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The ambiguous role of social clauses in European directive 2014/24

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Abstract

Public procurements represent a strategic solution to deliver "collateral" effects on the environment and social protection fields. As a reaction to the pro-market decisions of the Court of Justice, European Institutions demanded the revision of the 2004 Directives, in order to enhance the social use of procurements. The 2014 Directive embodies a remarkable shift in this direction. The new Directive nonetheless does not seem to sort out all issues regarding the application of social clauses especially those prescribing minimum pay rates.

Keywords: Public procurement; labour standards; social clause; Directive 2014/24/EU; Directive 96/71/EC

1. Public procurement and social purposes: chronicles of an historic connection.

The instrumental use of public procurements to deliver "*horizontal*" policies is a strategy that EU institutions and member states have adopted since a long time.[1] In the last three

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[1] Arrowsmith S., *Horizontal policies in public procurement: a taxonomy,* in *Journal of public procurement*, vol. 10, 2010, 150 highlighting multiple definitions of such trend: "*secondary policies*" (*see* also Arrowsmith S., *The Law of Public and Utilities Procurement,* Sweet & Maxwell, London, 2005); "*collateral policies*" (Cibinic J., Ralph C., Nash J., Yukins C. R., *Formation of Government Contracts,* Wolters Kluwer, Washington DC, 2011) and "*socio-economic policies*" or "*horizontal policies*". *See* also Arrowsmith S., Kunzlik P. (edited), *Social and Environmental Policies in EC procurement Law: New Directives and New Directions,* Cambridge University Press, Cambridge, 2009.

decades, European procurements regulation has been addressed by the growing interest for possible "social" outcomes of its application.[2] A clear evidence of this trend are the guidelines of the European strategy on public procurements, where public contracts are conceived as legal tools to accomplish works or provide services (the "primary objective" of the contract), but also to pursue a disparate set of "secondary objectives" as well. Among the latter, the EU Commission expressly names environmental protection, sustainable development, innovation and digitalization (the so-called "e-procurement"), corruption contrast, creation of employment opportunities and decent work, social inclusion, accessibility and ethical trade.[3]

At first sight, the last European Directive no. 24 of 2014 seems to make a step further to this direction.[4] This conclusion is grounded on the one hand, on multiple references to social aspects the Directive contains both in recitals and in the body.[5] On the other hand, on two provisions, namely article 18 par. 2 and article 70. They seem to provide for a renewed legal basis for social clauses and for new parameters to appreciate their compatibility with EU law. Directive no. 24 of 2014 has been interpreted therefore as a considerable change of approach in the EU public procurement regulation, which was previously characterized by the principle established in the so-called *Laval quartet,* and notably in *Rüffert*[6]: the primacy of economic freedoms over social rights.

This paper wants to investigate whether this interpretation is plausible especially considering that the analysis of multiple legal sources governing this matter, combined with the interpretation provided by the European Court of Justice, seems to offer a legal framework still characterized by the previous approach more favorable to the economic freedoms. As will be clarified below[7], without doubt this Directive represents a valuable

[2] McCrudden C., *Buying social justice. Equality, Government, Procurement, and Legal Change,* Oxford University Press, Oxford, 2007; Barnard C., *Using Procurement Law to Enforce Labour Standards,* in Davidov G., Langille B. (ed.), *The Idea of labour law,* Oxford University Press, Oxford, 2013, 256.

[3] European Commission, "*Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement*", 2010, available at *www.ec.europa.eu/growth/single-market/public-procurement/strateg y.* More recently European Commission, Communication 2017/572 "*Making Public Procurement work in and for Europe*" (available at *www.ec.europa.eu/docsroom/documents/25612*); see also the project "*Buying for Social Impact (BSI)"* carried out from July 2018 to January 2020 and commissioned by the Executive Agency for Small and Medium-sized Enterprises (EASME) and the European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW). One of the main objectives of this project which involved 15 member States (Italy included) was "*to encourage contracting authorities to use public procurement to pursue social goals"*, publishing examples of the best practices detected in member states (*https://op.europa.eu/en/publication-detail/-/publication/3498035f-5137-11ea-aece-01aa75ed71a1*); at supranational level United Nations, "*The 2030 Agenda for Sustainable Development*" spec. point 12.7 (available at *www.sustainabledevelopment.un.org).*

[4] *See* the European Parliament press release of 15 January 2015 (available at *http://www.europarl.europa.eu/news/en/press-room*). *See* also European Trade Unions Confederation (ETUC), *New EU framework on public procurement, ETUC key points for the transposition of directive 2014/24/EU* (available at *www.etuc.org*). Barnard C., *To Boldly Go: Social Clauses in Public Procurement,* in *Industrial Law Journal,* July 2017, 242: "the Directive provides the green light for social creativity in procurement and a strong indication that the EU – and the European Commission in particular – far from being a threat will in fact supportive or targeted social initiatives".

[5] Barnard C., nt. (4), 210, points out the Directive no. 2014/24 contains about 40 references to the word "social" (excluding the Annexes and the words "Economic and Social Committee", "social security", "social services"), while in the previous Directive no. 2004/18 the references were about 4.

[6] ECJ, C-346/06, 3 April 2008, *Dirk Rüffert v. Land Niedersachsen*.

[7] See par. 3.

starting point towards a new balance between social rights and economic freedoms in EU law, but to ensure more than a formal balance between them, EU legislation requires further interventions.

Before defining the real extent of changes embedded in the Directive no. 24 of 2014, it is important to analyze their premise: the development of the idea of using public procurements as a policy tool to pursue "secondary objectives". Of course, this approach is not new. First samples arose approximately at the end of 19th century both in United States and Europe (above all United Kingdom and France), where Governments used public procurements to sustain the industrialization process.[8] Over the years, public policies changed their collateral aims, which can be summarized in two main categories.[9] First, "*economic objectives"*: public procurements aim to increase investments in internal market without the intervention of foreign investors, to develop strategic sectors' or to support specific economic districts. Second, "*political objectives":* public procurements pursue an open list of "social" aims, which in recent years are focused especially on "third generation" interests (sustainable development and environmental protection).[10] Nevertheless, among "political objectives" great attention has always been dedicated to labour standards, especially to fair wage for workers hired by contracting companies.

Across the years, the balance between political and economic objectives changed many times for different reasons. Economic objectives were prevalent during the first half of '900, when, before the advent of the competition law at supranational level, Governments enacted strong "*buy national*" policies, more favorable to domestic companies and characterized by sharp discriminations against foreign contractors.[11] Then, the strengthening of labour rights and the ratification of international conventions (such as ILO Convention no. 94 of 1949) pushed national Governments to take into more serious account social objectives. Among them, fair wage for employees hired by contractors received particular attention as well as one of the main tools to ensure it: social clauses.[12]

[8] For an overview Barnard C., *To Boldly Go: Social Clauses in Public Procurement,* nt. (4), 211; Bercusson B., *European Labour Law,* Cambridge University Press, 2009, 429, footnote 41; Arrowsmith, *The law of Public and Utilities Procurement,* Sweet and Maxwell, 2005, vol. II, 1226; S. Arrowsmith S., Linarelli J., Wallace D., *Regulating Public Procurement: national and international Perspectives,* Kluwer Law International, Alphen aan den Rijn, 2000, 237-310; McCrudden C., *Using public procurement to achieve social outcomes,* in *Natural Resources Forum 28,* 2004, 257-267.

