup>227</sup> Directive 2004/18, Article 53; Directive 2004/17, Article 55. In *Sintesi*, the CJEU stated that Member States are free to choose between the lowest price and MEAT as their award criteria, rather than allowing the Member States to prescribe one of these as the norm, see Case C-247/02, *Sintesi* [2004] ECR I-9215 paragraph 40. It shall be noted that the rules of the Internal Market provisions do not authorise the EU to regulate national decisions on levels of expenditure or on the allocation of funds. Therefore, they do not authorise regulation of the way in which such priorities are implemented through PP award criteria (either through the 'lowest price' or MEAT criteria). A possible interpretation of this ruling is by considering the EU's competence to secure the functioning of the Internal Market through competition, Arrowsmith (n 105).

4.3). Both Directives provided a non-exhaustive list<sup>228</sup> of MEAT characteristics (quality, price, technical merit, etc.),<sup>229</sup> which could not be discriminatory.<sup>230</sup> Further, the 2004 Directives required authorities to specify the relative weighting of the criteria for determining MEAT, which had to be published in the contract notice in descending order of importance (transparency).<sup>231</sup>

The innovation of the 2004 Directives regarding MEAT resided in the first explicit reference to the possibility of using environmental characteristics as award criteria,<sup>232</sup> provided that they were linked to the subject-matter of the contract in question, as stressed in *Concordia Bus* (Section 4.3).<sup>233</sup> Recitals 1 of Directives 2004/18 and 2004/17 emphasised that the ‘link to the subject-matter of the contract’ was introduced to ensure that authorities were not conferred unrestricted freedom of choice.<sup>234</sup>

A further restriction to authorities’ discretion was the transparency requirement.<sup>235</sup> Transparency ensured that authorities only applied those criteria that were known to the tenderers so they were in positions of equality when formulating their offers and when those offers were assessed.<sup>236</sup> The requirement to disclose the weighting criteria made manipulation very difficult and enabled tenderers to identify situations where weighting systems were designed or applied discriminatorily.<sup>237</sup>

The incorporation of environmental considerations as award criteria was limited by the link to the subject-matter requirement; had to be transparent; and non-discriminatory.<sup>238</sup> Hence, the minor sustainability aspects mentioned by the 2004 Directives were subordinate to the principles safeguarding the Internal Market, which seemed to have precedence.

## 6. The latest reform: The 2014 Directives

After a relatively short legislative process, in 2014 the EU adopted a new set of Directives on PP:

Directive 2014/24 which replaced Directive 2004/18 and regulates the award of contracts by the public sector.

Directive 2014/25 which replaced Directive 2004/17 and regulates the award of contracts in the utility sector.

Directive 2014/23 – a new instrument to regulate the award of concessions covering both the concessions awarded by entities regulated by Directive 2014/24 and Directive 2014/25. The directive replaced and extended the regulation on concessions provided by Directive 2004/18 and Directive 2004/17.

Prior to 2014, Directive 2009/81<sup>239</sup> had been adopted to regulate procurement for defence and security.

The reform aimed at making the PP regime simpler and more flexible.<sup>240</sup> In theory, this was meant to increase the efficiency of the PP amendments and make it better suited for the political, social and economic contexts.<sup>241</sup> In practice, however, simplification was unlikely due to the increased number of legal provisions and the

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<sup>228</sup> *SIAC Construction* (n 146), paragraph 35.

<sup>229</sup> Directive 2004/18, Article 53; Directive 2004/17, Article 55.

<sup>230</sup> Directive 2004/18, Recital 46; *Contse and Others* (n 61), paragraph 36.

<sup>231</sup> Directive 2004/18, Article 53, Recital 1; Directive 2004/17, Article 55.

<sup>232</sup> Directive 2004/18, Article 53; Directive 2004/17, Article 55.

<sup>233</sup> *Ibid*; *Concordia Bus Finland* (n 182) paragraph 57.

<sup>234</sup> *Beentjes* (n 122) paragraph 19; *The Queen v Secretary of State* (n 136) paragraph 42; Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 68.

<sup>235</sup> *Beentjes* (n 122), paragraph 26; *SIAC Construction* (n 146), paragraph 37; *Concordia Bus Finland* (n 182), paragraph 61.

<sup>236</sup> Case C-331/04 *ATI EAC and Others* [2005] I-10109, paragraph 22.

<sup>237</sup> Trepte (n 2) 473.

<sup>238</sup> Peter Trepte, ‘Transparency requirements’ in Ruth Nielsen and Steen Treumer (eds), *The New EU Public Procurement Directives* (Djøf, 2005), 65.

