THE PERFORMANCE CLAUSES OF PUBLIC PROCUREMENT CONTRACTS; THE TUG-OF-WAR BETWEEN PUBLIC AND PRIVATE LAW

ΠΕΡΙΛΗΨΗ

Αναπόσπαστο μέρος των οδηγιών για τις δημόσιες συμβάσεις από τη δεκαετία του 1990, οι διατάξεις για τις ρήτρες επιδόσεων παρέμειναν ένας κοιμισμένος γίγαντας για δεκαετίες, δεδομένου ότι δεν είχαν φτάσει ποτέ στην πόρτα του ΔΕΕ. Ωστόσο, ο αναδυόμενος πληθωρισμός των στόχων που πρέπει να εξυπηρετεί η νομοθεσία της ΕΕ τονίζει κλαδικά την ενσωμάτωση κοινωνικών και περιβαλλοντικών όρων στις συμβάσεις. Αυτό το πλαίσιο περιγράφει τους λόγους για τους οποίους ορισμένες από τις πιο σημαντικές υποθέσεις της τελευταίας δεκαετίας περιστρέφονται γύρω από ρήτρες απόδοσης.

Ο στόχος της παρούσας μελέτης είναι να απεικονίσει τη μετάβαση των ρητρών απόδοσης από μια περιοχή που αφήνεται στην εθνική ρυθμιστική αρχή σε έναν πλήρως διεκδικούμενο συμβατικό όρο από το δίκαιο της ΕΕ.

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ABSTRACT

An integral part of the public procurement directives since the 1990s, the provisions on performance clauses have remained a sleeping giant for decades, considering that they had never reached the door of the ECJ. Yet, the emerging inflation of objectives that EU law needs to serve accentuates sectorally the incorporation of social and environmental conditions into contracts. This context outlines the reasons why some of the most important cases of the last decade revolve around performance clauses.

The aim of the present study is to illustrate the transition of performance clauses from a territory left to national regulatory authority to a fully claimed by EU law contractual term.

INTRODUCTION

A priority of the European edifice even before the adoption of the Treaty of Rome[1], the area of public procurement has, after six decades of non-stop regulation, become one of the most 'remarkably and atypically dense and detailed'[2] areas of EU law, taking into account the four generations of substantive law directives, the two generations of procedural ones and the innumerable soft law instruments and the inexhaustible case-law that outline it.

However, stereotypically, EU public procurement law has been conceptualised as a regulation that is exhausted to the award of the contract, aiming to establish a common, 'coordinated'[3] legal framework built on the axis of economic freedoms and the general principles of EU law. The contract award procedure has therefore monopolised the interest of European law for two reasons. On the one hand, although the origins of European public procurement law date back decades before any reference to the principle of subsidiarity[4], and thus before the development of the criteria of comparative efficiency and necessity[5], the European legislator was aiming even before that at replacing national laws and economic protectionist practices that were hindering the creation of the European common market. As can be seen, and as has subsequently been explicitly and repeatedly ruled by the ECJ, in the field of public procurement, hostile national provisions and practices were concentrated at the contractor selection stage, and this was therefore to be replaced as an obstacle to European integration[6]. On the other hand, the teleological inertia of intervention to the regime of the contract itself was also supported by traces of legal realism, since such was the diversity of national legal traditions that permeated public procurement, that refraining from interfering with the contract regime ultimately served a plethora of purposes[7].

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1 Maurice-Andre Flamme, *Traité Théorique et Pratique des Marchés Publics* (Bruylant 1969) 272, citing a 1960s letter from Baron Snoy et d'Oppuers to the *Confédération Nationale de la Construction*, in which he had stressed that 'it is with wisdom that the authors of the Treaty solved the problem by this method, because it is, from my point of view, certain that the adoption of precise rules eliminating discrimination in the award of works would not have been accepted by the competent Parliaments upon ratification of the Treaty. The protectionist traditions of certain countries of the Community are indeed far too strong for this to be hoped for'.

2 Stephen Weatherill, 'EU Law on Public Procurement: Internal Market Law Made Better' in Sanja Bogojević, Xavier Groussot and Jörgen Hettne (eds), *Discretion in EU public procurement law* (Hart Publishing 2019) 48.

3 Diachronically, public procurement directives have been labelled as aiming simply at the 'coordination of national procedures for the award of public works contracts', a narrative confirmed on numerous occasions by the case-law. For instance, Judgment of 9 July 1987, CEI v Association intercommunale pour les autoroutes des Ardennes, 27/86, 28/86 and 29/86, ECLI:EU:C:1987:355, para 15; Beentjes v State of the Netherlands, 31/87, para 20; Judgment of 12 December 2002, Universale-Bau and others, C-470/99, ECLI:EU:C:2002:746, para 88; Judgment of 27 November 2001, Mantovani, C-285/99 and C-286/99, ECLI:EU:C:2001:640, para 83.

4 Although traces of subsidiarity could be found in Article 5 of the Treaty of Paris establishing the ECCS; a minimal definition could also be drawn through a combined interpretation of Articles 114, 116 and 235 EEC and Article 5 describing the principle as, 'each institution shall act within the limits of the powers conferred upon it by this Treaty'. Despite these traces, the subsidiarity narrative was completely absent during the 1950s, 1960s until the mid-70s. The transformation of the concept from a platonic description of every international legal order to a proper threshold of competence occurred explicitly in the Treaty of Maastricht—a personal success of Jacques Delors, aka 'Mr. Subsidiarity', Julian Barroche, État, libéralisme et christianisme. Critique de la subsidiarité européenne (Dalloz 2012) 40.

