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Ankersmit, L.

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The contribution of EU public procurement law to corporate social responsibility

Laurens Ankersmit* 

Abstract

This article argues that while EU public procurement law increasingly allows public authorities to take environmental and social considerations into account in public purchasing decisions, it does impose limits on the possibility for authorities to incentivise corporate social responsibility (CSR) policies through public procurement. These specific limits are the result of the EU legislator’s choice to endorse the Court of Justice’s ordoliberal approach to public procurement law. This approach is in tension with EU CSR policy, and more broadly, the EU’s non-economic goals such as environmental protection, the fight against climate change, human rights and social policy. It reflects a normative preference for the right of undertakings to compete for a tender over the freedom of government authorities to choose a supplier on public interest grounds even if these choices are based exclusively on a legitimate public interest and should be reconsidered.

1 | INTRODUCTION

Arguing against trade-restrictive environmental measures by developed countries, free trade advocate Jagdish Bhagwati once wrote ‘the rich and powerful countries that wish to propagate their moral preferences, whether widely held or idiosyncratic, should [be] putting their own resources where they claim their moral preferences are.’ Bhagwati’s criticism of such measures is part of a lively debate in the WTO context, but it also

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opens up the question as to whether public funds intended for procuring foreign goods can or should be used to reflect moral preferences held in the EU. Public procurement accounts for 14% of the EU gross domestic product (GDP)—or roughly €2,000 billion yearly and can thus make a considerable contribution to protecting the environment or social conditions elsewhere even if only a fraction of that sum goes to goods sourced from developing countries.3

At first glance, it appears that the EU institutions recognise the important link between public procurement and promoting corporate social responsibility (CSR). The European Commission (Commission), for instance, states in its 2011 Communication on a renewed strategy for corporate social responsibility that there is ‘the need to promote market reward for responsible business conduct, including through investment policy and public procurement.’4 The European Parliament, in its 2018 resolution on the public procurement strategy package, stresses that ‘it is important for contracting authorities to consider the full life-cycle of products, including their impact on the environment, in their purchasing decisions’, and points out that ‘socially responsible public procurement must take into account supply chains and the risks associated with modern-day slavery, social dumping and human rights violations’.5

A closer look at EU public procurement law, however, shows a much more mixed picture. The preamble of the EU’s most recent Public Procurement Directive already states that contracting authorities should ‘not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place’.6 In the past, EU public procurement law and policy showed disapproval by EU institutions of Member States’ actions to use public procurement to promote CSR. Consider, for instance, both the Commission’s and Court’s objections to the Austrian government electricity supply contracts because they required the supplier to produce electricity from renewable energy sources in EVN Wienstrom.7 Or the Commission’s successful infringement case against the Netherlands because the Dutch province of North-Holland prescribed the existence of a CSR policy and the use a particular type of fair trade label in Commission v. Netherlands (Max Havelaar).8

As a result, while contracting authorities may include social and environmental criteria for the specific supplies they want to purchase, they cannot more generally require the supplier to adhere to certain CSR policies. Such CSR policies are, however, more and more commonplace. International standards such as the ISO 26000 guidelines, the Global Reporting Initiative (GRI), SA 8000, the Global Compact, the OECD Guidelines for multinational enterprises, and the Equator principles are widely used by undertakings. In addition, more nationally used CSR standards exist and companies themselves may have their own CSR policies. For instance, a bank may choose not to do business with undertakings involved in the weapons industry. While one would think that governments should at least have the choice to incentivise such corporate conduct, EU public procurement law does not allow contracting authorities to make public purchasing decisions on these grounds. Thus, if a local municipality in a Member State wishes, for example, to purchase solar panels from a manufacturer outside the EU but at the same time wants to ensure that the supplier is not involved in the manufacture of cluster munitions, EU public procurement law does not allow it to include these concerns in the tender process.

This article explores the origins of this specific limitation in the freedom of public authorities’ wider ability to make publicly responsible procurement decisions.9 It will explore how gradually, EU public procurement law

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6Case C-448/01, EVN AG and Wienstrom GmbH v. Republik Österreich, EU:C:2003:651.
7Case C-368/10, Commission v. Netherlands (Max Havelaar), EU:C:2012:284.
has become more enabling in allowing Member State authorities to take social and green considerations into account in their public purchasing decisions, in particular, in relation to the choice of supplies. However, the law still limits their freedom to incentivise CSR policies. This specific limitation is the result of the EU legislator's choice to endorse the Court of Justice's ordoliberal approach to public procurement law. That approach reflects a normative preference for undertakings' right to compete for a tender over government authorities' freedom to choose a supplier on public interest grounds even if the government's choices are based exclusively on a legitimate public interest. The article suggests that the current approach should be reconsidered in light of a less limited understanding of CSR policy and the increasing opening up of public procurement in the EU to competition from third countries.

This article proceeds as follows. Section 2 will briefly set out the EU's policy and understanding of CSR. Section 3 will explain the conditions under which public procurement law enables contracting authorities to incorporate social or green considerations in their purchasing decisions. Sections 4 and 5 will discuss how the limits imposed by public procurement law constrain contracting authorities from taking into account CSR considerations in its supplies requirements (Section 4) and in its requirements tied to the undertaking (Section 5). Section 6 will argue that this current policy choice should be reconsidered in light of the increasing openness of EU public procurement markets to competition from outside the EU and the increasing significance of CSR more generally.

2 | CORPORATE SOCIAL RESPONSIBILITY AND THE EU'S APPROACH TO CSR

Corporate social responsibility is a popular but fuzzy and contested concept.\(^\text{10}\) Two issues are especially contested: the definition of CSR and its mode of implementation.\(^\text{11}\) The former concerns the proper scope of CSR. This includes the particular area of impact CSR should address (only social impact, only the environmental impact, both, or other areas such as human rights).\(^\text{12}\) It also includes a discussion of whom CSR is to benefit: shareholders, stakeholders, or society at large, as well as a temporal dimension (should it benefit future generations).\(^\text{13}\) In addition, there is a debate as to the proper extent of CSR: should it only focus on the corporate activities of a particular undertaking, or the responsibility for the activities of undertakings in the entire supply chain (including suppliers).\(^\text{14}\) Lastly, CSR can take the form of specific conduct, but also adherence to principles, guidelines, or standards with various ways of ensuring compliance with such standards.\(^\text{15}\)

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\(^{12}\)See above, n. 10.


\(^{14}\)The ISO 26000 standard, for instance, notes that organisations are not required to exert their influence over the entire value chain to contribute to sustainable development. See Lars Maratis, ‘Out of the Ordinary? Appraising ISO 26000’s CSR Definition’ (2016) 58 International Journal of Law and Management, 26.