[9] Similarly see Trepte P., *Regulation Procurement: Understanding the Ends and Means of Public Procurement Regulation,* Oxford University Press, Oxford, 2004, 8.

[10] See the study carried out by the Directorate General for Internal Policies, *Green Public Procurement and the EU Action Plan for the Circular Economy,* June 2017 (available at *www.europarl.europa.eu*).

[11] For an overview see Arrowsmith S., *The law of Public and Utilities Procurement,* nt. (8), 1226. An example in United States is the "Buy American Act" of 1933.

[12] Izzi, *Lavoro negli appalti e dumping,* Giappichelli, Torino, 2020; Pantano F., *Le clausole sociali nell'ordinamento giuridico italiano. Concorrenza e tutela del lavoro negli appalti,* Pacini, Pisa, 2020; Izzi D., *Lavoro negli appalti e dumping salariale*, Giappichelli, Torino, 2020; Tullini P., *Concorrenza ed equità nel mercato europeo: una scommessa difficile (ma necessaria) per il diritto del lavoro*, in *Rivista Italiana di Diritto del Lavoro,* I, 199; Giubboni S., *Libertà economiche fondamentali, circolazione dei servizi e diritto del lavoro,* in Mezzanotte F. (ed.), *Le "libertà fondamentali" dell'Unione Europea e il Diritto privato,* RomaTrE-Press, Roma, 2016, 181; Arrowsmith S., *Rethinking the Approach to Economic Justifications under the EU's Free Movement Rules*, in *Current Legal Problems*, 2015*,* 307; Cremers J., Wixforth S., *Social considerations in public procurement: A political choice,* Werner Buelen, EFBWW, 2015; Forlivesi M., *Le clausole sociali negli appalti pubblici: il bilanciamento possibile tra tutela del lavoro e regioni del mercato*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*-275/2015; Costantini S., *La finalizzazione sociale degli appalti pubblici. Le "clausole sociali" fra tutela del lavoro e tutela della concorrenza*, in WP C.S.D.L.E. "Massimo D'Antona".IT-196/2014; Orlandini G., *Mercato unico dei servizi e tutela del lavoro*, F. Angeli, Milano, 2013; Brino V., *Diritto del lavoro, concorrenza e mercato. Le prospettive*

Well known in national laws since the beginning of the past century[13], the use of this kind of social clause ("pay clause") did not encounter oppositions before the advent of European legislation. Considering the lack of supranational rules protecting competition, at least two member state's constitutional courts admitted the compatibility with national constitutions of pay clauses in public procurements. The common argument was that the protection granted against wage dumping was considered as "matter of public interest", and for this reason it could be balanced with other interests like private enterprises' economic freedom, the good functioning and the impartiality of public administrations, exc..[14]

The real turning point for pay clauses' admissibility came with the advent of the European legislation, which substantially overturned the approach supported by national laws and courts. Europe started its integration as an economic process and this required the coordination of awarding procedures in public procurements, in order to avoid discriminations and guarantee fair competition.[15] In this period social aspects (included the use of social clauses) were completely ignored at EU level because social policies were

dell'Unione Europea, Cedam, Padova, 2012; De Mozzi B., *La tutela dei lavoratori nell'appalto transnazionale*, in Carinci M.T., Cester C., Mattarolo M.G., Scarpelli F. (eds.), *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività,* Utet, Torino, 2011, 29; Kilpatrick C., *Internal market architecture and the accomodation of labour rights: as good as in gets?,* in *EUI Working Papers Law* 2011/04; Bücker A., Warneck W. (eds.), *Reconciling fundamental social rights and economic freedoms after Viking, Laval and Rüffert*, Nomos, Baden-Baden, 2011; Varva S., *Le clausole sociali*, in Carinci M.T., Cester C., Mattarolo M.G., Scarpelli F. (eds.), *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività,* Utet, Torino, 2011, 321; Scarpelli F., *La dimensione sociale nella regolamentazione degli appalti pubblici*, in Carinci M.T., Cester C., Mattarolo M.G., Scarpelli F., (eds.), *Tutela e sicurezza del lavoro negli appalti privati e pubblici. Inquadramento giuridico ed effettività*, cit., 307; Kilpatrick C., *British jobs for British workers? UK industrial action and free movement of services*, in *LSE Law, Society and Economy Working Paper*, 16/2009; Sciarra S., *Viking e Laval: diritti collettivi e mercato nel recente dibattito europeo,* in *Lavoro e Diritto,* 2008, 245; Lo Faro A., *Diritti sociali e libertà economiche del mercato interno: considerazioni minime in margine ai casi Viking e Laval, in Lavoro e diritto*, 2008, I, 63; Ballestrero M.V., *Le sentenze Viking e Laval: la Corte di giustizia "bilancia" il diritto di sciopero*, in *Lavoro e Diritto*, 2008, II, 371; Dorssemont F., Jaspers T., Van Hoek A. (eds.), *Cross-border collective actions in Europe: a legal challenge,* Intersentia, Cambridge, 2007; Scarpelli F., *Regolarità del lavoro e regole della concorrenza: il caso degli appalti pubblici*, in *Rivista Giuridica del Lavoro,* 2006, III, 762; Ghera E., *Le c.d. clausole sociali: evoluzione di un modello di politica legislativa*, in *Diritto delle Relazioni Industriali,* 2001, 133.

[13] In United Kingdom policies concerning labour rights are enacted in 1891 in the House of Commons "Fair Wages Resolution" (*see* Arrowsmith S., *The law of Public and Utilities Procurement,* nt. (8), 1240). In 1907, the German Imperial Statistical Office reported dozens of regional and municipal procurement regulations with references to the pay and working conditions of workers involved in public contracts, Kaiserliches Statistisches Amt, Die Regelung des Arbeitsverhältnisses bei Vergebung öffentlicher Arbeiten, Beiträge zur Arbeiterstatistik no. 6, Carl Heymanns Verlag, 1907). In 1931 the American "*Davis Bacon Act*" required contractors to pay local prevailing wage rates when the United States or District of Columbia were the contractors.

[14] The Italian Constitutional Court in judgment 19 June 1998, no. 226 stated that social clauses answer to a double aim. On the one hand, to ensure "*a minimum standard of protection for the workers involved in procurements*"; on the other, to guarantee "*a better realization of the public interest, pursued, according to the principles of fair competition between entrepreneurs, functional to obtain for the public administration the most favorable conditions*". The Court underlined that the good functioning of public administrations can derive by the respect of collective agreements because "*even the costs for companies, deriving from the obligation of fair treatment, contribute to the better identification of the best bidder*" (author's translation). The Court confirmed its opinion in judgment 3 March 2011, no. 68. Accordingly, the German Federal Constitutional Court Bundesverfassungsgericht, Beschluss vom 1, July 2006, 1 BvL 4/00, spec. recital 90.

[15] Sànchez Graells A., *Public Procurements and the EU Competition Rules,* Oxford, Oxford, 2011; Ludlow A., *The Public Procurement Rules in Action: An Empirical Exploration of Social Impact and Ideology,* in *Cambridge Yearbook of European Legal Studies,* XVI, 2014; Joerges C., Rödl F., *"Social Market Economy" as Europe's Social Model?,* EUI Working Paper No. 2004/8, 5.

considered a matter reserved to member states.[16] Nevertheless, when it became clear that the use of social clauses could affect the good functioning of the common market in favor of domestic bidders, the EU legislation started to require the compliance of social clauses with the economic freedoms.[17]

2. Social clauses in EU legislation: from the early debate to the Directive 2004/18.

The evolution of European public procurement legislation began with the EC founding Treaty, which contemplated public contracts in article 163[18]. Already at that time, the volume of public resources involved made clear that the economic impact of public procurements could easily influence the primary aims of the European Community (listed in articles 3[19], and 4[20] of the Treaty). Articles 43 and 49 EC of the founding Treaty[21], which prohibited discriminations based on nationality, completed the original European legal framework on EU public procurement.