5 These criteria were set out in the Edinburgh conclusions, Conclusions of the Edinburgh European Council, Bull EC 12 – 1992 19.

6 Catherine Prieto, 'Entrave et accès au marché' in Loic Azoulai (ed), *L'entrave dans le marché intérieur* (Bruylant 2011) 73-95.

7 Depending on the criterion, classification of national traditions can vary significantly. For instance, the ex-

Although this rigid distinction has been relativised, the first era was defined by a macro-asymmetry between the two phases of the contract (Section I). Typical of this situation, the EU law was disinterested in the performance clauses (Section II). Yet, it was this non-existent EU law *acquis* for this part of contract that allowed for the expansion of discretion through the spillover effect of the posted workers directive (Section III).

I. THE MACRO ASYMMETRY BETWEEN THE AWARD AND THE PERFORMANCE STAGES OF THE CONTRACT

As a consequence, the 'realm' of European law extended up to the conclusion of the contract (essentially the signature of the contract), while the national legal order regained – at least initially – full autonomy for issues relating to the performance of the contract. European law maintained its neutrality with regard to the legal characterisation of the contract, which was left exclusively to the national legislator. And while the asymmetry between on the one hand the law of the award procedure and on the other hand the law of the contract emerged as a natural consequence for all the legal orders of the Member States, the intensity of the asymmetry between the two was dynamic and fluctuating. In particular, since the provisions on fundamental freedoms and general principles were the core of EU public procurement law, what started – for all Member States as a law of the administration (in the sense of its application by *lato sensu* public authorities) evolved as a *stricto sensu* administrative law, in the sense of the development of a vertical and unequal relationship between the contracting authority and the candidates.

In this respect, the relationship between the two layers of a public procurement contract (pre and post-award) was clearly smoother for those legal orders in which the contractual relationship also followed specific (public law) rules[8], while it was greater for those legal orders in which the contract itself constituted a civil contract[9], because the 'verticality' of the procurement procedure was, after the signature of the contract, being transformed into a horizontal relationship between the contracting parties.

In order to respect the principles that form the core of European public procurement law, namely the principles of equal treatment, non-discrimination and (later) that of transparency, EU law has progressively imposed a number of restrictions on the form and content of

istence of detailed regulation concerning the award as well as the execution phase of the procedure constitutes the distinguishing factor between the German and the common law archetypes of public contracts, since the latter lacks completely any, even non-binding sets of rules. Auby has qualified them as 'contrats privés spéciaux' because they are not exclusively governed by civil law provisions, Jean-Bernard Auby, 'Comparative Approaches to the Rise of the Contract in Public Sphere' (2007) I Public Law, 40 ff;on this issue see also A.C.L. Davies, *The public law of government contracts* (OUP 2008) 65. Essentially, this classification of procurement contracts as special private contracts divides the national archetypes into three categories, the French, the common law and the German one. Contrary to this classification, Fromont only accepts two models of procurement contracts in the European legal sphere, the French one and the English-German one, in Michel Fromont, *Droit administratif des Etats européens* (PUF 2006) 297-324. Comba has suggested another classification of the existing legal traditions based on the 'legal location' of the rules awarding public contractors with special powers during the execution phase of the contracts, Mario Comba, 'Contract execution in Europe: different legal models with a common core' (2013) 3 EPPPL 302-308.

8 France, Greece, Spain and Portugal have always followed this administrative archetype.

9 Germany, Austria, the Netherlands and Nordic countries constitute the most characteristic examples of regulation through civil law provisions.

certain contractual terms. Given the dichotomy between a procurement procedure governed by European law and the contractual relationship governed by national law, European law dragged selection and award criteria as well as technical specifications at the pre-contractual stage. Given the public nature of the pre-contractual phase, the 'dragging' of the above-mentioned generic concepts at this stage meant that the legality of their choice and their content would be scrutinised on the basis of public law legal standards - in the form of the general principles of European law - and no longer on the basis of those of private law (as was the case for Member States that followed a civil law tradition for procurement contracts). In particular, they were now being questioned on the basis of the due process/discretionary powers dichotomy and not in the context of lawful exercise of contractual freedom. Moreover, as a consequence of the fact that these conditions were drawn to the pre-contractual stage, their satisfaction by economic operators had to be verified during the pre-contractual stage, whereas, conversely, failure to fulfil them resulted in the latter being excluded from the competitive procedure on the basis of the principle of equal treatment.

Against the previously presented rigid dichotomy between the award and the performance of the contract, in recent years, EU public procurement law – primarily through principles of EU primary law – has extended its scope towards the performance stage of contracts, but this phase still remains largely unregulated by EU law[10]. The lack of regulation of the performance phase of procurement contracts and its subsequent regulation by national law, constitutes the main, yet implicit, reason behind the enrichment of the remedies' directives with post-conclusion litigation[11]. However, the understanding of this emerging post-conclusion case-law needs further contextualisation.

More specifically, the case-law regarding the choice of selection and award criteria has resulted in a powerful *acquis*. The choice of selection and award criteria depended on their linkage to the subject matter of the contract. Although this relative limit to the discretionary powers of the contracting authority seems only natural, it should be interpreted as a hindrance towards greater integration of the so-called horizontal policies, namely social and environmental criteria. Interpreted outside the legal context that led to its emergence, the connection of award criteria to the subject matter of the contract does not seem to be a restriction to the discretion of a contracting authority, but rather, a pragmatic description of an everyday practice. Had it been the case, this condition of lawfulness regarding the criteria would have emerged in parallel with the regulation. On the contrary, it emerged as a response to the growing pressure from Member States to incorporate social and environmental criteria to procurement contracts and to the rapidly developing EU primary law. It quickly became 'a fundamental condition that has to be taken into account when introducing into the public procurement process any considerations that relate to other policies'[12]. The consolidation of

[10] The first case that addressed issues that arose post-conclusion was *Succhi di Frutta*, where the Court recognised the right of an unsuccessful bidder to challenge a post-contractual modification, considering that the award of the contract had crystallised different competition terms, Judgment of 29 April 2004, *Commission* v *CAS Succhi di Frutta*, C-496/99 P, ECLI:EU:C:2004:236.