\(^{15}\)For instance, the ISO 26000 standard is not certifiable and does not include requirements for a management system. Labelling initiatives such as certain fair trade or sustainable fishing labels do contain different means of certification to verify compliance with CSR standards. There are also publicly regulated certification methods, such as the EU’s Regulation laying down due diligence obligations for undertakings in relation to conflict minerals and EU rules on non-financial reporting; see below, n. 17.
The second issue (mode of implementation) concerns the debate about whether CSR should be a matter of voluntary activity of businesses or whether it should be regulated. De Schutter has described three ways in which CSR may be used in that sense.\(^\text{16}\) The first refers to the duties of a business not only to its shareholders but also to the community and stakeholders. This may justify regulatory action in terms of standards of behaviour backed by sanctions and changes to corporate structure to ensure the corporation abides by its duties towards society. The second way manifests a shift from imposing legal obligations with sanctions to the reliance on incentives, voluntary initiatives and soft-law mechanisms. It may result in the introduction of regulation that enables rather than imposes business to act responsibly towards society and stakeholders, for instance through the introduction of reporting mechanisms or through the use of public procurement. The third way is to see CSR as an alternative to regulation itself, whereby market mechanisms dictate the conditions under which business can contribute to wider societal goals such as social and environmental protection.

The EU itself has several pieces of legislation that reflect the first approach, such as the EU’s Regulation laying down due diligence obligations for undertakings in relation to conflict minerals and EU rules on non-financial reporting.\(^\text{17}\) The Commission’s policy documents on CSR, however, have over the years shifted between the second and third approaches.\(^\text{18}\) The Commission’s policy approach is predominantly based on providing incentives to businesses to have responsible business practices, at times relying on enabling regulation.\(^\text{19}\) EU policy on CSR policy aims to encourage undertakings to improve the social and environmental impact of their business in their corporate policy generally, and seeks to do so beyond social and environmental legal requirements. As part of the Europe 2020 Strategy (of which the current Directive is also part), the Commission renewed its commitment to promote CSR through its Communication on a renewed EU strategy 2011–14 for CSR.\(^\text{20}\) The goal of this policy is to create an environment which incentivises responsible business behaviour, durable employment generation and sustainable growth in the medium and long term.\(^\text{21}\) According to the Commission, CSR is ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’ and is defined as ‘the responsibility of enterprises for their impacts on society’.\(^\text{22}\) The Commission considers respect for applicable legislation and collective agreements as a ‘prerequisite’ for meeting their responsibility. However, to ‘fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders’ so that shared value for the owners as well as other stakeholders and society at large is maximised and that potential adverse impacts are identified, prevented and mitigated.\(^\text{23}\) As such, ‘Corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment. Certain regulatory measures create an environment more conducive to enterprises voluntarily meeting their social responsibility.’\(^\text{24}\)

Two of the seven factors identified by the Commission which would help to increase the impact of its policy to promote this CSR are ‘the need to promote market reward for responsible business conduct, including through investment policy and public procurement’ as well as ‘the need to acknowledge the role that complementary


\(^{20}\) COM(2011) 681 final, above, n. 4.

\(^{21}\) Ibid., 4.

\(^{22}\) Ibid., 3.

\(^{23}\) Ibid., 6.

\(^{24}\) Ibid., 3 emphasis added.
regulation plays in creating an environment more conducive to enterprises voluntarily meeting their social responsibility.\textsuperscript{25} The Commission notes in this respect that public authorities ‘should play a supporting role through a smart mix of voluntary policy measures and, where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability.’\textsuperscript{26}

Public procurement is explicitly mentioned as one of the eight core points on the agenda for action for the period between 2011 and 2014, which not only consists of commitments for the Commission itself but also suggestions for Member States. As part of ‘enhancing market reward for CSR’ the Commission states that the EU should leverage policies in the field of public procurement to strengthen market incentives for CSR.\textsuperscript{27} To that end, the Commission invites public authorities at all levels ‘to make full use of all possibilities offered by the current legal framework for public procurement. The integration of environmental and social criteria into public procurement must be done in particular in a way that does not discriminate against SMEs, and abides by Treaty provisions on non-discrimination, equality of treatment and transparency.’ The Commission also intended to better integrate social and environmental considerations ‘into public procurement as part of the 2011 review of the Public Procurement Directives, without introducing additional administrative burdens for contracting authorities or enterprises, and without undermining the principle of awarding contracts to the most economically advantageous tender.’\textsuperscript{28}

The Commission’s policy on CSR is not one that relies exclusively on market mechanisms, but envisages an active role on the part of the EU institutions and Member States to provide the necessary incentives for CSR, including through regulatory action. One key aspect of this policy is to use public procurement to incentivise CSR. However, the current EU public procurement rules are not fully coherent and in line with this policy. As this article will explore below in Sections 4 and 5, EU public procurement law limits the ability of contracting authorities to incentivise CSR by requiring social and environmental considerations to be linked to supplies contracted and by restricting the ability of contracting authorities to select and exclude undertakings on considerations that go beyond mere legal compliance. First, however, the article turns to how public procurement law can in fact enable contracting authorities to consider the social and environmental impact of business in public purchasing decisions.

3 | BUYING GREEN AND SOCIAL: THE ENABLING FUNCTION OF EU PUBLIC PROCUREMENT LAW

As a preliminary matter, it is important to bear in mind that the rationale for regulating public procurement in the EU is, at its most basic level, the proper functioning of the internal market and, as such, to open up the procurement markets of Member States to bids from other Member States.\textsuperscript{29} The relationship between the internal market provisions and secondary procurement legislation is, therefore, one of mutual reinforcement.\textsuperscript{30} Similar to the free movement context, the Court has accepted the pursuit of public policy objectives within procurement policy in a way that

\textsuperscript{25}Ibid., 5.
\textsuperscript{26}Ibid., 7 emphasis added.
\textsuperscript{27}Ibid., 10.
\textsuperscript{28}Ibid., 11.
\textsuperscript{29}Case 45/87, Commission v. Ireland (Dundalk Water) [1988] ECR 4929, paras. 18–19; Case C-507/03, Commission v. Ireland (An Post) [2007] ECR I-9777, para. 27; Case C-380/98, University of Cambridge [2000] ECR I-8035, para. 16; Case C-19/00, SIAC Construction [2001] ECR I-7725, para. 32; Recital 1 of Directive 2014/24/EU, above, n. 6, states that ‘[t]he award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.’ See also Berend Jan Drijber and Hélène Stergiou, ‘Public Procurement Law and Internal Market Law’ (2009) 46 Common Market Law Review, 805–846; Sue Arrowsmith, ‘The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Policies’ (2011–2012) 13 The Cambridge Yearbook of European Legal Studies, 1–47.
is alike the Court’s treatment of public interest justifications in free movement law, as long as those objectives are in line with free movement inspired principles of non-discrimination, transparency and proportionality.³¹