Because of their vagueness, these principles were not able to eradicate the strong influence of previous "buy national policies" and did not open national markets up to foreign contractors. As consequence, it became necessary to introduce a specific regulation: the Directive no. 305 of 1971.[22] The provision of a general rule based on non-discriminatory awarding criteria tried to remove trade barriers and ensure the good functioning of the single market.[23] The following Directives in 1990s pursued the same goal[24] focused on competition, while no references were reserved to social purposes[25]. For this reason, the attitude of public procurements to protect social rights began to be considered only when the compatibility of national social clauses came before the European Court of Justice. In "*Gebroeders Beentjes B.V. v. the Netherlands*"[26], the Court recognized to contracting authorities the possibility to pursue

[16] See Joerges C., Rodl E, *Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval*, in *European Law Journal*, 2009, 15, 3-4. See also Giubboni S., *Social rights and market freedom in the European constitution: a Labour law perspective,* Cambridge University Press, Cambridge, 2006, 41-42. Barnard C., *EU Employment Law and the European Social Model: The Past, the Present and the Future,* Current Legal Problems, no. 67, 2014, 213.

[17] Barnard C., nt. (4), 217.

[18] Article 163 (now article 179 TFEU) conceived public contracts directed to develop "*scientific and technological bases of Community industry"* and to promote international competition and the opening-up of national public contracts markets.

[19] Namely lett. 'c': free movement of goods, persons, services and capital.

[20] In particular: to open market economy promoting free competition.

[21] Now articles 49 and 56 TFEU.

[22] Article 1 of Directive 71/305/EEC declared: "member states shall abolish (…) the restriction referred to affecting the right to enter into, award, perform or participate in the performance of public works contracts".

[23] Arrowsmith S., *The purposes of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies,* in *Cambridge Yearbook of European Legal Studies,* 2012, 2.

[24] In addition to Directive 93/37/EEC there were Directive 93/36/EEC (public supply contracts), Directive 92/50/EEC (public service contracts) and Directive 93/38/EEC (water, energy, transport and telecommunications sectors).

[25] Except for article 23 of Directive 93/37/EEC that mentioned "employment conditions" but simply to introduce duties of information.

[26] ECJ, C-31/87, 20 September 1988, *Gebroeders Beentjes BV v State of the Netherlands*. See also ECJ C-225/98, 26 September 2000, *Nord-Pas-de-Calais,* part. 48-54.

secondary objectives (such as lowering the unemployment rate) through specific clauses to be included in the contract. The only limit the Court required was the compliance of such clauses with the EU law, namely the right of establishment, the freedom to provide services and the principle of non-discrimination.

On the basis of this judgment, European Commission openly encourage member states to use social clauses in public contracts.[27] However, it soon became clear that the broad discretion left to national contracting authorities could hide discriminatory practices against foreign bidders.[28] So, the Court upheld that "restrictions"[29] to the economic freedom deriving by social clauses might be justified only by "imperative reasons" related to public interest and which apply to all persons or undertakings pursuing an activity in the State of destination.[30] Between the reasons related to public interest the Court expressly included workers' protection, but not without caveats.[31] To avoid employment protective measures turning into restrictions for fair competition, workers' protections must not become a "disproportionate burden" for the economic freedom of the employer.[32] Following this interpretation, in *Portugaia Construções* the Court stated that collective agreements could be applied to posted workers only if they contributed "significantly" to the workers protection[33]. This principle was further specified in *Finalarte*[34]*,* in which the ECJ requested protective measures to be "appropriate for securing the attainment of the objective which those rules pursue and must not go beyond what is necessary in order to attain it".[35]

Against this approach, the opposite idea of a stronger use of public procurement for social purposes affected the final approval of the 2004 Directives package, which includes the general Directive no. 18 of 2004.[36]

At least at formal level, Directive no. 18 of 2004 was influenced by theories more favorable to the social use of public procurements, mentioning social objectives both in the preamble and in the body. It was confirmed, for instance, the possibility for contracting authorities to use special conditions to achieve a broad range of collateral objectives like the recruitment of long-term job seekers or weak minorities, training for the unemployed or

[27] Provided the Directive neither forbids nor expressly authorizes member states to regulate secondary objectives, the Commission stated that public agents were allowed to pursue "*a broad range of social matters including professional training, health and safety, labour relations and the suppression of racial, religious discrimination or discrimination on the grounds of sex*", European Commission, Communication of 22 September 1989 "*Regional and social aspects of public procurements*", published in OJ C 311/7 of 12 December 1989, 12, spec. par. 46. Even in this case, the only limit required was the "*compliance with the principles of the European Community*".

[28] Indirectly in Beentjes, nt. (26), par. 29-30; see also C-360/89, 3 June 1992, *Commission v. Italy,* par. 16-23*;* C-225/98, 26 September 2000, *Commission v. French Republic,* par. 50-53.

[29] Defined by ECJ, C-76/90, *Manfred Säger v. Dennemeyer,* 25 July 1991, par. 12.

[30] ECJ C-76/90, 25 July 1991, *Manfred Säger v. Dennemeyer,* par. 15.

[31] *See* ECJ C-113/89, 27 March 1990, *Rush Portuguesa Ld[a] v Office national d'immigration,* par. 18; ECJ C-369/96, 23 November 1999, *Jean-Claude Arblade and Arblade & Fils SARL,* par. 36; ECJ C-165/98, 15 March 2001, *Mazzoleni and ISA Sarl,* par. 27.

[32] Mazzoleni*,* par. 36.

[33] ECJ C-164/99, 24 January 2002, *Portugaia Construções,* par. 29.

[34] ECJ C-49/98, 25 October 2001, *Finalarte.*

[35] Finalarte*,* par. 32.

[36] Idea supported by European institutions like the Council Proposal of Procedures for Public Procurement, 9270/02 of 28 May 2002 and the Internal Market Directorate General, Working Document CC/01/10 of 3 April 2001; *see* also B. Bercusson, *European Labour Law,* Cambridge University Press, Cambridge, 2009, 430.

young persons, exc.[37] In recital 24 there was also an indirect reference to pay clauses where it says "the laws, regulations and collective agreements, which are in force in the areas of employment conditions, apply during performance of a public contract, providing that such rules, and their application, comply with Community law".[38]

To determine if social clauses are compliant or not with Community law the Directive identified as parameter the Posted Workers Directive no. 71 of 1996.

Accordingly, article 26 of the Directive no. 18 of 2004 recognized the possibility for contracting authorities to lay down special conditions concerning environmental and social considerations (including workers' protection), in so far as they were compatible with Community law. In light of recital 2, the reference to "the Community law" concerns with those provisions protecting economic freedoms. In other words, even though article 26 introduced for the first time an express legal basis for social clauses in European public procurement legislation, the reference to their necessary compatibility with Community law confirmed the supremacy of economic freedoms.