[11] More specifically, for the countries that qualified their procurement contracts as civil contracts, the principle *pacta sunt servanda* was obstructing post-conclusion any review of the legality of the award procedure. As a result, in order to benefit from the privity of civil contracts, contracting authorities were racing to the conclusion of the contract, which would make any claim of judicial review inadmissible. This was essentially the problem that was resolved with the second generation of remedies directives.

[12] Green Paper on the modernisation of EU public procurement policy, COM (2011) 15, 39.

the link to the subject matter arose as a balance between, on the one hand, the complete instrumentalisation of procurement contracts for the promotion of these policies and on the other hand, the impossibility of integration of these characteristics. In other words, the linkage to the subject matter of the contract should be viewed as a sectoral application of the 'supportive integration' of the emerging multi-valued internal market[13]. Considering that for the selection and award criteria, linkage to the subject matter of the contract was interpreted with a remarkably restricted attitude by the Court[14], the strategic goals found an ideal landing route, the performance clauses.

II. THE NON-EXISTENT EU LAW *ACQUIS* REGARDING THE PERFORMANCE CLAUSES

The flexibility of the link to the subject matter of the contract is caused by two conditions. First, the content of this newly emerged condition of the subject matter has changed over the years, while second, this relative limit of discretion naturally meets the absolute limits of discretion and how they are enforced for each category of contractual terms. As a result, subject matter meets the *acquis* of fundamental freedoms for each category of contractual conditions. Since each category of contractual terms in not likely to impact market access to the same extent, the intensity of fundamental freedoms adapts to each category. If one were to imagine a schematic depiction of the interaction of each category of contractual conditions with access to the procurement market, a public procurement contract might be shaped like a funnel. Considering that selection criteria are, by definition, detached from the subject matter of the contract and attached to the standing of the economic operator, their impact extends beyond a particular procurement contract so they are placed at the wider top of the funnel. Technical specifications and award criteria develop a more stringent relationship with the subject matter, and consequently, are less inclined to impact the procurement market, so are found in the middle of the funnel. Finally, performance conditions were, until recently, completely detached from the subject matter and consequently, appear at the narrow bottom of the funnel.

The legal qualification of the procurement contract is of paramount importance for the definition of its performance conditions. Specifically, if the awarded contract is governed by civil law provisions, then "the contracting authority is bound, as a party having a status equivalent to that of the contractor, by a contract under private law"[15]. As a consequence, applying classic civil law principles, the legal relationship with the contractor is a horizontal and not a vertical one. Further, the decisions of the contracting authority are scrutinised against standards of civil law and not standards of public law. As a result, the concept of a contracting authority's discretion is no longer relevant. Post-award, the term should be replaced by freedom, since no public law provision or public right can be enforced at this level. The lawfulness of a performance condition will *a priori* only be judged against civil law doctrines.

Before analysing the administrative discretionary powers during the performance stages of

[13] On supportive integration (focused on environmental integration) see Julian Nowag, *Environmental integration in competition and free-movement laws* (OUP 2016).

[14] See later.

[15] Opinion of Ms Advocate General Trstenjak delivered on 28 March 2007, *Commission* v *Germany,* C-503/04, ECLI:EU:C:2007:190, para 73.

the contract, an important element should be succinctly addressed. The legal qualification of contracts belongs to the domestic legislator, which justifies why procurement contracts have been qualified both as private and administrative. Simultaneously, the judicial development of EU law has resulted in the recognition – since the 1970s – of a horizontal effect of fundamental freedoms[16]. From a theoretical standpoint, although completely detached from the directives' scope, the performance stage of the contract could have been scrutinised against fundamental freedoms in both public and civil law traditions. Yet on the contrary, the Court of Justice has clearly chosen the spill over path, expanding the initial vertical regulation of the sector.[17]

The understanding of the interaction between a contracting authority's discretion during the performance stages of the contract and the horizontal policies necessarily goes through the objectives set out in EU public procurement law. In particular, the objective of EU public procurement law has diachronically been the elimination of economic protectionism which is hidden behind national provisions and practices that successfully reserve the national procurement market to domestic undertakings. Considering that the effect of these discriminatory behaviours culminates at the award of the contract, beyond the choice of the successful bidder, any interest and consequently any interference from both EU primary and secondary law is, by definition, suspended[18]. Beyond the point of the contract's conclusion, national legislation initially retrieved full autonomy, which naturally included the legal qualification of public contracts[19]. As confirmation of that neutrality of EU law *vis-à-vis* the legal qualification of the contract, the latter remained - in the aftermath of Europeanisation - unchanged in almost all legal traditions[20]. Discretion during the performance phase replaced private freedom, with the Court acknowledging the justiciability of fundamental freedoms, even beyond the conclusion of the contract. However, recently, performance conditions became the ideal landing post for a more dynamic promotion of strategic procurement.