Notably, public procurement law allows contracting authorities to take into account the entire product life-cycle when distinguishing between products on the basis of public interest criteria. This is so even if those criteria do not form part of the material substance of the product.³² Thus, in EVN Wienstrom, the Court found that contracting authorities could in principle apply an award criterion requiring that the electricity supplied be produced from renewable energy sources.³³ In Max Havelaar, the Court was more explicit in endorsing both social (fair trade) and environmental objectives at the production stage of goods in public supply contracts.³⁴ The Court did not only consider it irrelevant whether social or environmental aspects of products needed to be intrinsic to the product itself, but it also did not place any territorial limits on the pursuit of those goals.³⁵

This approach has been endorsed by the legislator in the current Public Procurement Directive. The current Directive seeks to make EU procurement policy, more than before, enabling in pursuing social and environmental policy. Procurement is, in that respect, seen more and more as an instrument of EU industrial policy intended to contribute to the achievement of the EU’s goals.³⁶ For the Commission, public procurement policy is based on ‘two complementary objectives’: the first is ‘to increase the efficiency of public spending’; and the second is to enable contracting authorities to pursue goals ‘such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services’.³⁷

As such, the Directive is rather explicit in enabling contracting authorities to distinguish between products on public interest grounds when they decide what they want to buy (‘technical specifications’) and how much value they place on environmental or social attributes of products (‘award criteria’).³⁸ Contracting authorities may also take such attributes into account when requiring specific ‘conditions for performance of contracts’.³⁹ Award criteria offer the fullest range of possibilities for including environmental and social considerations in public supplies contracts

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³²In this context it is worth recalling that the Commission opposed the use of environmental considerations generally as a means of awarding a contract in Concordia Bus and the use of environmental production processes specifically in its 2001 interpretative guidelines. See Case C-513/99, Concordia Bus, above, n. 31, para. 52; Commission, ‘Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement’, COM (2001) 274 final, 10, 21. The inclusion of the term production processes and methods in the definition of technical specification in the previous public procurement Directive, for instance, was the result of amendments made by the European Parliament and was not envisioned initially by the Commission in its proposal. See Joel Arnould, ‘Secondary Policies in Public Procurement’ [2004] Public Procurement Law Review, 191.

³³EVN AG and Wienstrom, above, n. 7, paras. 32–42.

³⁴Max Havelaar, above, n. 8.

³⁵Ibid., paras. 76, 89, 91.

³⁶Recital 2, 91, and 95 of Directive 2014/24/EU, above, n. 6.


³⁸Ibid., paras. 74 and 75 and Article 42 of Directive 2014/24/EU. Article 42 (1) states that technical specifications lay down the characteristics of the required supplies. Those characteristics may also refer to the specific process or method of production or provision of the requested [...] supplies [...] or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. This new provision not only includes an explicit reference to processes and production methods, but also makes clear that a specific process for another stage of its life cycle can be part of the technical specifications, even where that characteristic is not physically present in the product itself. This addition puts to rest a long debate on whether there needs to be some kind of ‘use’ for the contracting authority from the production method specified. This used to be the position of the Commission. See Commission, ‘Commission interpretative communication on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement’, COM (2001) 274 final, 10. See, also, Arnould, above, n. 32. For criticism, see Peter Kunzlik, ‘The Procurement of ‘Green’ Energy’, in Sue Arrowsmith and Peter Kunzlik (eds.), Social and Environmental Policies in EC Procurement Law: New Directives and New Directions (Cambridge University Press, 2009), 369–406; Peter Kunzlik, ‘From Suspect Practice to Market-Based Instrument: Policy Alignment and the Evolution of EU Law’s Approach to “Green” Public Procurement’ [2013] Public Procurement Law Review, 97–115 and references therein.

³⁹The provisions on conditions relating to the performance of the contract, by contrast, only indirectly refer to process-based considerations in the preamble in Recital 97 and by reference to Article 67 (3) of the Directive. Article 70 on special performance conditions includes both environmental as well as social considerations as possible conditions for performance of contracts. It states that contracting authorities may lay down special conditions relating to the performance of the contract and that those conditions may include social and environmental considerations provided that such conditions are linked to the subject-matter of the contract within the meaning of Article 67 (3) of the Directive. The article incorporates the Court’s case law on workforce requirements, in particular the Beentjes (above, n. 17, paras 36–37), and Max Havelaar (above, n. 8, para. 91) cases.
generally, although they are not as determinative as technical specifications, since non-compliance with such criteria does not automatically lead to a rejection of a bid.  

However, the current Directive settles the debate as to whether price must be included as an award criterion in favour of the affirmative position. Under the old regime, authors offered competing visions as to whether contracting authorities could award a contract to the most economically advantageous tender by exclusively using qualitative, non-economic criteria. In EVN Wienstrom, the Court did not exclude this possibility, but did make it clear that 45% weighting for non-price award criteria was acceptable. The current Directive explicitly makes price or cost a mandatory aspect of awarding contracts even though the distinction between awarding contracts on the basis of the most economically advantageous tender or on the basis of price only has disappeared. This distinction is, nonetheless, somewhat mitigated by allowing contracting authorities to award a contract on the basis of cost (not necessarily price) and use a cost-effectiveness approach which may include life-cycle costing. The Directive, on the issue of life-cycle costing, appears to reflect a preference of the EU legislator for environmental considerations over social considerations because the Directive does not enable contracting authorities to use life-cycle costing to include costs imputed to social or other externalities other than environmental externalities.

Such a preference for environmental over social interests may exist in relation to fair trade criteria, although the law has not fully developed on this point. The Court’s case-law and the Directive suggest that fair trade criteria cannot be construed as technical specifications, but should be interpreted as conditions for the performance of contracts. In Max Havelaar, the Court found that while criteria related to organic production could constitute a technical specification, fair trade criteria could not because a technical specification ‘applies exclusively to the characteristics of the products themselves, their manufacture, packaging or use, and not to the conditions under which the supplier acquired them from the manufacturer.’

If this line of reasoning is maintained under the current Directive it may make fair trade policy less effective than environmental policy if it is pursued through public supplies contracts. This is because it is generally accepted in the literature, and actively supported by the Commission, that tenders can only be rejected for non-compliance with technical specifications a priori, whereas tenders under conditions for performance of contracts merely have to accept those conditions. As a consequence, anticipated non-compliance with conditions for performance of contracts cannot result in a priori exclusion of tenderers during the procurement procedure. According to the

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40In relation to contract performance conditions, the general view is that non-compliance with contract performance conditions cannot lead to a rejection of a tender a priori. See, for discussion, below, nn. 48 and 49.

41Arguing in favour of this possibility was Sue Arrowsmith, The Law of Public and Utilities Procurement. Regulation in the EU and the UK, vol. 1 (Sweet & Maxwell, 3rd edn, 2014), 761–763, questioning the policy justification for including a value for money consideration since the old Directive’s objective was not the allocation of resources between Member States. Arguing against was Albert Sanchez-Graells, Public Procurement and the EU Competition Rules (Hart, 2nd edn, 2015), 385–386, who argues that in fact the previous Directive did have such an objective.