<sup>239</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC 2009/81/EC [2009] OJ L216/76.

<sup>240</sup> Commission, ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM (2011) 896 final (Proposal for a Directive on Public Procurement).

<sup>241</sup> *Ibid*.

various novelties which added complexity to PP.<sup>242</sup> Among the introduced novelties, relevant to this study are the measures to support the shift towards a low-carbon economy and to facilitate SMEs' participation in PP – which are sustainability aspects.<sup>243</sup> The next sections will analyse the current regulation of sustainability aspects in the EU PP system and their 'standing' among the current EU PP objectives.

Even though directives are instruments that leave room for Member States to choose how to achieve the results prescribed (Section 3), they usually regulate their aim with sufficient considerable detail,<sup>244</sup> which is also the case with the 2014 Directives. The 2014 Directives are extensive legal instruments, (Directive 2014/24 contains 94 Articles, which are further specified in 138 Recitals while Directive 2014/25 contains 110 Articles and 142 Recitals, as well as numerous Annexes).<sup>245</sup> It should be noted that the provisions of the 2014 Directives entail different levels of harmonisation, yet, the general conclusion is that Member States have limited possibilities to derogate from the directives' provisions.<sup>246</sup>

## 6.1 Technical Specifications

The 2014 Directives regulate the possibility of inserting sustainability aspects in technical specifications, by mentioning 'Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law (...) performance or functional requirements *may* include environmental characteristics'.<sup>247</sup>

Other sectoral EU laws also refer to environmental sustainability in PP.<sup>248</sup> Some of these laws do not mandate environmental consideration in PP, but rather permit it.<sup>249</sup> Others provide minimum environmental targets for

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<sup>242</sup> Roberto Caranta, 'The changes to the public contract directives and the story they tell about how EU law works' (2015) 52 CMLR 391.

<sup>243</sup> 2030 Agenda for Sustainable Development (n 77), SDGs 12; 16.

<sup>244</sup> Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2015) 108.

<sup>245</sup> Caranta (n 242) 394.

<sup>246</sup> Proposal for a Directive on Public Procurement, (n 241) 7; Sabockis (n 54) 29; Treumer in Burgi, Trybus, and Treumer (n 113) 18; Arrowsmith (n 2) 177.

<sup>247</sup> Directive 2014/24, Article 42; Directive 2015/25, Article 60. Environmental law is one of the policy areas where the EU legislator has adopted over 200 secondary legislative instruments on various aspects of environmental aspects, Michael Faure 'To Codify or Not to Codify EU Environmental Law: That is not the Question' in Bernard Vanheusden, Theodoros Iliopoulos, and Anna Vanhellefont (eds.), *Harmonisation in EU Environmental and Energy Law* (Intersentia 2022) 18. Article 11 TFEU requires environmental protection to be integrated into the EU's actions and policies, however, it does not state the required level of protection, leaving it open for the EU policy-makers to establish the appropriate level. Therefore, the provisions in the 2014 Directives which concern environmental protection are regarded as integrating the provisions of Article 11 TFEU into the framework of the Directive, Sabockis (n 54); Julian Nowag, 'The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and its Intended Reach' in Beate Sjøfjell and Anja Wiesbrock (eds.), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015).

<sup>248</sup> Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 Amending Directive 2010/31/EU on the Energy Performance of Buildings and Directive 2012/27/EU on Energy Efficiency [2018] OJ L156/75; Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 amending Directive 2012/27/EU on energy efficiency [2018] OJ L328/210; Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82; Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 on the promotion of clean and energy-efficient road transport vehicles [2019] OJ L 188/116.

<sup>249</sup> Directive 2018/844 states that self-regulating devices in buildings for the separate regulation of the temperature in each should be considered 'where economically feasible' (Recital 21); Member States should provide for measures to simplify the deployment of recharging infrastructure for electric vehicles (Recital 23) and provide conditions for the deployment of recharging points 'if and where they are needed' (Recital 24). Directive 2018/2001 provides that Member States shall ensure that buildings 'fulfil an exemplary role' in using energy from renewable sources and may allow this obligation to be fulfilled by complying with nearly zero-energy building provisions (Article 15 (5)). Marta Andhov, Roberto Caranta, Willem A. Janssen, and Olga Martin-Ortega, 'Shaping Sustainable Public Procurement Laws in the European Union - An analysis of the legislative development from 'how to buy' to 'what to buy' in current and future EU legislative initiatives', 34 (The Greens/EFA Group 2022) <<https://extranet.greens-efa.eu/public/media/file/1/8361>> accessed 25 July 2023.

some categories of PP, subjected to limitations.<sup>250</sup> However, they make no reference to environmental aspects in technical specifications nor in the other phases of the PP. For these reasons, they will not be discussed further.