3. The ECJ limits to social clauses: from Rüffert to Regio Post.

Through the rigid interpretation of the proportionality test, the ECJ overturned the traditional idea of domestic employment law as counterweight of market integration and began to regard at protective legislation as a distortive factor of fair competition.[39] This trend involved also the use of pay clauses, which can give rise to direct or reverse discriminations in awarding procedures between undertakings established in different member states.[40] To determine whether Directive no. 24 of 2014 truly changed the previous legal framework, it is necessary to briefly consider how the ECJ transformed it defining notion and limits of social clauses.[41]

[37] Directive 2004/18/EC, recital 33.
[38] Directive 2004/18/EC, recital 34.
[39] Deakin S., *The Lisbon Treaty, the "Viking" and "Laval" judgments and the financial crisis: in search of new foundations for Europe's "social market economy",* in Bruun N., Lörcher K., Schömann I. (eds.), *The Lisbon Treaty and Social Europe,* Hart Publishing, Oxford, 2012, 19-43; Freedland M., Prassl J., *Viking, Laval and Beyond*, Hart Publishing, Oxford, 2014.
[40] The reason lays for example on the strong differences in average levels of cost of living that influence the wage level: the highest national median gross hourly earnings is even 15 times higher than the lowest one (in 2014 the highest median gross hourly earnings in Denmark was EUR 25.52 while in Hungary was EUR 3.59). Data available at *www.ec.europa.eu/eurostat/statistics-explained.*
[41] On the role of European Court of Justice *see* Costantini S., *Direttive sui contratti pubblici e Corte di Giustizia: continuità e discontinuità in tema di clausole sociali*, *cit.*; Pallini M., *Diritto europeo e limiti di ammissibilità delle clausole sociali nella regolazione nazionale degli appalti pubblici di opere e servizi,* in *Giornale di Diritto del Lavoro e delle Relazioni Indsutriali,* 2016, 525; Corti M., *Concorrenza e lavoro: incroci pericolosi in attesa di una svolta,* in *Giornale di Diritto del Lavoro e delle Relazioni Indsutriali,* 2016, 505; Guadagno S., *The right to strike in Europe in the aftermath of Viking and Laval*, in *European Journal of Social Law*, 2012, I, p. 241; Veneziani B., *La Corte di Giustizia e il trauma del cavallo di Troia*, in *Rivista Giuridica del Lavoro*, 2008, II, 295; Eliasoph I.H., *A «switch in time» for the European Community? Lochner discourse and the recalibration of economic and social rights in Europe*, in *Columbia Journal of European Law*, 2008, III, 467.

3.1. The Rüffert case.

The case in *Rüffert* is well known.[42] One could guess the core issue was the compatibility of the pay clause with the European procurement Directive (at that time Directive no. 37 of 1993). By contrast, the ECJ did not even mention the procurement Directive but focused on the interpretation of article 49 EC (now article 56 TFEU) and on Directive no. 71 of 1996 (Posting Workers Directive or "PWD"). In particular, the ECJ used the latter as a parameter even though the contested rule did not aim to govern posting workers situations.[43] Like in *Laval* case[44], the Court seemed to use PWD as a test to define whether the contested law breach article 49 EC. In line with this reasoning, only pay rate fixed in accordance with article 3 PWD was considered proportionate and compliant with freedom to provide services granted by article 49 EC. Consequently, the question became whether the rate of pay set by the contested social clause was fixed in accordance with article 3 par. 1 and 8 PWD.[45] The Court found the contested clause violated both provisions because the rate of pay was fixed by a collective agreement applicable only to a segment of the construction sector (the public one, not private sector) and only in a specific region (it was not universally applicable).[46] Given this, the Court stated the clause violated the PWD.

From this case, many implications derived about the compatibility of social clause with the European law. The use of PWD as parameter of compatibility allows social clauses to ensure only the minimum conditions fixed in the whole construction sector (public and private). In fact, the ECJ interpreted article 3 PWD in the light of the *effectiveness principle*: member states cannot introduce "conditions of employment which go beyond the mandatory rules for minimum protection", because "such interpretation would amount to depriving the directive of its effectiveness".[47] Assuming this, the Court rejected the idea of supporting the "promotional" use of social clauses, which aims not to guarantee the lowest minimum pay rate, but to fix higher conditions in public contracts in order to force private sector to follow the example, with a general improvement of working conditions.

Regarding the limits of social clauses, the Court did not recognize the peculiar characteristics of public procurement sector and required the law or collective agreement establishing the pay rate had to be applicable to all undertakings in the industry concerned, both in private and public sector.

Rüffert caused many adverse reactions from trade unions and European Institutions themselves.[48] Despite the hostility generated and the attempts to limit its relevance, seven

[42] ECJ C-346/06 3 April 2008, *Dirk Rüffert v. Land Niedersachsen;* see McCrudden C., *The Rüffert case and public Procurement,* in M. Cremona (ed.), *Market Integration and Public Services in the European Union,* Oxford University Press, Oxford, 2011, 117-148.
[43] Rüffert, par. 20.
[44] Laval, par. 86 -111.
[45] Rüffert, par. 23.
[46] Rüffert, par. 29-39.
[47] Rüffert, par. 33, but *see* also Laval, par. 80.
[48] European Commission, "*Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement*", nt. (3), 46-47: "this judgment has no implications for the possibilities offered by the Procurement Directives to take account of social considerations in public procurement. It only clarifies that social considerations (in public

years later the ECJ confirmed its interpretation in the *Bundesdruckerei* case, even though with some difference.

3.2. The Bundesdruckerei case.

The question at stake in *Bundesdruckerei*[49] was whether – in case the service is entirely provided in a different member state – article 56 TFEU or article 3 PWD preclude contracting authorities from requiring subcontractors to pay their workers a minimum wage higher than the one usually paid in their home state.

Contrary to what happened in *Rüffert*, the Court excluded the applicability of PWD because there was not a cross border situation within the meaning of article 1 PWD: the subcontractor was based in Poland and its employees would entirely carry out the service in Poland[50]. In this judgment, the Court stated that the use of PWD as test of compatibility for social clauses depended form the effective existence of conditions listed in article 1 par. 3 PWD.

Provided the contract fell under the application of the Directive, the ECJ looked at the procurement legislation (in this case the Directive no. 18 of 2004).[51] The Court assumed requirements concerning with minimum wage were "special conditions relating to the performance of a contract" within the meaning of article 26 Directive no. 18 of 2004.[52] Given the applicability of art. 26, the question became to determine whether the pay clause complied with the limits established by this provision: a) the compatibility with the Community law (in this case art. 56 TFEU) and b) the proportionality of the economic sacrifice imposed on tenderers. Evaluating the proportionality, the ECJ declared that the contested pay clause was "an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host member state".[53] The argument was that the imposition of a fixed minimum wage usually aimed to guarantee a "reasonable remuneration" to employees[54], which must be determined in proportion to the cost of living in that state. Consequently, the Court upheld that the oblige to pay a specific remuneration completely delinked from the cost of living in a different State violated article

procurement) regarding posted workers must also comply with EU law, in particular with the Directive on the posting of workers".

[49] ECJ C-549/13, 18 September 2014, *Bundesdruckerei GmbH v Stadt Dortmund* concerning the law of North Rhine-Westphalia (Germany) which required, as awarding criterion, bidders to agree – at the time of tender submission – to pay their employees a minimum hourly wage fixed by the law. In May 2013, the city of Dortmund issued a call for tenders for the provision of documents' digitalization service. The contracting authority requested the successful German undertaking (Bundesdruckerei GmbH) to guarantee the same minimum wage for workers employed by its polish subcontractor, who would entirely provide that service in Poland. The awarded company refused because the subcontractor would be unable to pay such wage, since it was unusual in Poland considering the standards of living. See Forlivesi M., *La clausola sociale di garanzia del salario minimo negli appalti pubblici al vaglio della Corte di Giustizia Europea: il caso Bundesdruckerei*, in *Rivista Italiana di Diritto del Lavoro,* 2015, II, 558;

[50] Bundesdruckerei, par. 27.