42Recital 96 and Articles 67 (1) and 68 (1) (b) of Directive 2014/24/EU, above, n. 6.

43The term ‘most economically advantageous tender’ is thus ‘streamlined’ to incorporate both concepts, whereas what was previously understood as ‘most economically advantageous tender’ should now be covered by the concept ‘best price-quality ratio’. This means that contracts should be awarded either (1) on the basis of price or cost, or, alternatively (2) on the basis of best price-quality ratio ‘which should always include a price or a cost element’.


45Recital 96 and Articles 67 (1) and 68 (1) (b) of Directive 2014/24/EU, above, n. 6.

46See, in particular, Recital 97. Article 42 (3) (a) of the Directive only refers to ‘environmental characteristics’ when contracting authorities formulate their technical specifications in terms of performance or functional requirements. By contrast, other parts of the Directive are more elaborate on including social-process attributes in procurement considerations, suggesting that the concept of technical specifications is to be narrowly construed in this respect, by only allowing for the inclusion of environmental process-attributes as characteristics of the products to be supplied. Article 43 on the use of labels refers to ‘environmental, social or other characteristics’. Conditions related to the performance of the contract and exclusion grounds equally are explicitly connected to environmental and social considerations. The article on award criteria—Article 67—is even more elaborate. Award criteria may include qualitative, environmental and/or social aspects and may comprise social, environmental, and innovative characteristics and trading and its conditions.

47Max Havelaar, above, n. 8, para. 74, emphasis added.


50If undertakings do not accept such conditions, however, their bids must be refused according to the Commission, basing its views on C-243/89 Commission v. Denmark [Storebaelt] [1993] ECR I-3353; see the Buying Social guide, above, n. 49, at 43, fn. 78.

Commission, conditions for performance of contracts, in contrast to technical specifications, selection and exclusion criteria, and award criteria, need not be met at the time of submitting the tender. Tenderers not meeting technical specifications, on the other hand, must be excluded from the procurement procedure a priori. RELATED TO this point is the issue of proof of compliance with conditions for performance of contracts. According to the Commission, tenderers are required to prove that their bids meet the technical specifications, but proof of compliance with conditions for performance of contracts cannot be requested during the procurement procedure. There seems to be no clear justification for this approach, other than to constrain the ability of contracting authorities to take into account fair trade considerations in their procurement decisions in favour of more competition for public contracts. Nonetheless, the wording of the Directive does suggest that there are also arguments to allow for such a priori exclusion of a tender for non-compliance with fair trade criteria. More generally, such a view would sit uncomfortably with the principles of public procurement and the principle of equal treatment in particular, because a tenderer that complies with the conditions stipulated in the contract notice would be treated less favourably than a tenderer that does not comply, since the latter does not have to adhere to those conditions during the procedure. This 'duty of verification' entails that not verifying whether tenderers can actually do what they say they can do is a violation of the principle of equal treatment of tenderers and a violation of the obligation of transparency.

### 3.1 Obligations under EU procurement law to buy green or social

While EU public procurement law enables contracting authorities to take into account social and environmental considerations in procurement decisions, it only to a very limited extent obliges authorities to buy green or social. The current approach towards such obligations is sector-specific, although the current Directive introduces a number of important innovations which will require contracting authorities to ensure that environmental and social legislation is complied with in the performance of the contract.

In relation to the sector-specific approach, only in a few instances, which concern the transport sector, the procurement of office equipment and the construction of buildings, are contracting authorities required to buy green. The more horizontal obligations introduced in the current Directive are the general clause in Article 18 (2) of the Directive that requires Member States to ensure compliance with environmental and social legislation during contract performance, and the mandatory exclusion criterion listed in Article 57 (1).

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52 Commission, Buying Social, above, n. 49, at 43.  
53 Storebaelt, above, n. 50.  
54 Commission, Buying Social, above, n. 49, at 43.  
55 In particular, Articles 56 (reference to 'conditions') and 43 of the Directive. Article 43 states that contracting authorities may require a specific label in the contract performance conditions for social or environmental characteristics 'as a means of proof that the [...] supplies correspond to the required characteristics'. Equally Article 44 states that contracting authorities 'may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.' Such provisions would make little sense if a contracting authority cannot reject the tender on the basis of non-compliance with those requirements.  
56 Storebaelt, above, n. 50.  
4 | RESTRICTING AUTHORITIES’ CHOICE IN SUPPLIES: THE ‘SUBJECT-MATTER OF THE CONTRACT’ CASE-LAW

The first limitation found in EU public procurement law on incentivising corporate social responsibility is that public interest considerations must be linked or related to the ‘subject-matter of the contract’. This requirement is central to EU procurement law and features in all the major concepts of the current Directive such as technical specifications, contract performance conditions and award criteria.59

The requirement is a specific application of the principle of proportionality, requiring contracting authorities to limit their social and environmental considerations to the supplies in question and nothing beyond that. This implies that contracting authorities can only take social and environmental considerations into account in relation to the goods that are part of the contract, and not take into account social and environmental considerations in the contract that are unrelated to the supplies of those goods, such as general environmental production requirements or evidence of a policy of CSR. Thus, a contracting authority may require goods to be of fair trade origin, but not require the tenderer to obtain all its products on the basis of fair trade criteria. Similarly, a contracting authority may require electricity to be supplied to be produced in an environmentally friendly way, but it may not require the tenderer to only produce green electricity.

This limitation on the freedom to contract on the part of the contracting authority is a significant impediment to encouraging CSR through procurement policy. For instance, a local authority that wishes to purchase solar panels, but wishes to ensure that the supplier is not involved in the manufacture of cluster munitions, has little legal means to include these concerns in the tender process. Such concerns, which are more related to the general policy of CSR of an undertaking, can only to a very limited extent feature in tenders through procurement criteria for the exclusion of the supplier (discussed in Section 5) not the criteria for the supplies.