For the first time, there is a stronger emphasis on social sustainability in the new directives. Under the 2004 Directives, accessibility criteria for people with disabilities ‘should whenever possible’ be considered (Section 5.1). The 2014 Directives state that ‘except in duly justified cases’ the technical specifications shall consider accessibility criteria for persons with disabilities or design for all users,<sup>251</sup> for PP *designed for use by persons*. This strengthens the importance of accessibility requirements,<sup>252</sup> but also echoes the rationale behind the *Concordia Bus* judgement (Section 4.3) – that authorities’ may adopt *buying* decision, including on what to buy, to meet a public need.<sup>253</sup> The directives do not indicate what are the ‘duly justified cases’; nevertheless, it follows also from other EU Directives that such requirements must be considered.<sup>254</sup> However, sustainability considerations in technical specifications are subject to limitations. Firstly, they are only suitable for open and restricted procedures when specifications can be drawn up at the very beginning. For negotiated procedures, where specifications cannot be drawn up because the input of the private sector is required even on the question of exactly what good or service to procure,<sup>255</sup> this approach cannot be used, and that excludes many of the more complex and valuable contracts.<sup>256</sup> Secondly, both the 2014 Directives, as well as other sectoral Directives, use the word ‘may’ or ‘shall evaluate the usefulness’ when affirming the possibility of considering environmental aspects.<sup>257</sup> In practice, this would mean that if Member State A never mentions environmental aspects in technical specifications, while its counterparts from Member State B always do so, Member State A is perfectly compliant with the 2014 PP Directives.<sup>258</sup> The 2014 PP Directive do not impose any obligations on the Member States to insert environmental aspects in technical specifications.<sup>259</sup> The Directives rather clarify that considering environmental aspects when drafting specifications is legal and that Member States have the discretion to do so. Probably this was intended to avoid problems of EU bids when environmental considerations are part of specifications and to reduce the risk of legal disputes when this is done.<sup>260</sup> This may also reflect the sustainability aspects in Internal Market law that are pursued by the Member States and recognised by EU law as part of a rule of reason (Section 3.1.1). Given that such aspects are balanced with the free movement rules, the EU legislator codified this rule of reason in the EU PP Directives. Considering that sustainability aspects in PP are pursued by the Member States (Sections 3.2; 4.3), the EU regulates but does

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<sup>250</sup> The requirement under Directive 2018/2002, Article 5, states that Member State shall ensure that 3 % of the total floor area of heated and/or cooled buildings owned and occupied by its central government is renovated each year to meet at least the minimum energy performance requirements, while Article 6 requires Member States to ‘ensure that central governments purchase only products, services and buildings with high energy-efficiency performance, insofar as that is consistent with cost-effectiveness, economical feasibility, wider sustainability, technical suitability, as well as sufficient competition’. Under Directive 2019/1161 Member States are required ‘to ensure that the procurement of vehicles complies with the minimum procurement targets for clean light-duty vehicles’ (Article 5). This means that authorities should consider environmental impacts when procuring some categories of road transport vehicles, in line with the minimum targets set in the Directive (Article 1).

<sup>251</sup> Directive 2014/24, Article 42; Directive 2015/25, Article 60.

<sup>252</sup> *Ibid*; Council, ‘Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 2: Strategic use of public procurement’ (2011) COD 5369/12.

<sup>253</sup> Sue Arrowsmith, *Government Procurement and Judicial Review* (Carswell, 1988), 81.

<sup>254</sup> Directive 2016/2102 of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1, Articles 4, 7.

<sup>255</sup> Martin Trybus, ‘The EU acting through Free Trade Agreements: The case of sustainability and public procurement’ (2021) 1 IEL <<https://www.birmingham.ac.uk/documents/college-artslaw/law/iel/euglobalactor2021ielwp.pdf>> accessed 2 June 2023.

<sup>256</sup> Maria Anna Corvaglia, ‘Public Procurement and Private Standards: Ensuring Sustainability Under the WTO Agreement on Government Procurement’ (2016) 19 (3) *Journal of International Economic Law* 607.

<sup>257</sup> André Sapir, Tom Schraepen, Simone Tagliapietra, ‘Green Public Procurement: A Neglected Tool in the European Green Deal Toolbox?’ (2022) 57 (3) *Intereconomics* 175, 177.

<sup>258</sup> Trybus (n 255) 6.

<sup>259</sup> Kirsi-Maria Halonen, ‘Is public procurement fit for reaching sustainability goals? A law and economics approach to green public procurement’ (2021) 28 *Maastricht J. Eur. Comp. L.* 535, 543.