Understandably, this post-award status of performance conditions meant that they would be horizontally enforced to any contractor who was chosen, on the basis of other contractual conditions to perform the contract. As McCrudden has rightfully summarised: "they operate post-award only; provided the contractor or supplier agrees to operate the condition if awarded

[16] Judgment of 12 December 1974, Walrave and Koch, 36/74, ECLI:EU:C:1974:140; Judgment of 15 December 1995, *Bosman*, C-415/93, ECLI:EU:C:1995:463; on free movement of workers see Judgment of 6 June 2000, *Roman Angonese*, C-281/98, ECLI:EU:C:2000:296, paras 35-36.

[17] On that issue, Brodec and Janeček argue that application of EU law to performance stage of the contract occurs through indirect effect principle. Although this is true for the entirety of national legislation, the field has been initially claimed directly through the direct effect of the general principles of EU law, Jan Brodec and Václav Janeček, 'How does the substantial modification of a public contract affect its legal regime?' (2015) 3 PPLR 90-105.

[18] As a reminiscent that the award procedure monopolises the attention of EU primary and secondary law, Recital 1 of Directive 2014/24 stresses that 'The 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. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition'.

[19] The concept of 'public contract' constitutes a neutral legal term, exclusive to EU law, which is irrelevant to the national divide of procurement contracts between civil and administrative contracts.

[20] This neutrality is perfectly illustrated by legal reality, considering that the (post-contractual) dichotomy between private and public law contracts continues to be distinctive of the field.

the contract, then the ability to comply with the condition is not subject to pre-award scrutiny, and can play no part in the award of the contract itself"[21]. Following this interpretation, they are irrelevant to the subject matter of the contract and they cannot restrict access. However, performance clauses may usually be disguised as award criteria or technical specifications relevant to the territory of the performance of the contract. Contracting authorities tend to tie local interests with the continuity of the service or the supply at stake. Yet, the Court has established that the critical element differentiating performance clauses from the rest of contractual elements, is their lack of impact on access to the procurement contract. As a result, the arsenal of EU public procurement law is irrelevant.

The Court has only reviewed the lawfulness of a performance condition in just two cases, the seminal *Beentjes* and decades later in *Contse*[22]. While confusing at times, the wording of the Court allows for the celebration of *Beentjes* as the first inclusive case-law; its social clause *acquis* is essentially a *non-acquis*. In particular, decades before the shift in the constitutional narrative and the explicit rejection of the pursuit of non-economic policies through fundamental freedoms, the insertion of similar labour clauses was approved by the Court in *Beentjes*. In that case, the contracting authority had rejected a tender on – among others – the grounds that the tenderer could not have provided long-term employment for unemployed people. The long-established confusing interpretation of this case-law has resulted from the interpretation of the factual background. Although the exigence of long-term employment was essentially put forward as an award criterion, since it had led to the rejection of the tender, the Court upheld its permissibility by conceptualising it as a performance condition[23]. In favour of that interpretation of the Court, McCrudden has stressed that "the Court was not deciding, therefore, whether the reduction in unemployment through the use of unemployed persons could be a permissible subject matter of the contract, only that it was not the subject matter of the contract *in this particular* case"[24].

A number of factors argue in favour of the interpretation of this clause as a performance condition. To begin with, the tender at stake was rejected on three grounds: lack of experience, appearing not to be the most economically advantageous, inability to guarantee long-term employment to unemployed people. Yet, the terminology chosen by the Court was confusing; any reference to the third ground was qualified as a condition, while the other two as criteria. Consequently, while the tender at stake was rejected on all three grounds, only the first two criteria were interpreted against the contracting authority's discretion in deciding the selection and the award criteria. The clause at stake was explicitly excluded from this line of reasoning. The condition was judged against more abstract grounds: "A condition such as the employment of long-term unemployed persons is an additional specific condition and must therefore be mentioned in the notice, so that contractors may become aware of its existence."[25].

Regardless that both doctrine and the subsequent case-law have received this case as a vote of confidence in favour of greater discretion during the award of the contract[26], and

[21] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement & Legal Change* (OUP 2007) 79.

[22] *Beentjes* v *State of the Netherlands*, 31/87.

[23] ibid para 79.

[24] McCrudden (n 21) 79.

[25] *Beentjes* v *State of the Netherlands*, 31/87, para 36.

[26] Although the Court has clearly admitted that this social clause was indeed a performance clause, it has constantly been invoking this case as the first that allowed social considerations in public procurement contracts,

despite the wording used by the Court, a series of arguments stemming from the overall context argue in favour of the interpretation of the clause as a performance condition and not as an award criterion. A reverse hypothesis would mean that fundamental freedoms and the specific provisions of the procurement directives could have non-economic content – a hypothesis unsupported by both EU primary and secondary law. The constitutional context of the early 1980s, combined with the explicit provisions of Directive 71/305/EEC explicitly exclude this scenario. In the late 1980s, even after the adoption of the Single European Act, primary law prescribed a rather monolithic vision of the common market, estranged from any social or labour narratives. Confirming that monosemous approach, a quarter of a century after *Beentjes*, the opinion of AG Kokott in *Max Havelaar* constitutes an excellent demonstration of the purity of the economic content of fundamental freedoms in the mid-80s:

> For a long time, the pursuit of environmental and social objectives was diapproved of in public procurement law, as was manifested not least in the use of the phase "objectives irrelevant to the contract". However, it is now generally recognised that contracting authorities may also take account of environmental and social factors when awarding contracts, and the Commission has not challenged this in principle[27].