This constraint on procurement policy is the result of the Court’s assessment that non-economic considerations must be linked to the ‘subject-matter of the contract’.60 The Court introduced this requirement in Concordia Bus, in which it held that award criteria, while they may be based on non-economic considerations, must be linked to the subject-matter of the contract.61 In EVN Wienstrom, the Court applied its newly developed criterion in a way that would serve a decisive blow to CSR criteria in supplies contracts.62 The Court, in its assessment, differentiated between production requirements for the supplies of the contract and production requirements that applied to undertakings in general. Whilst the former is in principle permitted, the latter is not. The award criterion used by the Austrian authorities awarded points to suppliers on the basis of electricity produced from renewable energy sources in excess of the supplies needed by the contracting authorities. This could not be regarded as linked to the subject-matter of the contract.63

The Court’s subsequent reasoning suggests that its insistence that a process-based award criterion can only relate to the actual supplies delivered was based on the concern that this would otherwise lead to a breach of the principle of equal treatment. Such a ‘decisive’ award criterion would be ‘liable to confer an advantage on tenderers who, owing to their larger production or supply capacities, are able to supply greater volumes of electricity than other tenderers.’64 This would result in unjustifiable discrimination of other undertakings which are able to supply

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60Ibid.
61Case C-513/99, Concordia Bus, above, n. 31, para. 64.
62The contracting authority specified that a successful tenderer should at least produce a certain amount of electricity from renewable energy sources. If it was able to do so, the award criteria were the price of the electricity supplied and the amount of electricity produced from renewable energy sources in addition to the minimum amount set. The reason why a production threshold was chosen was because at the time it was difficult for technical reasons for a supplier of electricity to guarantee that the electricity was produced from renewable energy sources.
63EVN AG and Wienstrom, above, n. 7, paras. 67–68.
64Ibid., para. 69.
green electricity in the amounts that the Austrian government required, but not in excess of that amount. According to the Court, such ‘a limitation on the circle of economic operators in a position to submit a tender would have the effect of thwarting the objective of opening up the market to competition pursued by the directives coordinating procedures for the award of public supply contracts.’65

In Max Havelaar, the Court reiterated this line of reasoning. The Court noted that the award criteria for the supply of fair trade and organic coffee and tea ‘covered only the ingredients to be supplied in the framework of that contract, without any bearing on the general purchasing policy of the tenderers.’66 As such, the criteria on fair trade and organic production related ‘to products the supply of which constituted part of the subject-matter of that contract.’67

As a consequence, the Court rejected any social or environmental considerations going beyond the supplies in question which addressed the conduct of the undertaking more generally as being able to constitute conditions relating to the performance of the contract. The Court refuted the argument by the Dutch government that criteria of sustainability of purchases and socially responsible business, which are intended to contribute to the improvement of the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, are conditions related to the performance of the contract under Article 26 of the Directive (currently Article 70 of the Directive). The Court noted that ‘the “suitability requirements” were defined in the introductory part of the specifications as requirements expressed either as grounds for exclusion or minimum levels to be satisfied by a tenderer so that his tender could be taken into consideration, being thus distinct from the tender as such. Finally, the requirement at issue was formulated in a general way and not specifically in relation to the contract at issue.’68 The Court went on to consider the criteria relating to conducting a socially responsible business under the rules governing selection criteria.

The sanctioning of awarding contracts on the basis of social or environmental performance beyond the supply of the products in question is broadly in line with the distinction made by Arrowsmith and Kunzlik between the procurement actions of the government as a regulator and as a purchaser. This distinction ‘reflects, broadly, the fact that sometimes the government’s concern is merely to acquire a product, work or service that it needs, but that in other cases it also uses its procurement power to ‘regulate’ behaviour as a substitute for more traditional regulatory techniques.’69 Thus, instead of regulating a particular industry by laying down environmental production standards, for instance, governments will try to use their procurement policies to nudge undertakings to produce in a more environmentally friendly manner.70

One reason for choosing such type of ‘regulation’ is that other more traditional forms of regulation are not possible.71 This can be the case, for instance, because production takes place outside the jurisdiction of the contracting authority or because the contracting authority lacks constitutional competence to do so. For example, regulating labour conditions by means of traditional labour legislation in developing countries is something that falls outside the Dutch constitutional competence of the province of North-Holland and is also something that is jurisdictionally impossible for a Dutch province because it does not have any jurisdiction in developing countries. Moreover, there might be a lack of political consensus to regulate production standards directly, and procurement policy might be a suitable compromise to address certain environmental or social concerns over production processes and methods.

However, while it might be true that these type of considerations that go beyond the concern over the production process—attributes of the particular goods supplied are more ‘regulatory’ in nature—as they prescribe CSR

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65Ibid.
66Max Havelaar, above, n. 8, para. 90, emphasis added.
67Ibid.
68Ibid., para. 103, emphasis added.
70In the WTO context, this distinction that the Court is endorsing is what has been referred to as permitting ‘how-produced’ standards but sanctioning ‘producer-characteristics’ standards. See Steve Charnovitz, ‘The Law of Environment “PPMs” in the WTO: Debunking the Myth of Illegality’ (2002) 27 The Yale Journal of International Law, 59–110.
71Other reasons may include maintaining ‘clean hands’ as a government or rewarding good conduct by potential contractors, discussed further below.
standards generally and not just for the products to be supplied—it can certainly not be entirely juxtaposed with purchasing behaviour either. Consumers, for instance, sometimes boycott products because of corporate misconduct of an undertaking which is not directly linked to the production of the boycotted product. In addition, the practical value of the distinction can be rather limited. Although an undertaking is only required to respect social and environmental production standards in relation to the products supplied, the fact of the matter is that if it wishes to do so it will have to set up a production line that meets the conditions set by the contracting authority.

The EU legislator has nonetheless subsequently codified this judge-created test throughout the current Directive, and not only in relation to award criteria for which the Court initially devised the test. The requirement of a link or a relation to the ‘subject-matter of the contract’ can be found in the provisions concerning technical specifications, labels, selection criteria, award criteria and conditions relating to the performance of the contract.

In essence, the current approach in public procurement law is to a not insignificant extent inspired by the jurisprudence of the Court of Justice. One of the central tenets that drives public procurement law is the opening up of public procurement to competition from other Member States in line with the goals of the internal market. However, the framing of procurement in these terms have allowed the Court in its case-law and the EU legislator in subsequent secondary legislation to go beyond this initial internal market rationale. By introducing concepts such as the ‘subject-matter of the contract’, reading provisions narrowly, and applying the principle of proportionality, the EU institutions at the same time constrain contracting authorities in their purchasing choices and allow undertakings to compete for public contracts beyond simple non-discriminatory terms. As a result, public procurement law enshrines a certain right to compete for public contracts for undertakings, in line with the basic ordoliberal tradition of state interference to preserve economic freedom of individuals.

One possible merit of this ordoliberal approach is that small and medium-sized enterprises (SMEs) can compete more easily for public tenders. SME participation in public tenders is a concern that is raised in several recitals in the current Directive. Large companies might be in a better position to adhere to CSR standards required by contracting authorities. As a result, CSR requirements could limit the share of SMEs competing for public contracts. The overall public procurement regime is complex and, as a result, favourable to large undertakings that have the necessary resources to understand its operation. In that sense, placing limits on what contracting authorities can require from undertakings can be seen as pro-competitive. On the flip side of this coin is an additional layer of complexity in the law as well as an intrusion in public authorities’ freedom to take non-economic considerations into account in public purchasing decisions.