<sup>260</sup> Trybus (n 255) 7.



not require, *per se*, their application.<sup>261</sup> This approach is in line with the Cassis-test, under which it is lawful to include sustainability considerations if these are non-discriminatory and proportionate (discussed below).

Thirdly, the technical specifications of 2014 Directives do not refer to social sustainability other than ‘meeting the needs of persons with disabilities’.<sup>262</sup> Certainly, protecting persons with disabilities is mentioned under SDG 10.<sup>263</sup> However, this provision rather reflects the logic of national PP objectives – meeting a functional public need and designing the PP process accordingly.<sup>264</sup> Presumably, the EU legislator intended to authorise governments to meet the needs of all categories of users of public goods, as proved by the words ‘designed for use by persons’ and was less concerned with the promotion of social sustainability, as no other social aspects are required by the Directives. No reference to economic sustainability is made under the technical specifications. Thus, the limitations to sustainability aspects in technical specifications are adopted to secure the Internal Market principles.<sup>265</sup> High sustainability requirements on the quality of an undertaking, which not all tenderers can live up to, threaten the non-discrimination obligation that lies at the core of the Internal Market (Section 2).

The wording of 2014 Directives’ technical specifications enables considering environmental aspects, meaning that the directives do not exhaustively harmonise this aspect.<sup>266</sup> Accordingly, in line with *Cassis de Dijon*, Member States may adopt more stringent environmental requirements when setting the technical specifications for their PP contracts. If applied non-discriminatorily and proportionately, environmental aspects may be used under the rationale of mandatory requirements (Section 2.4). However, to pass the proportionality test (Section 2.4), the provisions in the technical specifications shall, first, be suitable for achieving environmental protection, that is have a causal connection with the attainment of the objective. If States wish to protect the environment, *largo sensu*, they may be precluded from setting requirements on, e.g. using substance X for recycled paper products (especially if this substance is mainly used by national industries) if there is no authoritative evidence that substance X has any positive impact on the environmental protection. In fact, suitability shall be demonstrated by reference to the specific circumstances of the case (Section 2.4). Second, authorities shall adopt measures that represent the least restrictive alternative to attain the objective (necessity). They would be prohibited from specifying that just plastic-recycled materials shall be used for the construction of bus stops in a city, if more types of recycled materials may be used for bus stops construction. Even though there is authoritative evidence that recycled plastic has a positive environmental impact,<sup>267</sup> providing for a wider spectrum of solutions to meet environmental standards during the construction of bus stops would entail a less negative effect on intra-EU trade and would ensure that access to PP is not limited more than what is necessary in light of the specific contract (necessity). It is difficult to conceptualise how ‘unlimited’ sustainability requirements would comply with these conditions, as even when applied non-discriminatorily, they may disproportionately restrict trade, given the heterogeneous capacity of tenderers from different Member States to meet high sustainability standards.<sup>268</sup> Accordingly, sustainability criteria may be (within

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<sup>261</sup> Lela Mélon, ‘More Than a Nudge? Arguments and Tools for Mandating Green Public Procurement in the EU’ (2020) 12 Sustainability 988; Albert Sanchez Graells, ‘Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?’ (2016) 22 EPL 377.

<sup>262</sup> Directive 2014/24, Article 42; Directive 2015/25, Article 60.

<sup>263</sup> 2030 Agenda for Sustainable Development (n 77).

<sup>264</sup> Arrowsmith (n 176); Christopher Yukins, ‘Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement’ (2004) 33 PCLJ 667, 695.

<sup>265</sup> Bovis (n 146); Schooner (n 192).

<sup>266</sup> Sabockis (n 54) 145; Proposal for a Directive on Public Procurement (n 241) 9.

<sup>267</sup> OECD, ‘Climate change and plastics pollution Synergies between two crucial environmental challenges’ (2023) <<https://www.oecd.org/environment/plastics/Policy-Highlights-Climate-change-and-plastics-pollution-Synergies-between-two-crucial-environmental-challenges.pdf>> accessed 20 July 2023.