[51] Bundesdruckerei, par. 28.

[52] Bundesdruckerei, par. 28.

[53] Bundesdruckerei, par. 30.

[54] Bundesdruckerei, par. 34.

56 because liable to "prevent subcontractors established in a different member state from deriving a competitive advantage from the differences between the respective rates of pay".[55]

Summarizing, first, the ECJ excluded the use of the PWD as compatibility test for social clauses where there is not an "effective" cross border situation listed in article 1 PWD. Second, the Court recognized in article 26 Directive no. 18 of 2004 the legal basis for social clauses and used the ambiguous limit this article introduced ("the compatibility with the EU law") to define social clauses' fairness. Third, according to *Rüffert,* the ECJ did not consider public procurement sector's specific characteristics and kept to require a minimum pay applicable both in private and public sector. As consequence, the pay clause applicable only to public contracts was inappropriate to guarantee workers' protection because it led to unequal treatment between workers involved in private and in public contracts.[56]

3.3. The RegioPost case.

In 2015, the ECJ ruled again the matter in *RegioPost.*[57] In contrast with *Rüffert* and *Bundesdruckerei*, scholars welcomed this judgment as more respectful of social purposes, even though the Court's reasoning did not seem to reframe the balance between social rights and economic freedoms crafted in the previous cases.[58]

In *RegioPost* the questions at issue were basically two. First, whether the ECJ had jurisdiction to rule the matter despite the absence a cross-border situation. Second, whether the contested clause represented a restriction within the meaning of article 56 TFEU or a violation of PWD.

The ECJ addressed the first question looking at the contract's value (which fell under the application of the Directive no. 18 of 2004[59]) and stating a general principle on ECJ jurisdiction: every time the procurement Directive is applicable to a contract, that contract must be regarded as having "a certain cross-border interest"[60], regardless of the effective presence of cross-border situations. In fact, undertakings established in different member states could lose their interest in participating in the contract because the pay rate fixed by

[55] Bundesdruckerei, par. 34.
[56] Bundesdruckerei, par. 32: "such measure is not appropriate for achieving that objective if there is no information to suggest that employees working in the private sector are not in need of the same wage protection as those working in the context of public contracts".
[57] ECJ C-115/14 of 17 November 2015, *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*. The law of a German Land (Bundesland Rhineland-Palatinate) required tenderers to undertake at the time of submission to pay their staff a certain minimum hourly wage, under penalty of exclusion. In April 2013, the city of Landau issued a call for tenders at European level to award a public contract concerning the postal services of the municipality. All the bidders were established in Germany and none of them subcontracted the service to undertakings based in different member states. The administration excluded one of them (RegioPost GmbH & Co. KG), because it refused to undertake to pay the minimum rate. On this see Carosielli G., *La sentenza RegioPost e l'anima "dimezzata" della Corte di Giustizia europea nella tutela dei lavoratori impegnati negli appalti pubblici*, in *Diritto delle Relazioni Industriali*, 2016, III, 881.
[58] Pecinovsky P., *Evolution in the social case law of the Court of Justice,* in *European Labour Law Journal*, Vol. 7, Issue 2, 2016, 295.
[59] RegioPost, par. 47-48.
[60] RegioPost, par. 51.

social clauses is too high and reduces their profits. As a consequence, the ECJ has jurisdiction to rule cases which fell under the Directive.

The second question was whether article 26 Directive no. 18 of 2004 precluded national social clauses from laying down a minimum wage that tenderers (and their subcontractors) must pay to their employees. Alike in *Bundesdruckerei*, the Court considered such pay clause as a special condition within the meaning of article 26, which could be lawfully attached to the contract but must comply with the EU law, namely article 56 TFEU.[61]

Given the procurement Directive did not point out the criteria to define the compatibility of these conditions, it is necessary to define them interpreting the EU primary law.[62] Considering recital 34 Directive no. 2004/18, the ECJ chose as parameter – once again – the Directive no. 96/71 (namely article 3 par. 1).[63] However, in this case the Court reversed *Bundesdruckerei*, where it excluded the applicability of PWD since the absence of an "effective" cross border situation within the meaning of article 1 PWD. By contrast, in *RegioPost*, the ECJ considered only "potential" cross-border situations and the necessity to respect *ex ante* principles established in PWD: within the common market, indeed, it is always possible for foreign enterprises to participate in awarding procedures or for domestic companies to use transnational-posted workers. Under these premises, the ECJ declared the compatibility of the contested condition with PWD. It complied with article 3 par. 1, lett. c (the condition was universal applicable because fixed by the law), and it laid down a "minimum rate of pay" (there were no other national laws or collective agreements imposing a lower wage in that sector).[64]

In addition, the contested condition was considered compliant with PWD even though it was applicable only to the public sector of postal services.[65] Reversing both *Rüffert* and *Bundesdruckerei,* the ECJ recognized indeed the peculiar characteristics of public procurement sector that derived, among the others, by the existence of dedicated EU laws.[66]

In contrast with many positive commentaries, *RegioPost* does not seem to change principles established in *Rüffert* (and confirmed in *Bundesdruckerei*): social clauses find their legal basis in article 26 Directive no. 2004/18 and so are subject to the limit of "compatibility with the EU law"; this limit is still represented by article 3 PWD, which now must be applied every time the contract falls under the Directive (even in absence of a "concrete" cross-border situation).

[61] RegioPost, par. 54.
[62] RegioPost, par. 59.
[63] RegioPost, par. 58-61.
[64] RegioPost, par. 62; see also General Advocate Bot conclusions in the *Rüffert* case, par. 132-133.
[65] RegioPost, par. 64-65.
[66] The Court used the simplest argument to justify the peculiarity of public procurement sector: the existence of a specific legislative body. However, it seems the ECJ underestimated another argument as important as the previous one: the need to ensure impartiality and good functioning of public administrations as contractual parties. Supporting the idea of different characteristics and rules between private and public sector see Clarich M., *Considerazioni sui rapporti tra appalti pubblici e concorrenza nel Diritto europeo e nazionale,* in *Diritto Amministrativo,* 2016, I, 71; see also the "principal-agent" theory developed in common law countries on which see Heimler A., *Appalti pubblici, prassi applicative e controlli: quale spazio per gli aspetti sostanziali?*, in *Mercato, Concorrenza e Regole*, 2015, I, 184; Napolitano G., Abrescia M., *Analisi economica del diritto pubblico*, Il Mulino, Bologna, 2009, 95.

3.4. Notion and limits of social clauses in ECJ interpretation.

The overview allows to define the notion and limits of social clauses as interpreted by the ECJ. Since the entry into force of Directive no. 18 of 2004, the Court recognized the legal basis for social clauses in article 26. Before and after the Directive no. 18 of 2004 the limit for social clauses is the compliance with the "European law"[67], namely general principles of Treaties (like article 56 TFEU) and PWD. Given the potential cross-border "interest" of undertakings based in other member states in participating or using posted workers, social clauses must comply with article 3 PWD every time the contract falls under the procurement Directive[68], regardless the concrete presence of cross border situations listed in article 1 PWD.[69]

Furthermore, the ECJ laid down other limits, which contracting authorities must respect in awarding procedures.