In addition, the ruling of *Beentjes* was adopted during a period where discretion of contracting authorities was still perceived as a major threat to the fundamental freedoms. In particular, the extreme hesitance against the insertion of non-economic and specifically social clauses was evident, even decades later, in the vivid debates that paved the way for the adoption of Directive 2004/18. Finally, and somewhat paradoxically, confusion comes from the uniqueness of this case-law; inclusion of social clauses, let alone on the basis of *Beentjes,* has been a non-issue for more than two decades[28]. The confusion over whether the capacity to employ long-unemployed persons was an award criterion or a performance clause, was further reiterated on the occasion of another landmark case-law on social clauses. Specifically, in *Nord-Pas-de-Calais*, the Court admitted:

> *Beentjes* concerned a condition of performance of the contract and not a criterion for the award of the contract, it need merely be observed that, as is clear from paragraph 14 of *Beentjes*, the condition relating to the employment of long-term unemployed persons, which was at issue in that case, had been used as the basis or rejecting a tender and therefore necessarily constituted a criterion for the award of the contract[29].

supporting the confusion, see for instance *Concordia Bus Finland,* C-513/99; *Max Havelaar,* C-368/10.

[27] Opinion of Ms Advocate General AG Kokott delivered on 15 December 2011, C-368/10, *Commission* v *Netherlands*, ECLI:EU:C:2011:840, para 36.

[28] At this point, it should be noted that *Nord-Pas-de-Calais* concerned an infringement proceeding against France and considering that the Court had already found an infringement among the other grounds, it rejected that particular Commission's argument concerning the use of a social criterion as an award criterion. In addition to that, the Court adopted this ruling against the opinion of the AG that was of the opinion that the use of social clause as an award criterion infringed article 30 of the directive. In particular, AG was of the opinion that 'It should be borne in mind that the employment aspect is now probably perceived differently in terms of social policy from when the Directive was adopted: from today's perspective, the Directive focuses more on microeconomic, and less on macroeconomic, factors. However, any change would be for the legislature', Opinion of Mr Advocate General Alber delivered on 14 March 2000, *Commission* v *France*, C-225/98, ECLI:EU:C:2000:21.

[29] *Commission* v *France*, C-225/98, para 52.

Consequently, the term was interpreted as a lawful performance condition, bestowed upon national regulatory autonomy. The only relevance to the procurement directives *acquis* was the obligation regarding the inclusion of performance conditions in the contract notices—a novel obligation considering that the directives were completely oblivious to post-award conditions. The importance of *Beentjes* is partially justified by its isolated nature. For decades, performance clauses were in the shadow of both the EU legislator and judge's attention. While *Beentjes* concerned the disguise of a performance condition as an award criterion, these clauses have recently been used as selection criteria and technical specifications.

Specifically, in *Contse*, the contracting authority had attempted to design the contract locally, considering that it had required from tenderers both at the level of "admission conditions"[30] and "award criteria" to have, at the moment of the submission of their tender, offices "open to the public in the province or the capital of the province in which the service is to be provided"[31]. Adopting the Commission's take on these criteria, the Court discarded this requirement – both as a selection and award criterion – as unnecessary and disproportionate. On the contrary, in light of the legitimate purpose, its fulfilment as a performance condition would be lawful. Specifically, "Contse accepts that such a criterion, given the purpose of assisting patients, might be consistent with the objective pursued, but takes the view that a simple contractual undertaking to set up such offices in the event that the contract is awarded would have enabled that objective to be attained"[32].

A decade later, the requirement of local establishment resurged, this time as a technical specification. As a result, non-compliance with this technical specification,

> [had] the effect of automatically excluding those tenderers who cannot provide the services in question in an establishment situated within a given municipality, despite the fact that they may satisfy the other conditions laid down in the contract documents and technical specifications of the contracts under consideration[33].

The Court explicitly established that as a restrictive access condition,

> Articles 2 and 23(2) of Directive 2004/18/EC … preclude the inclusion, in the technical specifications of a public contract … of a requirement that the services be provided exclusively at health-care facilities located within a given municipality, where that requirement is not based on an objective assessment of travel difficulties for patients, regard being had to the nature of the health-care services which are the subject of the public contract[34].

Although both cases seem irrelevant to contract performance conditions, the Court has explicitly stated that these – relating to the performance of the contract terms – would have been lawful had they been designed as post-award conditions, as AG Szpunar clarified:

> I wish to stress that that requirement does hinder such access, even though it was not used as a qualifying criterion for tenderers, and the availability of a facility is essential only at the stage of performance of the contract. On this point, I disagree with the po-

30 A term used by the contracting authority instead of selection criteria.
31 *Contse and others*, C-234/03.
32 ibid para 54.
33 Judgment of 22 October 2015, *Grupo Hospitalario Quirón*, C-552/13, ECLI:EU:C:2015:713.
34 ibid para 79.

> sition of the Departamento de Sanidad, based on the judgment in *Contse and Others*, to the effect that the requirement to have a facility available in the place of performance of the services does not restrict access to a call for tenders if it is formulated as a condition for the performance of the contract. I would mention that the judgment in *Contse and Others* concerned the requirement to have an office available in a particular province in order to participate in a call for tenders for the provision of respiratory treatment services. That requirement was a qualification criterion applicable at the time when tenders were submitted and would probably not have been problematic if it had had to be met only at the stage of performance of the services[35].

Consequently, well-established case-law of the Court had made clear that both EU primary and secondary law are disinterested in performance clauses, considering that – if applied post-award - they are incapable of hindering access either to the national or to the *ad hoc* procurement market.