The introduction of the concept of linking to the ‘subject-matter of the contract’ by the Court is a good example of this ordoliberal view. This approach, endorsed by the EU legislator throughout the Directive, conceals an intrusive application of the principle of proportionality to public interest decision-making that goes beyond the initial internal market rationale of allowing businesses from other Member States to compete on non-discriminatory terms only. The Court justifies its approach on teleology, based upon the idea that the limitation is necessary for the smooth operation of the internal market and that any considerations of public policy must comply with the principle of proportionality. The Court thus balances the imperative of competition within the internal market with social and environmental considerations and concludes that while such considerations are permitted, they may not go beyond the supplies part of the contract in question.

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72See, for a more critical assessment of the EU legislator’s ability to revisit the ECJ’s interpretation of the EU legislator’s own legislation, Grith Skovgaard Ølykke and Albert Sanchez-Graells (eds.), Reformation or Deformation of the EU Public Procurement Rules (Edward Elgar, 2016).
73See Recitals 97 and 104. See, in relation to supplies criteria: Article 42 (1) on technical specifications, Article 43 (1) (a) for labels, Article 67 (2–3) for award criteria and Article 70 on contract performance conditions. See, in relation to supplier criteria: Article 58 (1) on selection criteria.
74Foreign competition primarily constitutes competition from other Member States. However, with the WTO’s Agreement on Government Procurement and the expanding network of bilateral trade agreements, Article 25 of Directive 2014/24/EU opens up Member State procurement markets beyond competition from other Member States, above, n. 6.
This argument—that the limitation is necessary for the smooth operation of the internal market—is thus not based on the principle of free movement of goods alone, but rather read in combination with the principles of proportionality, equal treatment and the goal of opening up public procurement to competition generally. Thus, it is not necessarily discrimination between tenderers on the grounds of nationality which is the main concern for the Court. Rather, the Court seems to have found social and environmental considerations disproportionate to the interest of opening up the tender for competition for other undertakings. Indeed, this is why the Court adds in EVN Wienstrom that accepting such criteria ‘would have the effect of thwarting the objective of opening up the market to competition pursued by the directives coordinating procedures for the award of public supply contracts.’

5 | Restricting Authorities’ Choice in Supplier: Going Beyond Legal Compliance

The second major limitation for contracting authorities’ ability to use public procurement as an incentive for CSR is the exhaustive and limited means by which contracting authorities can select and exclude an economic operator in a procurement procedure. Both exclusion grounds and selection criteria in public procurement law relate to the conduct of undertakings and not to the selection of supplies. Exclusion grounds require contracting authorities to exclude undertakings on the grounds listed in Article 57 (1–2) and may exclude undertakings on the grounds listed in Article 57 (4). For example, contracting authorities must exclude undertakings that have been convicted for child labour. Selection criteria, on the other hand, are the means to assess the ability of the undertaking to perform the public contract. For example, contracting authorities may verify whether an undertaking has the necessary technological expertise to produce the required goods in an environmentally friendly way in accordance with the technical specifications.

Generally, the use of these criteria is currently limited and cannot serve as a powerful means to encourage CSR through procurement policy. The reasons are threefold: firstly, the list of exclusion grounds and selection criteria is exhaustive, which does not enable Member States to go beyond the grounds listed in the Directive in excluding or selecting tenderers. Secondly, selection criteria must be related and proportionate to the subject-matter of the contract, which means that only the ability of the undertaking to produce the goods to be supplied in, for instance, an environmentally friendly way can be assessed and not the general ability of undertakings to do so. Thirdly, and perhaps most importantly, the exclusion grounds and selection criteria are not worded in a way that explicitly mandates either exclusion or selection on grounds related to CSR considerations other than observance of applicable legislation. This article will now turn to this third point.

5.1 | Technical or professional ability as selection criteria

The Directive establishes an exhaustive list of selection criteria that allow contracting authorities to verify economic operators’ ability to perform the contract. Economic operators will, therefore, be excluded from a procedure if the

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77 This approach is endorsed by the EU legislator as well, see Recital 2 of Directive 2014/24/EU, above, n. 6.
78 Ibid.
80 Article 58.
81 Joined Cases C-226/04 and C-228/04, La Cascina, above, n. 79, paras. 21–22; see Arrowsmith, above, n. 79, 104. By way of exception, Member States may also exclude undertakings to ensure equal treatment in accordance with Joined Cases C-21/03 and 34/03, Fabricom SA v. Belgian State [2005] ECR I-1559.
contracting authorities have verified that the economic operator does not comply with any of the selection criteria set and therefore lack the ability to perform the contract.82

The Directive and case-law of the Court have made clear that even the selection criteria related to the ‘technical or professional ability’ of the undertaking is of limited use to include social and environmental considerations. These criteria enable contracting authorities to ensure that the tenderers are capable, in terms of expertise and capacity, to perform the contract in question.83 This means, for instance, that the contracting authorities can require a tenderer to furnish documents such as qualifications and certificates that demonstrate technical or professional ability to perform the contract.

The exhaustive list of criteria for ‘technical or professional ability’ in the Directive contains few references specifically relevant for social and environmental considerations. The list mainly consists of previous experience, qualifications and abilities of personnel, samples of products, equipment lists, certificates that confirm the undertaking’s ability to produce goods in accordance with certain standards, and the facilities used and the capabilities of those facilities.84 Thus, a contracting authority might require proof of the fact that a tenderer has the technological capacity and knowledge to produce green electricity for instance, but it cannot require an undertaking to demonstrate how the undertaking more generally has a policy of corporate social responsibility.

In Max Havelaar, the Court made clear that these provisions can by no means be interpreted as allowing contracting authorities to request information on the policy of undertakings relating to their CSR. These selection criteria should be understood in a more technical sense as verifying the undertakings’ ability to produce goods to be supplied, and not their policy on corporate social responsibility. The Court held that ‘the requirement of respect for the “criteria of sustainable purchasing and socially responsible business” is not connected to any of [the] factors concerning technical and professional ability’.85 In particular, according to the Court,

the information requested pursuant to that requirement, that is to say the statement of ‘[in what way the economic operator] fulfils the criteria of sustainable purchasing and socially responsible business [and] contributes to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ cannot be assimilated to ‘a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking’s study and research facilities’ referred to in [the Directive].