<sup>268</sup> Christopher Bovis, *EC Public Procurement: Case law and Regulation* (Oxford University Press, 2006), 220-223; Sustainable Development Solutions Network and Institute for European Environmental Policy, ‘Europe Sustainable Development Report’ (2022) 8 <<https://s3.amazonaws.com/sustainabledevelopment.report/2022/europe-sustainable-development-report-2022.pdf>> accessed 22 July 2023; Halonen (n 259). In fact, the European Commission expressed its concern in PP relating to less intensive competitive procedures, Commission ‘Making Public Procurement work in and for Europe’ (Communication) COM (2017) 572 final, 5.

limits) used to meet a public need. However (following *Cassis*) they should be non-discriminatory and proportionate to safeguard the Internal Market.<sup>269</sup>

## 6.2 Selection criteria

Directive 2014/24 consolidates and clarifies the requirements for selection criteria that had been set by Directive 2004/18 (Section 5.2). Despite the apparently-exhaustive wording of Directive 2014/24, authorities have the flexibility to establish various selection criteria if they fall under Article 58.<sup>270</sup> This safeguards authorities' discretion in setting selection criteria,<sup>271</sup> which impacts on value for money.<sup>272</sup> It also facilitates competition, which is crucial for opening PP markets (Section 4.1).

As in the previous regime, authorities are permitted to set selection criteria that relate to tenderers' technical and professional ability with respect to their capacity to carry out environmental aspects of a contract.<sup>273</sup> Also as in the previous regime, these provisions are permissive and not mandatory.<sup>274</sup> They merely seem to emphasise the States' discretion to decide on the accommodation of sustainability in PP, which is a common PP objective for many States (Section 3.2), as long as these comply with the Internal Market principles.

It is worth looking more in-depth at the new requirements under economic and financial standing, as they are relevant to this study. Directive 2014/24 indicates that the minimum turnover required to prove economic standing cannot be higher than double the value of the contract. The previous legal regimes did not impose a limit on the global turnover of the economic operator (Section 5.2). This approach is aimed at avoiding

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<sup>269</sup> Trybus (n 13); Sanchez Graells (n 222); Piotr Bogdanowicz, 'The Application of the Principle of Proportionality to Modifications of Public Contracts' (2016) 3 EPPPL 194.

<sup>270</sup> Albert Sanchez Graells, 'Exclusion, Qualitative Selection and Short-listing in Directive 2014/24' in Francois Lichère, Roberto Caranta, and Steen Treumer (eds) *Modernising Public Procurement: The New Directive*, (Djof 2014) 115.

<sup>271</sup> Case C-76/81, *Transporoute v Ministère des travaux publics* [1982] ECR I-0417.

<sup>272</sup> When authorities have higher flexibility in assessing the quality or technical merit of a public undertaking, they contribute to achieving better value for money, as they have higher discretion in drafting the PP requirements and tailoring them to the corresponding public need that has to be fulfilled. This is opposed to scenarios in which authorities have to follow strict evaluation standards (for the selection or award criteria) that reduce their flexibility, and also, impact the achievement of better value for money. An example of prioritising other PP objectives over value for money can be found in the Italian PP system, which in the 20<sup>th</sup> century had strong anti-mafia policies implemented through PP. The Italian Law of 8 August 1977 n. 584, provided for strict rules on selection criteria which narrowed down the competition (that in the domestic PP systems is aimed at achieving value for money) by putting pressure on the bidders to lower their prices and offer better quality. The Italian legislator might have found that increased discretion could pose a risk of corruption and mafia infiltration, which might have outweighed any potential benefits from increased flexibility of authorities to award the contract to the best tenderer. See Gabriella M. Racca and Dario Casalini, 'Competitive dialogue in Italy' in Sue Arrowsmith and Steen Treumer, *Competitive Dialogue in EU Procurement* (Cambridge University Press, 2012); <sup>272</sup> Diego Ravenda and others, 'The effects of mafia infiltration on public procurement performance' (2020) 64 EJPE <<https://www.sciencedirect.com/science/article/pii/S0176268020300719>> accessed 22 March 2023; Frédéric Boehm and Juanita Olaya 'Corruption in Public Contracting Auctions: The Role of Transparency in Bidding Processes' (Wiley, 2006) <<https://onlinelibrary.wiley.com/doi/10.1111/j.1467-8292.2006.00314.x>> accessed 22 March 2023; Giovanni Magnano *Appalti pubblici: prevenzione della corruzione e antimafia* (Wolters Kluwer, 2022).

<sup>273</sup> Directive 2024/14, Annex XII headed 'Means of proof of selection criteria' refers in paragraph (g) of Part II to 'an indication of the environmental management measures that the economic operator will be able to apply when performing the contract', as one of the means of providing evidence of the economic operators' technical abilities, as referred to in Article 58. The CJEU has specified that the assessment of the technical and professional ability of an economic operator depends, on a retrospective evaluation of the experience gained by the operators through the performance of previous contracts. C-295/20 *Sanresa* EU:C:2021:556, paragraph 48. However, authorities are permitted to decide on the level of quality standard, *CEI v Association intercommunale pour les autoroutes des Ardennes* (n 119) paragraph 26.