III. THE REPLACEMENT OF CONTRACTUAL FREEDOM WOTH ADMINISTRATIVE DISCRETION THROUGH THE *ACQUIS* OF POSTED WORKERS DIRECTIVE

In light of the consolidation and the expansion of the obligation of transparency throughout the 1990s, it comes as no surprise that, although neglected in the 1990s directive, the procedural acquis of *Beentjes* was codified in 2004. In particular, Article 26 held that:

> Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [Union] law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

A first reading of Article 26 of the 2004 directives creates the impression that the content of performance conditions is restricted by EU law ("provided that these are compatible with Union law"), while from a procedural point of view, their inclusion must respect the classic transparency *acquis*. While the codification of the obligation of advertisement – set out as an *obiter dictum* in *Beentjes* - is not doubted, the content of performance conditions is not regulated with the same intensity as are the remaining contractual conditions. In order to illustrate that the content of performance conditions was only loosely regulated by the 2004 directives and attention was primarily drawn to their advertisement, the context is necessary. In particular, it should be recalled that the 2004 directives were adopted in the aftermath of *Concordia Bus Finland* and *EVN and Wienstrom*, and that Article 53 had explicitly codified the subject matter to the contract as the benchmark of lawfulness for contract award criteria. The 2004 generation of directives explicitly established – although unjustified – a discrepancy between social and environmental considerations, the former being continually viewed with greater hesitance[36].

[35] Opinion of Mr Advocate General AG Szpunar delivered on 11 June 2015, C-552/13, *Grupo Hospitalario Quirón,* ECLI:EU:C:2015:394, paras 45-47.

[36] For instance, the Commission, considered at that time that authorities wishing to order 'sustainable' timber can focus at the stage of technical specifications on 'environmental' aspects of sustainability but not on 'social' ones, European Commission, *Buying green! A handbook on environmental public procurement* (n 52) 26. This po-

Against that context, Recital 33 of Directive 33 was extremely generous regarding the content of these conditions, allowing that:

> [Contract performance conditions] may, in particular, be intended to favour onsite vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. For instance, mention may be made, amongst other things, of the requirements – applicable during performance of the contract – to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with the provisions of the basic International Labour Organisation (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.

Although directives' recitals are not binding and can only function as interpretative tools, a regulatory divergence established between other contractual terms and performance conditions are definitely established. A combined reading of the directions towards socially inclusive performance conditions – the phrase "applicable during performance of the contract" – and the extremely abstract provision of Article 26, create the impression that the only enforceable *acquis* regarding performance conditions is, essentially, the advertising one. Interpreting the provisions of the directives, had the expansion towards performance conditions also concerned their content (considering that this constitutes a huge novelty), it would have been reflected in the soft law instruments leading to the adoption of the directive. As a result, those clauses were in a tug-of-war between public and private law. On the one hand, the fundamental principle of the privity of contracts was still applicable to contractual clauses, but on the other, those clauses had to respect some procedural rules.

Nonetheless, the obligation of advertising alongside the other contractual terms has definitely influenced their post-award function, since contracting authorities have used them to reject tenders. In other words, contracting authorities have been using performance conditions as pre-award factors distinguishing tenders. Understandably, the recent case-law on performance conditions has been interpreted from several perspectives, considering the interconnection of at times even contracting *acquis* in these cases. However, from the perspective of discretionary powers of contracting authorities, two major conclusions can be reached. First, regarding the choice of performance conditions, EU law discretion has replaced freedom or discretion governed by national administrative law rules. And second, considering that, until recently, performance conditions remained – as any other term occurring post-award – unaddressed by the EU legislator, there was no fundamental freedoms *acquis* restricting them. Consequently, the second conclusion is that the non-existent *acquis* of fundamental freedoms resulted in a more generous acceptance of horizontal policies, confirming the dynamic dimension of discretion in public procurement contracts.

Regarding the first conclusion, for the acceptance of the expansion of EU discretion to performance conditions and their subsequent alienation from their previous legal standard, their compatibility (or not) with EU primary or secondary law is irrelevant. On the contrary,

sition of the Commission was later blatantly confirmed on the occasion of Max Havelaar, considering that an eco-label was considered lawful while an ethical fair-trade one not, Judgment of 10 May 2012, *Commission* v *Netherlands ('Max Havelaar')*, C-368/10, ECLI:EU:C:2012:284, paras 73-74.

the mere applicability of provisions of directives or Article 56 TFEU against the choice of performance conditions – in other words provisions that give rise to subjective public rights and that constitute expressions of non-discrimination or equal treatment - suffices for the confirmation of discretion. For legal traditions that, once concluded, governed procurement contracts with civil law provisions, a horizontal relationship is once more transformed into a vertical one; freedom is being replaced by discretion[37]. For the legal traditions that had already subjected the performance of these contracts to administrative law, discretion is being replaced by EU-oriented discretion[38]. Understandably, and in light of the indifference of procurement directives in general and the 2004 procurement directives in particular for the performance phase, the drafting of performance clauses was questioned by another area: the European efforts against social dumping[39]. It should be noted that the attention of EU law was caught by the quasi-general application of these performance conditions, in the sense that they were not drafted by the contracting authority and applied thus to a single contract, but they were regulatory interventions. As a result, fundamental freedoms do not extend to the performance of the contract. They scrutinise national regulatory discretion and as a result, the contracting authority's discretion. Before moving on, a paradox should be addressed: the avoidance of social dumping and the subsequent limitations against contractual freedom are in fact a proof of the success of the regulation of procurement contracts. In particular, considering that the threat of social dumping originates from cross-border working environments, is an indicator of the economic attractiveness of the field[40].