The Court emphasises the technical nature of these selection criteria, and opposes more policy-oriented use of these criteria. Even when selection criteria can be used as a means to exclude undertakings because they are not able to supply goods with environmental or social characteristics, the Court has made clear that the contracting authority is required to make a serious effort in making the criteria transparent and understandable for the undertakings concerned, in accordance with the principle of transparency.86

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82 Article 56 (1).
83 Article 58 (4) states that ‘contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard’, which may in particular relate to experience. Annex XII provides the means of proof that the contracting authorities may request in that respect to verify that the tenderer complies with the selection criteria in accordance with the nature, quantity or importance and use of the supplies in question. This list of selection criteria which may verify the technical or professional ability of a tenderer is exhaustive. As such, contracting authorities may only use the list contained in Annex XII of the Directive.
84 Two criteria may be relevant for verifying the ability of undertakings to produce the goods supplied in an environmentally friendly or socially responsible way. Part II (c), (d), (g), and (k) (ii) refer to ‘a description of the technical facilities and measures used by the economic operator for ensuring quality and the undertaking’s study and research facilities’; ‘an indication of the supply chain management and tracking systems that the economic operator will be able to apply when performing the contract’; ‘an indication of the environmental management measures that the economic operator will be able to apply when performing the contract’; ‘certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to technical specifications or standards.’
85 Max Havelaar, above, n. 8, para. 106.
86 Criteria ‘must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract’, see para. 109.
As such, requirements relating to compliance with the ‘criteria of sustainability of purchases and socially responsible business’ and the obligation to ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ are not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are. The same applies, and all the more so, in relation to the requirement addressed to tenderers that they state in their tender ‘in what way [they] fulfil’ those criteria or ‘in what way [they] contribute’ to the goals sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide.87

5.2 Exclusion grounds and going beyond legal requirements

Article 57 regulates an exhaustive list of obligatory (paras. 1 and 2) and facultative (para. 4) grounds for excluding economic operators from a procurement procedure. In essence, these provisions oblige contracting authorities to exclude economic operators from the tender when they have been convicted of corruption, fraud, terrorism, money laundering, child labour and human trafficking.88 Economic operators must also be excluded if judicial or administrative authorities have established that they have not paid taxes or social security contributions.89

For CSR purposes, the most important grounds for facultative exclusion that can be used by contracting authorities or may be prescribed by Member States to contracting authorities are ‘grave professional misconduct’ and a violation of ‘applicable obligations in the fields of environmental, social, and labour law established by Union law, national law, collective agreements or by international environmental, social, and labour law provisions listed’ in Annex X of the Directive.90 This is a more limited list than the list of international agreements that are required of third countries to be implemented in the EU GSP scheme.91 On the other hand, the Directive does also refer to compliance with national and EU legislation in the field of labour law and environmental and social protection.

These provisions are novel, and an accommodating feature of these exclusion grounds for social and environmental considerations is that these grounds need not be connected with the subject-matter of the contract. This enables contracting authorities to exclude an undertaking from the procurement procedure even if the undertaking in question is able and willing to perform the contract under the conditions set out in the contract notice.92 None-theless, their contribution to incentivising CSR policies is limited for three reasons.

First, exclusion grounds do not allow contracting authorities to go beyond requiring legal compliance if they want to exclude economic operators for their conduct. Only to the extent that conduct can fall under the heading of ‘grave professional misconduct’ can contracting authorities exclude a tenderer from a procurement procedure irrespective of compliance with applicable legislation.93

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87 Ibid., para. 110.
88 Article 57 (1).
89 Article 57 (2).
90 Article 57 (4) (a) (c) and Article 18 (2) of the Directive.
92 Recital 101 of Directive 2014/24/EU, above, n. 6, states in that respect ‘It should be clarified that grave professional misconduct can render an economic operator’s integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise have the technical and economical capacity to perform the contract.’
93 The ground for violation of norms contained in Article 18 (2) of the Directive and the ground for ‘grave professional misconduct’ can overlap. Violation of social and environmental legislation can also amount to grave professional misconduct. Recital 101 of the Directive states that ‘authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.’
The Court’s case law suggests that ‘grave professional misconduct’ may go beyond violating the law. The Court, in *Forposta*, while maintaining that Member States have a certain degree of discretion in implementing this term, has interpreted ‘grave professional misconduct’ as covering

all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs, which are established by the disciplinary body of that profession or by a judgment which has the force of res judicata.94

Therefore, according to the Court, ‘the concept of “grave misconduct” must be understood as normally referring to conduct by the economic operator at issue which denotes a wrongfull intent or negligence of a certain gravity on its part.’95 The Court did seem to have civil liability in mind when it came to this conclusion as it noted that ‘grave professional misconduct’ cannot be equated with ‘circumstances for which the economic operator concerned is responsible’. It does, however, open the door for excluding companies which have been found liable for damages that are connected with harmful production in developing countries, for instance when an undertaking has been held liable for causing environmental damage abroad.

However, Article 57 does not imply that only in the case of civil liability may a contracting authority exclude an undertaking if that liability leads to grave professional misconduct. The Directive stipulates that grave professional misconduct must be ‘proven by any means which the contracting authorities can demonstrate’. Any evidence, for example, of environmental pollution in the production facilities of an economic operator, of animal abuse, or other misconduct could therefore constitute a ground for excluding a tenderer, as long as such conduct can be qualified as grave professional misconduct as defined by the Court in *Forposta*.

Second, the burden of proof lies with the contracting authorities to demonstrate either ‘grave professional misconduct’ or a violation of the norms contained in Article 18 (2) of the Directive.96 The Directive makes clear that for these grounds contracting authorities cannot require evidence from the economic operator that demonstrates absence of these violations.97 Only Member State authorities are under a duty to exchange information with each other in relation to these facultative exclusion grounds.98

Third, the territorial reach of Article 57 (4) (a) of the Directive is ambiguous to say the least. On the one hand, the provision suggests that economic operators can only be required to comply with the obligations ‘applicable’ in the jurisdiction where the economic operator is active. In other words, a Member State contracting authority cannot require compliance with its own environmental laws where the economic operator is active in a third country.99 On the other hand, the provision does refer to Article 18 (2) of the Directive which in relation to the list of international agreements in Annex X, does not refer to the word ‘applicable’. This may suggest that a violation of those international norms may still result in exclusion even where the economic operator is active in a country that is not party to the relevant international agreement. Thus, in our hypothetical example of the solar panel producer, it may be excluded from a procurement procedure for violation of an ILO Convention even where it is active in a country that has not ratified it.100 However, the undertaking can in

94*Case C-465/11, Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA [2013], not yet reported, paras. 26–27.*
95*Ibid., para. 30, emphasis added.*
96*Violations of social and environmental legislation referred to in Article 18 (2) of the Directive may be proven ‘by any appropriate means’ and a contracting authority can demonstrate ‘by appropriate means’ that an economic operator is guilty of ‘grave professional misconduct’. These terms will have to be clarified by the Court, but it seems that it does not necessarily entail a document proving a conviction by final judgment. Nor is a conviction of violation of social or environmental legislation itself necessary: proof of a successful claim for damages can be sufficient to prove grave professional misconduct.*
97*Article 60.*
98*Article 60 (5).*
99*Recital 105 of Directive 2014/24/EU relating to subcontracting appears to suggest as much by stating that the observance by subcontractors of ‘applicable obligations’ is ‘ensured through appropriate actions by the competent national authorities within the scope of their responsibilities and remit, such as labour inspection agencies or environmental protection agencies.’*  
100*Granted that the economic operator can rely on Article 25 of the Directive through an international agreement opening up public procurement to third country competition.*
any event not be excluded because of a violation of the Convention on Cluster Munitions as this agreement is not listed.