<sup>274</sup> As confirmed by the CJEU, 'contracting authority has been granted a broad discretion by the EU legislature when determining selection criteria, as can be seen inter alia from the recurring use of the term 'may' in Article 58 of Directive 2014/24', C-195/21 *Smetna palata na Republika Bulgaria* EU:C:2022:239, paragraph 50. In the same judgement the Court confirmed that when determining the selection criteria, authorities must treat tenderers without discrimination, act in a transparent and proportionate manner and 'ensure that procurement is not designed with the intention of excluding it from the scope of that directive or of artificially narrowing competition, by designing it with the intention of unduly favouring or disadvantaging certain economic operators' paragraph 49.

excessively strict requirements on tenderers' selection, as they often constitute unjustified obstacles to participation in PP.<sup>275</sup> Such measures promote sustainability aspects in PP, as they facilitate SMEs access.<sup>276</sup>

In line with the simplification objective of the 2014 PP reform (Section 6), the European Single Procurement Document (ESPD) was introduced to reduce administrative burdens for tenderers' participation to PP. The ESPD simplifies the documentary requirements by allowing the self-declaration by economic operators<sup>277</sup> and serves as preliminary evidence (in lieu of certificates issued by authorities) that tenderers were not convicted with a final sentence; fulfil the professional suitability requirements; have economic and financial capacity; and technical and professional skills.<sup>278</sup> This also lessens the bureaucratic barriers to SMEs' participation in PP. However, the 2014 Directives do not indicate that the ESPD was specifically adopted to facilitate exclusively SMEs' access to PP (and therefore do not pursue sustainability).<sup>279</sup>

It seems that the selection criteria of 2014 PP Directives aim to simplify the requirements for the selection process, which, also facilitated SMEs' access to PP. However, it does not seem these provisions were drafted specifically to promote SMEs' access to PP; they are rather aimed at reducing the bureaucratic barriers for all categories of tenderers to PP.

No references to other sustainability-related objectives are found in the provisions regulating the selection criteria, which suggests the EU legislator is not concerned with regulating the selection criteria for sustainability purposes.

### 6.3 Award Criteria

Compared to the 2004 regime, the 2014 Directives stipulate that authorities shall award the contract based on MEAT without providing the option of the lowest price.<sup>280</sup> However, this change has a merely terminological nature rather than a substantial one.<sup>281</sup> The meaning of MEAT has been changed to cover both awards that included non-price criteria and awards that are based solely on price.<sup>282</sup> Both possibilities are provided for in Directive 2014/24. Article 67(2) indicates that MEAT shall be identified 'on the basis of the price cost' and 'may include the best quality-price ratio'. It is also possible to assess the contract award based on sustainability criteria such as *environmental, and/or social* aspects linked to the subject-matter of the contract.<sup>283</sup> Article 67(2) then numbers a list of criteria that can be used when awarding PP contracts, which under Directive 2004/18 were purely illustrative. The concept of 'price' regulated by Directive 2014/24 was referred to 'the lowest price' in Directive 2004/18; whereas the term 'cost' implies the expenses that occurred during the entire life cycle of a product, work or supply. The life cycle includes all consecutive stages in the production of a good or service, including, *inter alia*, maintenance costs.<sup>284</sup> One interpretation of these provisions is that it is

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<sup>275</sup> Directive 2014/24, Recital 58.

<sup>276</sup> 2030 Agenda for Sustainable Development (n 77), SDG 8.3; Kristensen Balshøj, 'Can Affirmative Action be Allowed in EU Procurement Law? – SMEs to be Positively Discriminated?', (2021) 32 EBLR 965.

<sup>277</sup> Directive 2014/24, Article 59.

<sup>278</sup> Ibid; Michael Steinicke, 'Comment to Article 58' in Michael Steinicke and Peter L. Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law* (Hart/Nomos 2018) 564. See also Stefan, Niewerth, Peter Vogt, and Markus Thewes, 'Tender evaluation through efficiency analysis for public construction contracts' (2022) 9 *Frontiers of Engineering Management* 148.

<sup>279</sup> Directive 2014/24, Recital 84.

<sup>280</sup> Directive 2014/24, Article 67 (1); Directive 2014/25, Article 82.

<sup>281</sup> Case T-117/17 *Proximus v Council* EU:T:2019:19, paragraph 112.

<sup>282</sup> Arrowsmith (n 2), 208; Martin Trybus and Marta Andrecka, 'Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU?' (2017) EPPPPLR 12 (3) 224; Martin Trybus, 'The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective in the New Public Sector Directive?' in Lichère, Caranta, and Treumer (n 269). For an analysis on the development of the regulation of award criteria see Roberto Caranta, 'Award criteria under EU law (old and new)' in Mario Comba and Steen Treumer (eds.), *Award of Contracts in EU Procurements* (DJØF Publishing, 2013).