Rüffert was the first case where the posted workers directive met public procurement law[41]. In particular, in *Rüffert*, the contracting authority had added as an additional clause—that was nevertheless not used as a prescriptive criterion—the obligation of the successful tenderer to pay the workers employed in the performance of the contract, the remuneration prescribed in the collective agreement of the land. Failure to satisfy this clause would lead to the termination of the contract. When the contracting authority was informed that the polish subcontractor had employed polish workers and was indeed remunerating them only half of the statutory minimum wage, it applied for application of the penalty clause. Both the Court and the AG agreed on the applicability of the Posted Workers Directive and therefore the critical question was whether the collective agreement applicable to the construction industry could be qualified as the minimum rate of pay within the meaning of Article 3(1) of Directive 96/71.

Even though national legislation concerned the award of contracts, the condition was applied as a performance clause. AG Bot argued in favour of national legislation being universally applicable and therefore being part of the nucleus of the posted workers protection not creating an issue with the principle of non-discrimination on the grounds of nationality[42]. The relevant to the performance clauses in articles of Directive 93/37/EU did not provide for any useful insight concerning the substance of these cases[43]. On these

37 Germany, Austria, the Netherlands constitute the most characteristic examples of regulation through civil law provisions.

38 France, Greece, Spain and Portugal have always followed this administrative archetype.

39 This explains why although the directive had preconised both the inclusion of environmental and social clauses, only the latter have been addressed in the case-law.

40 Against that, the threat of social dumping seems particularly minimised for below threshold contracts.

41 Judgment of the Court of 3 April 2008, *Rüffert*, C-346/06, ECLI:EU:C:2008:189.

42 Opinion of Mr Advocate General AG Bot delivered on 20 September 2007, *Rüffert*, C-346/06, ECLI:EU:C:2007:541

43 ibid para 58.

grounds, unsurprisingly, the AG adopted a rather passive position concerning the possibility to decide upon the lawfulness of this performance clause, stating that the compatibility should be judged against the principle of non-discrimination and the principle of transparency, returning however, the question of lawfulness concerning the principle of transparency to the referring court. On the contrary, the Court concluded that the collective agreement was not generally applicable and since it exceeded national minimum rate of pay it could not qualify as the minimum rate of pay in the sense of the posted workers directive[44]. Consequently, the contracting authority had infringed Article 49 TFEU by rendering the provision of the service of undertakings established in other Member States less attractive[45]. In light of the 2004 directives, the Court demonstrated a renewed willingness to find a balance between the contrasting objectives of EU primary law.

In *Bundesdruckerei*, the contracting authority had set a wage condition for workers on a contract for digitising documents[46]. Nevertheless, in light of the nature of the contract, the successful bidder had decided to perform the contract in another Member State using a subcontractor established there. As a result, the bidder had argued that the minimum wage clause could not be satisfied since "such a minimum wage was not provided for by collective agreements or by the law of that Member State and payment of such a minimum wage was also not usual in that State in the light of the general standard of living there"[47]. *Bundesdruckerei* constituted the perfect occasion for the activation of Article 26. In particular, the Court examined whether the condition was compatible with Article 56 TFEU. The Court accepted – a novelty compared to *Rüffert* – that the aim of protecting workers was legitimate[48]. However, in light of its limited applicability solely to public contracts and its limited effect, the Court decided on the inappropriateness of this provision to tackle social antidumping, stopping its scrutiny at the first level of the principle of proportionality[49].

The culmination of this attention on performance clauses of procurement contracts was undoubtedly the case of *RegioPost*[50]. The case involved a postal services contract for which, the city of Landau had stated, the successful bidder would have to comply with a regional law that set a minimum wage for public contracts. It should be noted that there was no national minimum wage at that time in Germany. Tenderers were required to sign a declaration confirming their intention to comply with the aforementioned law. The penalty for the lack of this declaration was the tender's rejection. *RegioPost* submitted a bid without signing the

44 *Rüffert*, C-346/06, para 28.
45 ibid para 37.
46 Judgment of 18 September 2014, *Bundesdruckerei*, C-549/13, ECLI:EU:C:2014:2235.
47 ibid para 34.
48 ibid para 31, 'Such a national measure may in principle be justified by the objective of protecting employees expressly referred to by the legislature of the *Land* of North Rhine-Westphalia'.
49 ibid paras 32-33, 'However, the Court has already held that, in so far as it applies solely to public contracts, such a national 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 (see, to that effect, the judgment in *Rüffert*, C-346/06, paragraphs 38 to 40). In any event, the national legislation at issue in the main proceedings, in so far as its scope extends to cover a situation such as that in the dispute in the main proceedings, in which employees carry out a public contract in a Member State other than that to which the contracting authority belongs and in which the minimum wage rates are lower, appears disproportionate'.
50 *RegioPost*, C-115/14.

aforementioned declaration, complaining that it was incompatible with EU law. Starting from the non-exhaustive rules contained in Article 26, the Court stressed that the compatibility of national legislation should be interpreted in light of EU primary law and more particularly in light of Article 56 TFEU. Nevertheless, the Court went on to assess the compatibility in light of the posted workers directive. Surprisingly, although the Court followed the classic restriction road it had followed in the two previous rulings, it held that the minimum wage requirement was compatible with Article 26 "read in conjunction with the posted workers directive"[51]. Despite the three cases seeming similar, there is one structural difference that justifies the different outcome: in the two former cases, the collective agreement applied exclusively to public contracts of the construction sector, while private contracts were outside its scope. Conversely, the minimum wage clause in *RegioPost* was laid down in a legislative provision, which applied horizontally to all public contracts in the land, irrespective of the sector concerned[52].