First, social clauses must ensure a "minimum" protection for workers (limited to basic conditions). In contrast with national traditions and international conventions' goals[70], the ECJ adopted the "minimalist" approach and rejected the idea of a "promotional" use of social clauses, which means to fix better standards in public sector (where public Administration should act as "model employer") to push undertakings in private sector to follow the example.[71] By contrast, the Court embraced a "minimalist" idea of pay clauses, which must ensure the lowest standards set in that sector within the purposes of article 3, par. 1 lett. a-g PWD.[72] As clarified in *RegioPost*, this limit does not create problems in Countries where the required pay rate is fixed by the law or collective agreements with general effectiveness, if the minimum pay rate does not exceed the provisions of article 3 PWD. On the contrary, in countries where minimum pay is fixed by collective agreements without general effectiveness (like Italy), the use of social clauses could violate the PWD, and consequently article 26 Directive no. 18 of 2004.[73] The violation is related to two reasons. On one side, these collective agreements do not comply with article 3 PWD, which requires minimum pay rate set by the law or collective agreements universally applicable. On the other side, multiple contracts per each sector could imply the existence of a lower minimum pay than that required by the social clause. This means the clause guarantees standards exceeding the "minimum" protection within the purpose of PWD.

The second limit concerns the "universal" applicability of pay rate fixed by the law or collective agreements. This limit has been mitigated in *RegioPost,* where the ECJ stated that the "universal" applicability of the provision establishing minimum pay rate can interest only the public sector and not the private one.

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[67] RegioPost, par. 54.
[68] Considering the value of the contract fixed by article 7 Directive 2004/18.
[69] RegioPost, par. 51.
[70] *See* ILO Convention no. 94 and Recommendation no. 84 and N. Bruun, A. Jacobs, M. Schmidt, *Ilo Convention no. 94 in the aftermath of the Rüffert case,* in *Transfer: European Review of Labour and Research,* vol 16, Issue 4, 2010, 473 – 488.
[71] Arrowsmith S., *The Law of Public and Utilities Procurement,* nt. (8), 1239.
[72] RegioPost, par. 62.
[73] In Italy, for instance, there are about 900 national collective agreements and many of them rule the same sector or industry.

Third, in line with the principle of transparency and impartiality of public Administration, and to avoid discriminatory practices in favor of domestic tenderers, the condition has to be expressed in a clear manner and mirrored in the contract[74].

According to the ECJ reasoning (especially in *Bundesdruckerei*), there is a case in which the use of pay clauses is completely ineffective: contracts for the provision of services, if the contractor (or subcontractor) plans to provide the service entirely in its home state, where wages are lower. In this case, which is growing its relevance thank to technological evolution, the clause that requires to pay a higher remuneration compared to normal standards of living violates the PWD and article 26 Directive no. 18 of 2004, so the use of social clauses seems to be useless.

4. Social Clauses in 2014 Directives: a new impulse towards social purposes?

In 2014, a new package of Directives repealed the previous procurement legislation[75]. Different aims drove the revision. On the one hand, the new regulation aimed to achieve economic objectives (to increase internal markets' exposition to competition[76], develop public spending efficiency[77]) and to make clearer the interpretation of the EU legislation (through the definition of unclear notions and concepts[78] and the incorporation of specific statements of ECJ).[79] On the other hand, the Directive, both in the preamble and in the body, put a strong accent on the use of procurements to achieve common "societal goals".[80]

With particular concern to pay clauses, it was argued whether the new discipline reframed the primacy of economic freedoms over social rights defining new functions and limits for social clauses. These expectations were related to two questions. First, it was discussed whether the notion of "social market economy"[81] introduced by the Lisbon Treaty might have had any effect on the evaluation of the social clauses' compatibility with the European law. In fact, after the Lisbon Treaty the EU single market shall aim also at "*social progress*".[82] The reference to this new market's goal could support the transition to a new notion of social clauses based on their "promotional" rather than "minimalist" function. Under the "promotional" notion, authorities could require contractors to pay higher wages than the

[74] RegioPost, par. 83. See also ECJ C-368/10, 10 May 2012, *European Commission v. Netherlands,* par. 109.
[75] Beside the Directive 2014/24/EU (which repeals Directive 2004/18/EC), there are Directives 2014/25/EU (water, energy, transport and postal services sectors) and 2014/23/EU (concession contracts).
[76] Directive 2014/24, recital 1.
[77] Directive 2014/24, recital 2.
[78] Such as "procurement", "acquisition", "contracting authorities", "economic operator", "award criteria".
[79] Directive 2014/24, recital 2.
[80] *See* Directive 2014/24, recital 2 and on this C. Barnard, *To Boldly Go: Social Clauses in Public Procurement,* nt. (4), 210; *see* also Varva S., *Promozione dei soggetti svantaggiati negli appalti pubblici. La regolazione locale e la direttiva 2014/24/Ue*, in *lavoro e Diritto*, 2016, I, p. 53; Varva S., *Concorrenza e promozione sociale. Le nuove prospettive alla luce della direttiva appalti 2014/24/UE*, in Perulli A. (ed.), *L'idea di diritto del lavoro, oggi*, Wolters Kluwer Cedam, Padova, 188; Kaupa C., *Public Procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process?*, in *European Papers*, 2016, I, 127.
[81] Article 3 par. 3 TEU. On the notion of "social market economy" *see* Joerges C., Rödl F., *"Social Market Economy" as Europe's Social Model?,* EUI Working Paper No. 2004/8. S. Deakin, *The Lisbon Treaty, the "Viking" and "Laval" judgments and the financial crisis: in search of new foundations for Europe's "social market economy",* nt. (39).
[82] Article 3 par. 3 TEU.

minimum fixed in that sector, even though the rate is fixed by a collective agreement without general effectiveness. Second, it was discussed whether the new Directive might have adopted effective measures to fight social dumping and abuses in the use of posted workers[83], given that *Bundesdruckerei* left the question unsolved.

The most meaningful provisions of Directive no. 24 of 2014 to answer these questions are article 18 par. 2 and article 70.

4.1. Article 18 par. 2.

Article 18 opens the second chapter of the Directive, dedicated to the "General rules" of public procurements. It contains two paragraphs. The first one reaffirms well-known principles in awarding procedures like equal treatment and non-discrimination. By contrast, the second paragraph introduces an unprecedented provision in this field, and for this reason has been properly renamed "*labour clause*".[84] According to this provision, member states "*shall*" adopt the necessary measures to guarantee that, during the performance of public contracts, economic operators comply with applicable obligations concerning "environmental, social and *labour law* established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X". [85]

Through this clause Directive no. 24 of 2014 obliges member states to ensure the respect of obligations concerning with labour standards and deriving from Union law, national law, collective agreements and ILO conventions. Looking at this provision, there are at least two particular features that could influence nature and effects of social clauses under the new discipline.

First, article 18 seems to put all legal sources (EU law, national law, collective agreements and ILO Conventions) at the same level, without defining a hierarchy between them, or establishing – as in the past – the primacy of the Union law over national law or collective agreements. Second, the reference to "collective agreements" (and to their pay clauses) is worded in general terms without any specific mention of their necessary general effectiveness. This could mean that the new Directive does not request such contracts to comply with the requirements of article 3 PWD (universal effectiveness and ensure the minimum pay rate in that sector).