The limited possibilities under the Directive to exclude and select suppliers on social and environmental considerations and the narrow reading of these possibilities by the Court is also an example of the underlying ordoliberal rationale of giving undertakings a right to compete for public procurement contracts. The rationale here equally seeks to limit the exclusion of those undertakings that either do not have the capability to perform the contract or have violated certain laws that the legislator has found particularly important. No questions can be asked about anything that goes beyond these basic requirements. This preserves the right of companies to compete for public contracts even though their societal conduct may be an important factor for consumers on the 'ordinary' market.

6 | THE INTERNATIONAL DIMENSION

The EU’s regulatory framework is increasingly opening up Member State government procurement markets to competition from outside the EU. Article 25 of the Public Procurement Directive requires contracting authorities to not discriminate between EU undertakings and undertakings of third countries with which the EU has concluded international agreements that open up the EU’s public procurement market. The EU’s long-standing trade policy of negotiating comprehensive bilateral trade agreements that cover public procurement will ensure that more and more undertakings from third countries are covered by this provision. This includes, for instance, the recent trade agreement between the EU and MERCOSUR, but also the EU-Korea FTA, the CETA, the EU-Singapore FTA, and the FTA between the EU and Peru, Colombia and Ecuador.101

The extensive opening up of government procurement markets in the EU to undertakings outside the EU makes the question of excluding CSR requirements from government contracts even more pressing. Opening up these markets gives economic incentives to economic operators outside the EU, potentially requiring contracting authorities to contract supplies with economic operators with harmful business practices. In contrast to undertakings operating within the EU, Member State governments and the EU itself have no jurisdiction to directly address such harmful business practices through regulatory action. An EU Member State may be able to pass legislation prohibiting undertakings to manufacture and sell cluster munitions, for example, but it cannot directly regulate economic activities of companies established in South Korea. At the same time, EU public procurement law requires contracting authorities in that Member State to allow these companies to compete for public contracts on non-discriminatory terms. Here, CSR requirements in a public contract could fill in a gap to ensure that contracting authorities can retain clean hands when spending taxpayers’ money.

An often-heard argument is that addressing such concerns has extraterritorial effects and is therefore illegitimate or even illegal under WTO rules. By imposing norms through public contracts on undertakings operating abroad, governments would exercise their power in another jurisdiction. This line of reasoning was taken in an unadopted GATT panel report in the early 1990s in relation to a US ban on imports of tuna products from countries that permitted the use of fishing methods that were harmful to dolphins, where the panel in question described the measure as ‘extra-jurisdictional’.102

This view is misguided for several reasons.103 First, from a formal legal perspective, CSR requirements in tenders certainly do not violate customary international law on jurisdiction. In Lotus, the Permanent Court of International

101See, for the trade agreement between the EU and MERCOSUR, the negotiated text of the chapter on government procurement; Chapter 19 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ 2017 L 11/23; Chapter 9 of the draft EU-Singapore Free Trade Agreement; Title VI of the trade agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ 2012 L 354/3.
Justice held that while it was prohibited for states ‘to exercise its power in any form in the territory of another state’, it did not follow that ‘international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.’ The ECJ has also adopted this line in relation to the jurisdiction of the EU under international law. Thus even if one would equate criteria for public contracts with regulation, governments are entitled to take into account acts which have taken place abroad. Second, extraterritorial effects of public decision-making, including procurement decisions, are simply inherent to—and the consequence of—opening markets to foreign competition. This point has been recognised by the WTO’s DSB in more nuanced decisions following the early Tuna/dolphin decisions. Thus, it is not the extraterritorial effect or domestic market regulation or purchasing behaviour WTO law takes issue with, but merely whether or not such action is discriminatory. Third, and related to the second point, other contractual conditions may equally become problematic, including supplies criteria that focus on the production process of the specific goods supplied to the contracting authority (e.g. green electricity requirements) or in relation to the already existing restrictions in choice of supplier discussed above.

7 | CONCLUSION

EU public procurement law has gradually allowed contracting authorities to include social and environmental criteria in their public contracts with undertakings. The public procurement Directive enables (but does not require) contracting authorities to use such criteria even to the extent that these criteria cover the entire life-cycle of supplies that are the subject-matter of the contract, including at the stage of the production process of those supplies. This enables contracting authorities to incentivise undertakings to improve the social and environmental impact of their business. For instance, public procurement can now be used to encourage energy suppliers to produce green energy by requiring supplies of energy in public contracts to be green. This gradual expansion of government’s freedom is to be welcomed in light of the EU’s ambitions beyond the establishment of an internal market.

However, the current approach in the EU also limits the use of public procurement by contracting authorities to promote CSR. In making the choice of supplies and in selecting suppliers, social and environmental considerations must be ‘linked to the subject-matter of the contract’. This legal test holds that such considerations need to be linked to the goods supplied, not the conduct of the undertaking more generally. This approach focuses only on the environmental and social impact of the goods supplied, rather than allowing public authorities to take into account the broader environmental or social impact of the undertaking when making choices on the market.

EU public procurement law subsequently curtails the space for considering such broader environmental or social impacts to compliance with applicable social and environmental legislation. There is thus no space for excluding undertakings and cannot go beyond the already existing legal requirements to be met by such undertakings. Only to the extent that an undertaking is guilty of ‘grave professional misconduct’ can such an undertaking be excluded from...
a public procurement procedure irrespective of whether the undertaking is able to produce goods in a socially or environmentally friendly way. The merit of this approach is that SMEs can potentially more easily compete for public tenders, but it does go at the expense of contracting authorities’ freedom to make environmentally and socially responsible purchasing decisions.

This article has put forward three arguments why the current approach should be reconsidered. The first is that the current approach is based on a normative preference for undertakings’ right to compete for a tender over government authorities’ freedom to choose a supplier on public interest grounds even if the government’s choices are based exclusively on a legitimate public interest. The second is that the current approach is in tension with an understanding of CSR endorsed by the Commission whereby businesses go beyond their legal obligations towards society and the environment and where there is an active role for governments to incentivise such conduct. In that sense, EU public procurement law reduces CSR to a consideration linked solely to supplies and turns a blind eye to the wider impact on society or the environment of the undertaking and the supply chain of which it is part. The reality is, of course, different. Businesses do not solely produce for one public contractor but generally engage in wider economic activities that may or may not have negative impacts on society or the environment. The third argument is that the opening up of public procurement markets in the EU to competition from third countries by the EU makes the ability for government authorities to incentivise CSR all the more pressing. The loss of regulatory control as a result of economic activities taking place outside the EU exposes contracting authorities to a greater risk of dirtying their hands.

ORCID
Laurens Ankersmit https://orcid.org/0000-0001-6420-588X

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