<sup>283</sup> Directive 2014/24, Article 67 (2); Directive 2014/24, Article 82 (2).

<sup>284</sup> Directive 2014/24, Article 2 (1) (20).

necessary to indicate in the tender notice whether the contract award will be based *just on price* or on *price along with other factors*.<sup>285</sup>

Firstly, under these intricate provisions, awarding a contract based solely on price may be one of the possibilities for determining MEAT, which applies when the authority decides to only use price as the optimal award criterion.<sup>286</sup>

Secondly, the evaluation criteria allow for the consideration of environmental or social criteria at a very late stage of the procurement procedure when all qualified and selected bids are compared and the contract is awarded to the MEAT. The rule does not include considerations other than environmental and social ones, nor does it impose an obligation (*may*) on contracting authorities in the EU Member States.<sup>287</sup>

Thirdly, as referred to in Article 53(1)(a) Directive 2004/18 and in *Concordia Busses*, a significant constraint on the criteria that may be used to determine MEAT is that they must be related to the subject-matter of the contract.<sup>288</sup> This requirement clearly rules out criteria that are not limited to what is provided under the contract or the way in which the contract work is carried out.<sup>289</sup>

Fourthly, the life-cycle cost definition allows considering the environmental and social impact of production as linked to the subject-matter of the contract. However, this does not make clear how to resolve the question of measures that relate to the production process. Accordingly, an excessively strict interpretation of discretion awarded to authorities by Article 67(2) has the potential to undermine sustainability criteria if this limits the extent to which externalities can be considered.<sup>290</sup> However, a loose interpretation of the test may pose problems in terms of verification of criteria and the additionality of the benefits they target, increasing the risks for green or social washing.<sup>291</sup>

The 2014 set of Directives incorporates more extensively sustainability aspects than their predecessors. This involves the provisions, for example, regulating the possibility of inserting environmental and social aspects into technical specifications, dividing larger contracts into smaller lots to facilitate SMEs' access to PP and incorporating life cycle costs into the price of a product. The fact that sustainability aspects in PP are pursued by the Member States seems to be mirrored in the 2014 Directives which clarify that the application of sustainability considerations in PP is legal and that the Member States have the discretion to do so. However, any provision regulating sustainability aspects is drafted so as not to hinder the opening of the Member States' PP markets, which safeguards the operation of the Internal Market.

## 7. Conclusions

The construction of the European Internal Market – and, to a large extent, of the whole European project – is strongly supported by a set of rules safeguarding intra-EU trade. EU primary law clearly imposes on Member States the duty to conduct their PP with a view to respecting the general free movement provisions of the

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<sup>285</sup> Arrowsmith (n 2), 737. It shall be noted that the EU legislator has been criticised for not taking efficiency objectives into account when regulating PP (with regard to other aspects of the PP process), Giancarlo Spagnolo, 'Public Procurement as a Policy Tool' in Swedish Competition Authority (ed), *The Cost of Different Goals of Public Procurement* (2012), 29; Author Iryna Malacina, Elina Karttunen Aki Jääskeläinen, Katrina Lintukangas, Jussi Heikkilä, and Anni-Kaisa Kähkönen, 'Capturing the value creation in public procurement: A practice-based view' (2022) 28 *J. Purch. Supply Manag* <<https://www.sciencedirect.com/science/article/pii/S1478409221000844>> accessed 24 July 2023. As established in Section 4.3, value for money and efficiency represent national PP objectives and it is the competence of national authorities to establish how to achieve these through PP.

<sup>286</sup> *ibid*; See also Adrian Brown, 'In an open procedure, may a contracting authority exclude a tender which fails to reach a minimum technical score without also evaluating its price? Case C-546/16 Montte SL v Musikene' (2019) 1 *PPLR* 1.

<sup>287</sup> Peter Kunzlik, 'The procurement of 'green' energy' in Arrowsmith and Kunzlik (n 194) 393.

<sup>288</sup> *Concordia Bus Finland* (n 182); Case C-403/21 *NV Construct* EU:C:2023:47, paragraph 64.

<sup>289</sup> Directive 2014/24, Recital 92.

<sup>290</sup> Abby Semple 'The Link to the Subject-Matter: A Glass Ceiling for Sustainable Public Contracts?' in Beate Sja fjell and Anja Wiesbrock (eds.), *Sustainable Procurement under EU Law* (CUP 2016).