In addition, the relevance of article 18 is increased by many references that other articles of the Directive make to it and that extend its effects beyond the performance stage: namely article 56, article 57, par. 4, lett. a); article 69 and article 71, par. 1 and 6. During the stage of

[83] Like in the case of letter-box companies, on which see Cremers J., *Letter-box Companies and Abuse of the Posting Rules: How the Primacy of Economic Freedoms and Weak Enforcement Give Rise to Social Dumping,* in *ETUI Policy Brief,* n. 5, 2014.
[84] Barnard C., *To Boldly Go: Social Clauses in Public Procurement,* nt. (4), 217.
[85] Those concerning labour conditions are the ILO Conventions no. 87 (Freedom of Association and the Protection of the Right to Organise), no. 98 (Right to Organise and Collective Bargaining), no. 29 and 105 (Forced Labour), 138 and 182 (Minimum Age and child labour), no. 111 (Discrimination Employment and Occupation), 100 (Equal remuneration).

participants' selection and award of contract, article 56 introduces the possibility for contracting authorities not to award a contract to the tenderer whether the tender does not comply with the applicable obligations – included the labour obligations – mentioned in article 18 par. 2. This, even in the case that the tender results the most economically advantageous. During the qualitative evaluation of tenderers, article 57, par. 4, lett. a) recognizes that contracting authorities may exclude from participation any economic operator when a violation of obligations referred to in article 18 par. 2 can be demonstrated "by any appropriate means". Then, considering the evaluation of abnormally low tenders, article 69 states that tender "shall" be rejected when the contracting authority establishes that it "is abnormally low because it does not comply with applicable obligations referred to in article 18, par. 2", included obligations concerning employees' pay. Article 71 par. 1 extends to subcontractors the oblige to fulfil the obligations of article 18 par. 2 and requires member states to ensure mechanisms of joint liability between subcontractors and the main contractor in compliance with the conditions set out in Article 18 par 2.

4.2. Article 70.

Article 70 ruling the "conditions for performance of contracts" replaces the previous legal basis of social clauses in public procurements (article 26 Directive no. 18 of 2004). Combined with article 18 par. 2, this provision could represent an additional evidence of the supposed new role of social clauses in European procurement legislation. This change could appear even clearer if article 70 is compared with the previous article 26: the only limit article 26 required for pay clauses was the "compatibility" with the European legislation ("*provided that these are compatible with Community law*"). So, the criteria were found by the ECJ in article 3 of Posting Workers Directive. Article 70 partially differs from article 26. It specifically points out that they may include "*employment-related considerations*", while article 26 used general terms like "*social* (*and environmental*) *considerations*". Then, in contrast with article 26, in article 70 there is no one reference to the limit of compatibility with the European legislation. In other words, in article 70 the reference to the limit of compatibility with the EU law disappears, and article 18 par. 2 does not seem to introduce a hierarchy between different sources that must be respected during the entire procurement procedure (EU law, national law, collective agreements and ILO conventions). Given this, one could argue that the Directive no. 24 of 2014 effectively aims to adopt a new balance between economic freedoms and social rights, changing notion and limits of social clauses under EU law. In other words, at first sight it seems the combined interpretation of articles 18 par. 2 and 70 allows to delink social clauses from the evaluation of economic compatibility with the EU law and from proportionality test.

By contrast, a deeper analysis of the whole Directive leads to a different solution.

4.3. Directive 2014/24 as "social" turning point in procurement legislation?

The literal interpretation of articles 18 and 70 Directive no. 24 of 2014 seems to make social clauses independent from the limit of compatibility with the EU law, and consequently free from evaluations concerning the proportionality of economic sacrifices public Administrations are allowed to require from contractors. If true, this would reverse the previous regime of social clauses based on their strict compatibility with the economic freedoms. In addition, this would finally encourage the "promotional function" of social clauses, obliging contractors to pay wages even higher than those required by article 3 PWD, or set by collective agreements without general effectiveness.

This interpretation can be supported interpreting articles 18 par. 2 and 70, but also appreciating recent reforms at EU level that aim to increase the importance to social aspects and to address distortions and harmful effects of the economic integration process within the EU: the Lisbon Treaty, the recognition of the Charter of Fundamental Rights of the EU and the European social pillar of 2017.

The enactment of the Lisbon Treaty and the promotion of values such as social justice, solidarity, sustainable development, but above all the establishment of a new paradigm of common market functioning (the "*social market economy*") strengthen the role of social policies in the balance with economic purposes. Between the purposes of "social market economy" there are the maximization of the Common Market's efficiency, but also the full employment and "the social progress". In particular, the reference to social progress could support a different interpretation by the ECJ in the balance between economic freedoms and social rights, and consequently a new reasoning on the compatibility of social clauses with EU law.

A further element in favor of this new interpretation could come from some provision of the Charter of Fundamental Rights, notably article 28, which establishes the right to negotiate and conclude collective agreements "at the appropriate levels", and article 31, which ensures the respect of employee's health, safety and dignity. Nevertheless, the effect of the Charter on the ECJ interpretation of EU law is not noteworthy, especially in public procurement cases. In previous judgments concerning social clauses (like *Bundesdruckerei* and *RegioPost*) the ECJ not even mentioned the Charter (as well as the Directive no. 24 of 2014).

The growing importance of social profiles in EU policies is promoted also by the European Pillar of Social Rights jointly signed by the European Parliament, the Council and the Commission on November 2017. Even though this declaration contains programmatic objectives (without mandatory effects), its analysis can be useful to understand the evolving trends in EU policy-making. In particular, point 6 of the declaration is focused on wages and states that "adequate minimum wages shall be ensured, in a way that provide for the satisfaction of the needs of the worker and his/her family in the light of national economic and social conditions" and that "all wages shall be set (…) according to national practices and respecting the autonomy of the social partners". Like Directive no. 24 of 2014, the declaration does not mention any limit of compatibility with the EU law for measures that ensure fair wages and focuses on tools and actors at national level (given the lack of EU competence).

By contrast, Directive no. 2014/67/EU (on the enforcement of Directive no. 96/71/EC) seems to reaffirm the previous framework, even though with some softening. Article 1 – defining the field of application – points out the two purposes of the Directive. First, to guarantee respect "for an appropriate level of protection of the rights of posted workers for the cross-border provision of services". Second, to facilitate at the same time the exercise of freedom to provide services and promoting fair competition between service providers, and thus supporting the functioning of the internal market. In this case, the Directive comes back to the previous framework where social rights can be used until they do not become disproportionate burdens for economic freedoms.[86]

As said, despite the listed arguments in favor of a possible new notion of social clauses, the analysis of Directive no. 24 of 2014 leads to reject this interpretation and confirm the previous framework where the PWD is the main criterion to evaluate the compatibility of social clauses. The arguments in favor of this solution come from the systematic interpretation of articles 18 par. 2 and 70 in light of other provisions of the whole Directive no. 24 of 2014.

Preliminarily, recital 1 – worded as a general key of interpretation for the entire Directive – states that the award of public contracts must comply with the principles of Treaties. Among them, recital 1 expressly mentions economic freedoms (like free movement of goods, freedom of establishment and to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency). No one reference is dedicated within this recital to social interests.

Focusing on article 18 par. 2, at first sight it seems to not require collective agreements with general effectiveness to set the minimum rate of pay. Nevertheless, recitals 37 and 39 and article 69 par. 5 expressly confirm the previous interpretation based on the necessary compliance with PWD requirements: universal applicability and minimum pay rate in that sector.