To state that *RegioPost* constitutes the most commented upon procurement case of the decade, would be an understatement. A number of factors justify the enhanced doctrinal attention: from the disagreement between the Court and the AG on the relevant provisions to be interpreted[53], to the shift regarding the interpretation of the posted workers directive as a minimum and not a maximum[54]; the use of the leverage principle in the sense of interpreting EU primary law in light of secondary law and not the reverse[55]; but most importantly, the enhanced possibilities of using procurement contracts as shields against social dumping[56]. The regulatory *acquis* of the case was dismantled from every possible perspective. However, alongside the regulatory possibility, an administrative one was scrutinised—the possibility of a contracting authority to exclude a tenderer due to lack of a declaration of compliance with a regional legislation.

From the perspective of the discretion of contracting authorities, the elements that differentiated *RegioPost* from the two previous cases are irrelevant. On the contrary, the *acquis* of *RegioPost* is the equivalence of a contract performance criterion to the rest of contractual conditions, since in both *Bundesdruckerei* and *Rüffert* compliance with performance conditions did not result in the rejection of tenders. In particular, the previous case-law for performance conditions clearly established a rigid distinction between performance clauses and the rest of the contractual terms on the basis of their pre-award or post-award function. Specifically, the term "performance condition" can no longer relate to terms applied vertically, as they are liable to hinder access. The verticality criterion is satisfied once the failure of its satisfaction

51 ibid para 66.

52 ibid paras 74 and 75.

53 Adrian Brown, 'The lawfulness of a regional law requiring tenderers for a public contract to undertake to pay workers performing that contract the minimum wage laid down in that law: Case C-115/14 RegioPost' (2016) 2 PPLR 49 55; Fransesco Costamagna, 'Minimum Wage between Public Procurement and Posted Workers: Anything New After the *RegioPost* Case?' (2017) 42 EL Rev 101.

54 Contrary to Judgment of 18 December 2007, *Laval un Partneri*, C-341/05, ECLI:EU:C:2007:809.

55 Phil Syrpis, '*RegioPost*–A Constitutional Perspective' in Albert Sanchez-Graells (ed) *Smart Public Procurement and Labour Standards: Pushing the Discussion after RegioPost* (Hart Publishing 2018) 11–28.

56 ACL Davies, 'Government as a socially responsible market actor after RegioPost' in in Albert Sanchez-Graells (ed) *Smart Public Procurement and Labour Standards: Pushing the Discussion after RegioPost* (Hart Publishing 2018) 165-194.

results in the rejection of a tenderer. On the contrary, the Court managed to call the bluff of the Member States when they tried to escape the scope of the directives, by hiding performance conditions in the criteria or in the technical specifications[57]. In *RegioPost*, the contracting authority did not try to hide a performance condition in the other categories. At the same time, non-compliance with it was tantamount to the rejection of tenders.

However, although post-award was a territory unclaimed for decades by the EU legislator and EU primary law, it was the spillover of the posted workers directive *acquis* that allowed contracting authorities to exclude tenderers due to lack of a declaration of compliance to a performance clause. Strictly put, rejection is not an assessment in the sense that a performance clause could not be used to separate two equivalent tenders. However, structured between the absolute terms of compliance and non-compliance, the performance clause was perfectly capable of hindering access to procurement contracts to bidders that failed to provide a declaration of compliance. Although from a qualitative perspective, the performance clause was unable to decide the winning bid, it could perfectly diminish the pool of bidders from which to choose from. The abstract writing of Article 26 contributed to the rejection for non-compliance with a performance clause. In the words of the Court:

> In this case, RegioPost was excluded from participation in the procedure for the award of the public contract at issue in the main proceedings after refusing to put its tender in order by appending its written undertaking to comply with the obligation to pay the minimum wage laid down in Paragraph 3(1) of the LTTG. Exclusion from participation in that contract cannot be regarded as a penalty. It is merely the consequence of the failure, characterised by the failure to enclose with the tender the written undertakings required under Paragraph 3(1) of the LTTG, to meet a requirement formulated in a particularly transparent manner in the contract notice and intended to emphasise, from the outset, the importance of compliance with a mandatory rule for minimum protection expressly authorised by Article 26 of Directive 2004/18. Consequently, just as that provision does not preclude a written undertaking as to compliance with that rule being required, Article 26 permits such exclusion[58].

CONCLUSION

Understandably, any distinction between pre- and post-award conditions was shuttered in the aftermath of *RegioPost*. Performance conditions could have – albeit in absolute terms – identical use to the other contractual terms. The codification of *RegioPost* in the 2014 directives explicitly codifies not only the absolute limits of discretion of EU primary law – limits already enforced for the first time in *RegioPost* – but also the relative limits of discretion. In particular, although recitals are not binding for the Court, the connection of performance conditions to the subject matter to the contract, confirms categorically their full transition to pre-award elements. According to Recital 104:

> Unlike contract award criteria which are the basis for a comparative assessment of

[57] See previously, *Beentjes* and *Contse*.
[58] *RegioPost*, C-115/14 paras 82-84.

> the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders. Contract performance conditions should be compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject matter of the contract, which comprises all factors involved in the specific process of production, provision or commercialisation. This includes conditions concerning the process of performance of the contract, but excludes requirements referring to a general corporate policy[59] ❑

[59] Recital 104, Directive 2014/24. However, acknowledging that despite their incorporation in the contract notices, scrutiny over the performance of contracts is naturally attributed to the Member States, article 18(2) of Directive 2014/24 reads that 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the elds of 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'.