<sup>291</sup> Ling He, Shengdao Gan, and Tingyong Zhong, 'The impact of green credit policy on firms' green strategy choices: green innovation or green-washing?' (2022) 29 *ESPR* <<https://doi.org/10.1007/s11356-022-20973-w>> accessed 27 February 2023.

TFEU. Given that the Internal Market regime consists of the prohibition of protectionist behaviour directed at the Member States, the aim of creating an Internal Market within the EU strongly impacts the regulation of PP in all its Member States. When considering opening markets to tenderers from different Member States it becomes challenging to incorporate sustainability aspects into the aims of EU PP.

There is a potential risk of possible ‘instrumental’ distortions of intra-EU trade in the light of obtaining sustainability objectives. If sustainability requirements discriminate against foreign tenderers (by hindering their access to PP contracts and, therefore, to national markets), they breach the Treaty provisions on free movement that prohibit discrimination or MEQR on imports within the Internal Market and directly apply to the PP process. The Treaty rules on free movement preclude technical specifications, selection criteria and award criteria that exclude products able to meet the entity’s requirements for fulfilling a public need. Mandatory sustainability requirements may also obstruct competition, by limiting tenderers’ participation in PP due to lower possibilities of winning the bid. States’ limited capability to attract competition for a PP contract may reduce the number of foreign bids for a national PP contract, thus, impacting intra-EU trade. The PP directives follow the primary law free movement principles, as indicated by their legal base – Articles 53 (2), 62, and 114 TFEU.

EU law provides for the possibility of including some of the sustainability aspects following the rule of reason developed in *Cassis de Dijon*. It should not be forgotten that the CJEU’s explicit objective when introducing it was to mitigate the effects of strict prohibitions in the Treaty provisions on free movement when this was strictly necessary for the protection of some national legitimate interests. In line with *Cassis de Dijon*, in the absence of harmonisation measures, each Member State is considered competent to conceive rules that will be valid in its own territory. However, the ruling also nuances this competence in view of the TFEU free movement provisions. Accordingly, Member States are permitted to adopt mandatory requirements – which are an open category, and many SDGs can be covered by the relevant case law – in their PP policies if such measures are non-discriminatory and proportionate. National measures that do not fulfil these parameters are violating EU law. This test guarantees that interests that are deemed worthy of protection from a Member State’s perspective are counterbalanced with free movement. Thus, the ‘lenses’ through which Member States can incorporate sustainability aspects into their national PP policies are shaped by *Cassis de Dijon*. This suggests that the EU does not aim to promote sustainability through PP, but rather that it regulates it so as not to contravene the EU free movement principles.

In fact, the very limited references to sustainability aspects in the current PP directives only *permit* considering environmental objectives in the technical specifications; facilitating SMEs’ access and provide for limited possibilities for considering environmental aspects in the selection phase; and allow considering social and environmental aspects in the award criteria. The existing rules do not require the use of sustainability criteria, which indicates, as specified above, that the EU legislator does not aim to promote it nor that sustainability is paramount to the EU regulation of PP. The EU leaves the incorporation of sustainability in PP at the Member States’ discretion (while safeguarding the Internal Market), which suggests sustainability is more of interest to the Member States when assessing the methods fulfilling a public need.

Further, if the award of a PP contract based on sustainability considerations is the result of free competition, the measure would not involve restriction to market access unless the criteria hinder access to PP contracts (access to contract decisions). In the same line of thought, government buying decisions, including the preference for environmental or social criteria in a product, service, or work, must be linked to the subject-matter of the contract. This is because substantive decisions that define the criteria against which compliant tenders are evaluated to determine the winning bid establish the market, rather than restrict access to it, and thus are not hindrances to trade. These are distinct from the technical specifications, which define the required characteristics of a contract. If a bid does not comply with the specifications, it must be excluded as ‘non-compliant’.<sup>292</sup>

This paper emphasised that given the basic purpose and history of the EU, its policies are largely determined by economic concerns and objectives rather than social and environmental ones. In this respect, it is suggested that the PP directives are concerned primarily with promoting the Internal Market and that they do this by: prohibiting discriminatory and non-discriminatory barriers to trade, securing transparency to allow monitoring and enforcing the non-discrimination rule, and removing barriers to market access. It was also identified that

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<sup>292</sup> *Commission v Denmark* (n 24).

competition supports eliminating obstacles to free movement provisions by ensuring the elimination of discrimination.

Thus, the EU PP system is almost exclusively focused on these regulation objectives. Even when applying the limited possibilities of using sustainability criteria in the PP procedure, these shall not restrict intra-EU trade, which is the rationale behind the EU Internal Market creation.