Recital 37 calls for national measures ensuring in awarding procedures compliance with labour law obligations. Those measures can be set also within collective agreements, but with *caveats*. It is essential that "such rules, and their application, comply with Union law". The meaning of "Union law" is clarified in the second part of recital 37: "such relevant measures should be applied in accordance with Directive no. 96/71/EC, and in a way that ensures equal treatment and does not discriminate directly or indirectly against economic operators and workers from other member states".

Recital 39 states that particular obligations could be mirrored in contract clauses and that "it should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in public contracts". In cases where clauses require the respect of particular conditions established by collective agreements, it is necessary they comply with the EU law (included article 3 of PWD), without any reference to the specificities of public procurement sector.

Article 69 par. 5 introduces the duty of cooperation between member states and obliges them to make available to other member states any information at their disposal. Between

[86] Article 4 represents the real core of the Directive that introduces criteria to determine whether posting practices are genuine and tools to prevent abuses and circumventions.

them there are laws, regulations and "universally applicable collective agreements". No one reference is made to collective agreements without general effectiveness.

Article 70 – which provides the new legal basis for social clauses – comes into consideration because of the absence of any reference to the limit of compatibility of social clauses with the European law. As said, it would represent one of the most important elements of innovation of Directive no. 24 of 2014. Nevertheless, article 70 should be interpreted in light of recital 98 of the Directive, that makes clear how conditions concerning social aspects should be applied "in accordance with Directive no. 96/71/EC, as interpreted by the ECJ and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other member states". In its second part, recital 98 is even clear: "requirements concerning the basic working conditions regulated in Directive no. 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or by collective agreements applied in accordance with Union law in the context of that Directive".

Not even the reference in article 18 par. 2 to the international labour law provisions listed in Annex X looks enough to argue a real change in social clauses' notion. Among the conventions listed in Annex X, indeed, it is not mentioned the ILO Convention no. 94 of 1949 on social clauses in public procurements, which does not require they are fixed by collective agreements with general effectiveness.

5. Toward a "social" future for the EU?

Despite these arguments, one could still argue article 18 par. 2 and article 70 Directive no. 24 of 2014 – combined with the ECJ interpretation in *RegioPost* – introduced a special regime for the evaluation of social clauses' compatibility with the European law. This because procurement legislation (article 70) rules a special sector (public contracts) which differs from that one regulated by PWD.[87] Such theory, however, seems to violate the interpretation of the entire Directive no. 24 of 2014 and the many references to the PWD made by the same Directive. In fact, even though they are made in softer and sometimes vague terms, references to PWD are still present in Directive no. 24 of 2014 and they still make article 3 PWD the parameter of compatibility of social clauses.

Without a specific legal intervention that declares the peculiarity of social clauses in procurement sector, in its next cases the ECJ will probably continue to use the PWD as a parameter of compatibility for social clauses, confirming the solution adopted in *RegioPost* where – considering recital 34 Directive no. 2004/18 (now transposed in recital 98 Directive no. 2014/24) – the ECJ defined social clauses compatibility using article 3 par. 1 PWD.[88]

If compared to previous regulation quite totally focused on economic purposes, Directive no. 2014/24 undoubtedly represents a remarkable advancement in social aspects'

[87] Forlivesi M., *Sulle clausole sociali di equo trattamento nel nuovo codice degli appalti pubblici,* in *Rivista Italiana di Diritto del Lavoro*, IV, 2017, 686; *see* also Allamprese A., Orlandini G., *Le norme di rilievo lavoristico nella nuova direttiva sugli appalti pubblici*, in *Rivista Giuridica del Lavoro*, 2014, I, 169.
[88] *RegioPost,* par. 59-61.

consideration within the EU law. Nevertheless, this change represents a starting point. Even in Directive no. 24 of 2014 social sphere plays a secondary role if compared to economic aims (like the good functioning of the common market). Of course, to fulfill the social goals fixed by the European social pillar and mentioned by the European Directive no. 24 of 2014 itself, wide reforms are still necessary changing the nature itself of European Union. In this long path, public procurements with their peculiar rules and their growing impact on EU economy can represents one the most effective tool.

Even though in this particular moment such kind of legal reforms seem to be very difficult to be enacted by European Institutions, an advancement in this direction could come from a different field: the proposal for a Directive on adequate minimum wages in European Union of October 28, 2020.[89]

Namely, article 9 of the proposal states: "in accordance with Directive 2014/24/EU, Directive 2014/25/EU and Directive 2014/23/EU, Member States shall take appropriate measures to ensure that in the performance of public procurement or concession contracts economic operators comply with the wages set out by collective agreements for the relevant sector and geographical area and with the statutory minimum wages where they exist".

The reference to Directive 2014/24 ("*in accordance with Directive 2014/24/EU*") precludes arguing that article 9 refers to "collective agreements" without any other requirements, like their general effectiveness (supporting that interpretation which highlights the peculiarity of public procurement sector).

On the contrary, it refers to the previous version of PDW, but particularly such reference confirms that also the Proposal of Directive on adequate minimum wages (focusing on article 9 on public procurements) requires the obligation of economic operators falls within applicable obligations in the field of labour law set in article 18 par. 2 of Directive 2014/24. As said before, this implies that obligations of economic operators must be interpreted under the recitals 37 and 39 and article 69 par. 5 of Directive 2014/24, which support the previous interpretation based on the necessary compliance with PWD requirements: universal applicability and minimum pay rate in that sector.

Concluding, the proposal for a Directive on adequate minimum wages at EU level represents an unprecedented opportunity to fulfill social goals fixed by the European social pillar, even throughout public procurements sector. For the first time, political and social context offers to EU the concrete possibility to set a new balance for its priorities. The enactment of such reform in the field of minimum wages could reinforce the attempts to strengthen the role of social clauses and overcome the mentioned difficulties encountered in the interpretation by ECJ of procurement legislation.

[89] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0682. On this see Menegatti E, *Il salario minimo nel quadro europeo e comparato. A proposito della proposta di direttiva relativa ai salari minimi adeguati nell'Unione europea*, in *Diritto delle Relazioni Industriali*, I, 2021, 41; Proia G., *La proposta di direttiva sull'adeguatezza dei salari minimi,* in *Diritto delle Relazioni Industriali*, I, 2021, 26; Razzolini O., *Salario minimo, dumping contrattuale e parità di trattamento: brevi riflessioni a margine della proposta di direttiva europea,* in *Lavoro Diritti Europa,* 2021, available at *https://www.lavorodirittieuropa.it/images/Razzolini_salario_minimo_LDE_2_1.pdf*;; Lo Faro A., *L'iniziativa della Commissione per il salario minimo tra coraggio e temerarietà*, in *Lavoro e Diritto*, 2020, IV, 540; Treu T., *La proposta sul salario minimo e la nuova politica della Commissione europea*, in *Diritto delle Relazioni Industriali*, I, 2021, 1; Ratti L., *La proposta di direttiva sui salari minimi adeguati nella prospettiva di contrasto alla in-work poverty*, in *Diritto delle Relazioni Industriali*, I, 2021, 59*;*

Nonetheless to avoid the same interpretative problems experienced by public procurements legislation on the role of PWD as a parameter, especially in those countries where collective agreements are not generally applicable, it could be helpful to expressly recognize in article 9 of the Proposal the peculiarity of social clauses in procurement sector.

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